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Introduction

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Abstract

This Chapter introduces a new book-length study of the genesis and genius of the America's constitutional commitment to granting religious freedom to all and religious establishments to none. The study analyzes the prescient movements for disestablishment in the colonies and the new states and the revolutionary new guarantees of religious freedom built into the First Amendment. It also shows how the ongoing battles over education, immigration, polygamy, funding, exemptions, and more have made the original and evolving understanding of the First Amendment disestablishment guarantee a source of perennial cultural and constitutional contest.

Keywords: First Amendment, establishment clause, establishment of religion, religious freedom, separation of church and state, religion and politics, American colonies, American states, United States Constitution

Thomas Jefferson once described America's new constitutional guarantees of disestablishment and free exercise of religion as a "fair" and "novel experiment" in religious freedom.¹ These guarantees, set out in the new state and federal constitutions of 1776-1791, defied the millennium-old assumptions inherited from Western Europe—that one form of Christianity must be established in a community and that the state must protect and support it against all other forms of faith. America would no longer suffer such governmental prescriptions and proscriptions of religion, Jefferson declared. All

¹ Saul K. Padover, ed., *The Complete Jefferson, Containing His Major Writings* (New York: Duell, Sloan & Pearce, Inc., 1943), 538, 673–676, 1147; P. L. Ford, ed., *The Works of Thomas Jefferson*, 12 vols. (New York and London: G.P. Putnam's Son, 1904–1905), 11:7; Julian P. Boyd, ed., *The Papers of Thomas Jefferson*, 37 vols. (Princeton: Princeton University Press, 1950), 1:537–39.

forms of Christianity had to stand on their own feet and on an equal footing with all other religions. Their survival and growth had to turn on the cogency of their word, not the coercion of the sword, on the faith of their members, not the force of the law.

America's new experiment in granting religious freedom to all and religious establishments to none was designed to end what James Madison called the Western "career of intolerance."² "In most of the Gov[ernment]s of the old world," Madison declared, "the legal establishment of a particular religion and without or with very little toleration of others, makes a pa[c]t of the political & civil organization." "[I]t was taken for granted that an exclusive & intolerant establishment was essential," and "that Religion could not be preserved without the support of Government, nor Government be supported with[ou]t an established Religion."³ The main European lands that had colonized the Americas all had religious establishments -- with Anglican establishments in England, Lutheran establishments in Germany and Scandinavia, Calvinist establishments in Scotland, the Netherlands, Switzerland, and Germany, and Catholic establishments in France, Spain, Portugal, and Italy.

Many founders laid the blame for the initial creation of these Western laws of religious establishment squarely on the first Christian Roman Emperor Constantine in the fourth century. Seventeenth-century critics of religious establishment in England and America -- John Milton, John Locke, Roger Williams, and William Penn -- had already targeted Constantine as the culprit.⁴ Roger Williams, for example, had written:

[W]hen Constantine broke the bounds of this his own and God's edict, and [drew] the sword of civil power in suppressing other consciences for the [sake of] establishing the Christian [church.] [T]hen began the great mystery of the churches' sleep, [by which] the gardens of Christ's churches turned into the wilderness of National Religion, and the world (under Constantine's dominion) into the most unchristian Christendom.... There never was any National Religion good in this world but one [namely, ancient Israel], and since the

² James Madison, "Memorial and Remonstrance Against Religious Assessments," in *The Papers of James Madison*, ed. W. T. Hutchinson, et al., 17 vols. (Chicago: University of Chicago Press, 1962-1991), 8:298.

³ Letter to Rev. Adams (1833), in Daniel L. Dreisbach, *Religion and Politics in the Early Republic* (Louisville, KY: University of Kentucky Press, 1996), 117-121, at 118 (paragraph breaks omitted).

⁴ On Williams, see chapter by David Little. See further examples in John Witte, Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2008), 226-48 and John Witte, Jr. and Joel A. Nichols, *Religion and the American Constitutional Experiment*, 3d. ed (Boulder, CO: Westview Press, 2011), 1-20

desolation of that nation, there shall never be any National Religion good again.⁵

Such sentiments became increasingly commonplace in America after the Revolution of 1776. A New Hampshire conventioner put it thus in 1781:

Who, sir, since that ever to be lamented era, when Constantine the great connected the church and the state together, has ever been able to fix an exact equipoise between the prerogatives of princes and claims of dignified priests. Visionaries have written about it, politicians have labored, but it is all in vain. The prince or priest must govern the whole. Priests when connected with the prince will sound the dread alarm, cry out infidel, infidel – the church, the church is in danger: and then lead armies under the banner of the cross, to exterminate heretics and massacre whole nations.⁶

A Massachusetts preacher put it thus:

No doubt, Constantine the Great, who first established [C]hristianity, had a good intention in the same; but all the darkness that has since overspread the Christian church, the exorbitant power of the popes and church of Rome, all the oceans of blood that have been shed in the contests about religion, between different sects of Christians, the almost total cessation of the progress of [C]hristianity, the rise of Mahometanism, the rise and spread of deism, the general contempt in which christianity is fallen; all may fairly be laid at the door of that establishment.⁷

James Madison wrote similarly against “Ecclesiastical Establishments”:

During almost fifteen centuries has the legal establishment of Christianity been on trial. What has been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance

⁵ Quoted in the chapter by David Little herein.

⁶ *The New Hampshire Patriot* 3(15) (July 23, 1781), 4.

⁷ Elhanan Winchester, “A Century Sermon on the Glorious Revolution (1788),” in Ellis Sandoz, ed., *Political Sermons of the American Founding Era, 1730-1805* (Indianapolis, IN: Liberty Fund, 1991), 969, 989–90.

or servility in the laity, in both, superstition, bigotry and persecution.... Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all differences in Religious opinion. Time has at length revealed the True Remedy.... The American Theatre has exhibited proofs that equal and compleat liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the state.⁸

Anyone who was still not convinced could turn to Massachusetts jurist John Adams's massive three-volume *A Defense of the Constitutions of Government in the United States of America* (1788) for an exhaustive account of the "gory ecclesiastical or civil tyranny" of the Western tradition of religious establishments, and America's "glorious new experiment" of granting religious freedom for all and religious establishment to none. America has created something "strikingly original," Adams declared proudly.⁹

Some of the new American states came only gradually to this new understanding of disestablishment of religion. As both Michael McConnell and Mark McGarvie document in their opening chapters herein, seven of the original thirteen states still had forms of religious establishment at the time the First Amendment was being drafted in 1789. Massachusetts, Connecticut, and New Hampshire (along with the independent territories of Vermont and Maine that achieved statehood shortly thereafter) all retained what John Adams called their "mild and equitable" establishments of Puritan Congregationalism, although individual townships could go their own way.¹⁰ After the American Revolution, Georgia, South Carolina, North Carolina, and Maryland replaced their exclusive Anglican establishments of colonial days with "multiple establishments" of "all denominations of Christian Protestants."¹¹ The four counties that comprised much of New York City still retained a soft Anglican establishment as well.

Though local practices varied in these establishment states, their governments still exercised some control over religious doctrine, governance, clergy, and other personnel. They still required church attendance of all citizens, albeit at a church of their

⁸ Madison, "Memorial and Remonstrance," secs. 8, 11. See also his Letter to William Bradford (Jan. 24, 1774), in Madison, *Papers*, 1:537

⁹ In *The Works of John Adams*, ed. C. F. Adams (Boston: Little, Brown, 1850–1856), vols. 4–6; see further John Adams, "A Dissertation on the Canon and Feudal Law (1774)," in *ibid.*, 3:447, 451ff.

¹⁰ See sources and discussion in John Witte, Jr., "A Most Mild and Equitable Establishment of Religion: John Adams and the 1780 Massachusetts Constitution," *Journal of Church and State* 41 (1999): 213-52.

¹¹ South Carolina Constitution (1778), Art. XXXVIII.

choice. They still collected tithes for support of the church that the tithe-payer attended, and often gave state money, tax exemptions, and other privileges preferentially to one or some religions. They still obstructed the organization, education, and worship activities of dissenting churches, particularly Catholics and Quakers. They still used established church institutions and their clergy for birth, marriage, and death registries, for public education, poor relief, political rallies, and distribution of state literature. They still often administered religious test oaths for political officials, sometimes for lower officials and teachers, too. To be sure, these formal state establishments of religion, particularly the controversial practice of state funding and tax collections for religion, were eroding in support by 1789 when the First Amendment was being forged. These traditional state tithing provisions of state establishments of religion ended formally in 1833 when Massachusetts became the last state to abandon them. Yet many other vestiges of traditional establishments remained in place in many states thereafter.

Despite the remaining establishment practices, disestablishment movements were gaining support in the new states, especially as Baptist and other Evangelical advocates grew stronger and as Enlightenment arguments for disestablishment cut deeper into traditional establishment practices inherited from Europe and colonial America. By 1789, six of the original thirteen states had no establishment of religion. Rhode Island and Pennsylvania had never had establishments from the time of their founding. New Jersey, Delaware, and New York (except for the four counties that comprised New York City) had constitutionally abandoned their religious establishment shortly after the American Revolution. Virginia in 1786 passed its (ironically named) Act for the Establishment of Religious Freedom. And even in states that still maintained religious establishments – indeed, especially in these states – virtually all founders feared a national establishment of religion. Newspapers of the day were filled with hyperbolic projections of Anglican bishops, Presbyterian divines, and even the Catholic papacy presiding tyrannically over the vulnerable young nation. Such a national establishment of religion simply could not be allowed, even if state establishments of various types might be countenanced.

The term “establishment of religion” was an ambiguous phrase in eighteenth-century America. In the dictionaries and common parlance of the day to “establish” meant “to settle firmly,” “to fix unalterably,” “to settle in any privilege or possession,” “to make firm,” “to ratify,” “to ordain,” “to enact,” “to set up,” to “build firmly.”¹² Such was the basic meaning of the term when used in the text of the 1787 Constitution: “We the people of the United States, in order to form a perfect union, to *establish* justice ... do ordain and *establish* this Constitution” (preamble); Congress shall have power “[t]o

¹² See entries under “establish” and “establishment” in John Andrews, *A Complete Dictionary of the English Language*, 4th ed. (Philadelphia: William Young, 1789); John Ash, *A New and Complete Dictionary of the English Language* (London: Edward and Charles Dilly, 1775); Samuel Johnson, *A Dictionary of the English Language*, 4th ed. (Philadelphia: William Young, 1773); William Perry, *The Royal Standard English Dictionary*, 1st Am. ed. (London: W. Strahan, J. and F. Rivington, 1788); Thomas Sheridan, *A Complete Dictionary of the English Language*, 2d ed. (London: Charles Dille, 1789).

establish an uniform rule of naturalization” and “[t]o *establish* post offices” (Art. I.8); Governmental offices “shall be *established* by law” (Art. II.2); Congress may “ordain and *establish* ... inferior courts” (Art. III.1); the ratification of nine states “shall be sufficient for the *establishment* of this Constitution” (Art. VI).¹³

Following this basic sense of the term, most American founders understood the establishment of religion to mean governmental actions to “settle,” “fix,” “define,” “ordain,” “enact,” or “set up” the religion of the community—its religious doctrines and liturgies, its religious texts and traditions, its clergy and property. To most founders, the most notorious example of religious establishment in this sense was the established Anglican Church that prevailed in the American colonies until the 1776 American Revolution. According to the formal ecclesiastical law of the day,¹⁴ The King was Supreme Head of the Church and Defender of the Faith. Together with the Parliament, he mandated the Thirty-Nine Articles of Faith as the established doctrine, prescribed the Book of Common Prayer as the established liturgy, and made official the King James Version of the Bible. The King and his delegates vested, disciplined, and removed the clergy as political appointees, collecting tithes and taxes for their support and granted them privileges and immunities from civic duties. They instituted special criminal laws of blasphemy and sacrilege to protect the church’s doctrine, liturgy, clergy and property. They consigned all non-conformists to second class status at best, officially tolerating only Protestants, but not Catholics and Jews, who would remain formally illegal in England until the Jewish and Catholic Emancipation Acts of the 1830s.

If “establishment of religion” meant anything to the founders, it meant at least this, and no influential American founder writing from 1776-1800 -- even former Anglicans became Episcopalians after 1789 -- defended this kind of traditional establishment law either for the national government or any of the states. For many American founders, such an establishment of religion violated three other principles of religious freedom that they also championed: (1) liberty of conscience; (2) religious equality, and (3) the separation of church and state.

For most founders, the movement to disestablish religion served, first, to protect the principle of liberty of conscience by foreclosing government from coercively prescribing mandatory forms of religious belief, doctrine, and practice. As both the original Delaware and Pennsylvania constitutions put it: “[N]o authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with,

¹³ See T. Jeremy Gunn, *A Standard for Repair: The Establishment Clause, Equality, and Natural Rights* (Buffalo, NY: Prometheus Books, 1992), 46–47, 71–73.

¹⁴ The best summary of the day was Richard Burn, *Ecclesiastical Law*, 4 vols., 3d ed. (London: A. Strahan, 1775).

or in any manner controul, the right of conscience in the free exercise of religious worship.”¹⁵ Thomas Paine put this same argument:

All religions are in their nature mild and benign, and united with principles of morality. They could not have made proselytes at first, by professing anything that was vicious, cruel, persecuting or immoral.... Persecution is not an original feature in any religion; but it is always the strongly marked feature of all law-religions, or religions established by law. Take away the law-establishment, and every religion reassumes its original benignity.¹⁶

The movement to disestablish religion served, second, to protect the principle of equality of all faiths before the law by preventing the government from singling out certain religious beliefs and bodies for preferential treatment. The problem for some founders was not so much government support of religion or its institutions; many founders thought religion was essential for cultivating virtue, maintaining order, and promoting good works in the community.¹⁷ The real problem was preferential government support for one form of religion to the exclusion or deprecation of all others. Those policies could not be countenanced. This concept of no “preferential establishment” of religion came through repeatedly in state constitutional debates. In the Virginia Ratification Convention, for example, Madison and several other conventioners said that they were seeking to “prevent the establishment of any one sect in prejudice to the rest.”¹⁸ A South Carolina conventioner likewise “oppose[d] the ideas of religious establishments; or of states giving preference to any religious denomination.”¹⁹ The New Jersey Constitution provided “there shall be no establishment of any one religious sect ... in preference to another.”²⁰ Several state

¹⁵ Delaware Declaration of Rights (1776), sect. 3; Pennsylvania Declaration of Rights (1776), II.

¹⁶ Thomas Paine, *Rights of Man* (1791), in Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution*, 5 vols. (Chicago: University of Chicago Press, 1987), 5:95–96.

¹⁷ See the chapter by Daniel Dreisbach herein.

¹⁸ For Edmund Randolph, see Jonathan Elliot, ed., *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution*, 5 vols., 2d ed. (Washington, DC: Printed for the Editor, 1836-1845), 3:208; see also *ibid.*, 3:431. For Madison, see *ibid.*, 3:330; for Zachariah Johnson, see *ibid.*, 3:645-46.

¹⁹ Quoted in Chester J. Antieau, Arthur T. Downey, and Edward C. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (Washington, DC: Bruce Publishing, 1964), 106.

²⁰ New Jersey Constitution (1776), Art. XIX.

ratifying conventions suggested amendments to the United States Constitution that “no religious sect or society ought to be favored or established by law in preference to others.”²¹

The movement to disestablish religion served, third, to protect the basic principle of separation of the offices and operations of church and state. Disestablishment, in Jefferson’s words, prohibited government “from intermeddling with religious institutions, their doctrines, discipline, or exercises.” It also kept government from “the power of effecting any uniformity of time or matter among them. Fasting & prayer are religious exercises. The enjoining them is an act of discipline. Every religious society has a right to determine for itself the times for these exercises, & the objects proper for them, according to their own peculiar tenets.”²² To allow such governmental meddling in the internal affairs of religious bodies would inflate the competence of government. As Madison wrote, it “implies either that the Civil Magistrate is a competent judge of religious truth; or that he may employ religion as an engine of civil policy. The first is an arrogant pretension falsified by the contradictory opinions of rulers in all ages, and throughout the world, the second an unhallowed perversion of the means of salvation.”²³

A number of founders pressed this idea of separation of church and state further by prohibiting not only governmental interference in religious bodies but also clerical participation in political office. Clerics who serve in government, they argued, could use the threat of spiritual reprisal to force their congregants, including fellow politicians who sat in their pews, to acquiesce in their political positions. They would inevitably be conflicted over whose interests to represent and serve – the interests of their religious congregants or their political constituents. Clerics who tried to serve both God and the state would be distracted from their fundamental callings of preaching and teaching, and tempted to bend their religious messages toward political causes. These arguments for clerical exclusions led seven of the original thirteen states, and several later states to ban ministers from serving in political office, provisions that remained in place in a few states until the twentieth century before finally outlawed the Supreme Court in *McDaniel v. Paty* (1978).

The American founders advocated no establishment of religion not only because it violated the other religious liberty principles of liberty of conscience, religious equality, and separation of church and state, but also because religious establishments simply no longer worked. Madison, for example, contrasted the erosion of religion in establishment states with the flourishing of religion in non-establishment states in his day. In the Congregationalist establishment states of New England and the south, he

²¹ Elliot, ed., *Debates*, 1:328, 334.

²² Thomas Jefferson, Letter to Rev. Samuel Miller (1808), in Kurland and Lerner, eds., *The Founders’ Constitution*, 5:98–99.

²³ Madison, Memorial, para. 5.

wrote, “[t]he old churches, built under the establishment at the public expense, have in many instances gone to ruin, or are in a very dilapidated state, owing chiefly to a transition desertion of the flocks to other worships.” It had been “the universal opinion” in such states “that civil government could not stand without the prop of a religious establishment, and that the Christian religion itself, would perish if not supported by a legal provision for its clergy. The experience of Virginia [together with that of Rhode Island, Pennsylvania, New Jersey, and Delaware] conspicuously corroborates the disproof of both opinions. The civil government, though bereft of everything like an associated hierarchy, possesses the requisite stability and performs its functions with complete success; whilst the number, the industry, and the morality of the priesthood, & the devotion of the people have been manifestly increased by the total separation of the church from the state” and the complete disestablishment of religion.²⁴

Similarly, John Leland, the fiery Baptist preacher, decried all establishments as “evil” and “harmful” – whether the Roman Empire’s establishment of Christianity, the Ottoman Empire’s establishment of Islam, Spain’s establishment of Catholicism, New England’s establishment of Puritan Congregationalism, or England and colonial America’s establishment of Anglicanism. All such establishments are evil and harmful, Leland argued, first, because when “uninspired, fallible men make their own opinions tests of orthodoxy,” then religion is stunted and stilted, “ignorance and superstition prevail, or persecution rages.” Second, establishments are evil and harmful because “the minds of men are biased to embrace that religion which is favored and pampered by law, and thereby hypocrisy is nourished.” Third, “establishments not only wean and alienate the affections of one from another,” but they keep or drive non-conformists away from the state, taking their loyalty, work, and taxes with them and leaving dull anemic religions to propagate themselves or convert others by force. Fourth, “establishments metamorphose the church into a creature, and religion into a principle of state, which has a natural tendency to make men conclude that religion is nothing but a trick of state.” Fifth, even in so-called Christian lands, “there are no two kingdoms and states that establish the same creed and formalities of faith.” This brings neighbors and families into inevitable conflict and war, as European history has too often shown. Sixth, establishments merely cover for the insecurity and doubt of church leaders. Instead of having faith in the cogency of their views, they “dictate for others” and betray an “overfondness for a particular system” that becomes its own theological idol. And seventh, establishments cover the insecurity of politicians. “Rulers often fear that if they leave every man to think, speak, and worship as he pleases, that the whole cause [of statecraft] will be wrecked in diversity.”²⁵

²⁴ Letter to Robert Walsh (March 2, 1819), in Madison, *Writings*, 8:430-32 (spelling and punctuation modernized).

²⁵ John Leland, “The Rights of Conscience Inalienable,” in *The Writings of John Leland*, ed. L.F. Greene (New York: Arno Press, 1969), 179-92.

Such sentiments eventually persuaded all the states to remove the most glaring features of traditional establishments -- the state dictates of religious doctrine, liturgy, and canons, the overt state favoritism of one religion and bald discrimination against others. The question that remained controversial—in the eighteenth century as much as in our own—was whether more gentle and generic forms of state support for religion could be countenanced. Did disestablishment of religion prohibit governmental support for religion altogether, or did it simply require that such governmental support be distributed nonpreferentially among all religions? Did disestablishment require that government remove old Sabbath, blasphemy, marriage, and other laws grounded in religious teachings or could those laws now be justified on grounds of tradition, morality, or utility? Did disestablishment mean removal of all religious texts and symbols from public documents and public lands, or all religious officials and ceremonies from political life, or could a democratic government reflect and represent these in ever more inclusive ways? Did disestablishment require states to abstain from all cooperation with religious bodies and officials in the governance of marriage, education, social welfare, and other social services, or could church and state still cooperate in these areas of “mixed jurisdiction”? Strong disestablishment advocates in the founding generation and thereafter, particularly those influenced by strict Baptist and Enlightenment liberal views, pressed for no religious aid, no religious laws, and no cooperation of church and state so much as possible. Others used arguments from civic republicanism and religious utility to argue for non-preferential religious aid, maintenance of traditional religious morality, and generous cooperation between church and state.

The chapters in this volume take up the story from here, with Jeremy Gunn’s sweeping introduction providing an excellent map of many of the main issues. In their opening chapters, David Little and Paul Finkelman analyze some of the prescient arguments and policies of disestablishment and religious freedom already in place in the seventeenth-century colonies of Rhode Island and New York. Rhode Island, David Little demonstrates, was the first American colony to operate without a formal religious establishment, inspired by the progressive theories of religious freedom advocated by its founder Roger Williams, a liberal Calvinist. New York, Paul Finkelman argues, was the first new state constitution to disestablish religion, inspired in no small part by its seventeenth-century experiment in religious pluralism with Jews, Quakers, Lutherans, Catholics, and Reformed Christians eventually living together in New Amsterdam, albeit after ample controversy. Not surprisingly, both these states became leading advocates of disestablishment after the American Revolution. The state of Virginia, Ralph Ketcham shows, though a bastion of established Anglicanism during the colonial era, quickly became a leader in the disestablishment campaign as well, under the masterful direction of Madison and Jefferson.

In later chapters herein, Steven Green and Thomas Berg, echoing Jeremy Gunn’s opening chapter, show how these state disestablishment practices became more culturally contested and constitutionally specific in the course of the nineteenth and early twentieth centuries. Protestant-Catholic rivalries, battles over aid to religious schools and charities, growing religious pluralism and anti-religious and anti-immigrant animus were among the factors that prompted at least some states in the nineteenth

century to insist upon a sharper separation of church and state and to adopt more stringent legal policies if not state constitutional provisions against government funding and support of religious causes, especially religious schools. Important in the last quarter of the nineteenth century was the battle over the proposed Blaine Amendment to the United States Constitution, which would have applied the First Amendment guarantees of no establishment and free exercise of religion to the states, and cut off government funding of religion. The federal Blaine Amendment narrowly failed passage, despite repeated efforts, but various states did adopt their own constitutional policies of no government funding of religion.

While the new American states came more gradually and sporadically to a broader consensus on the meaning and method of disestablishment, the new national government committed itself to no establishment of religion early on. As Derek Davis's chapter shows, the Continental Congress of 1774-1789 legislated regularly on issues of religion, but already began to move toward greater religious freedom for the nation, if not disestablishment of religion. The United States Constitution, drafted in 1787, was largely silent on religion, except in prohibiting religious test oaths for federal office – a critical first step in the federal protection of religious freedom as Jeremy Gunn, Daniel Dreisbach, and Martin Marty each show in their chapters. More decisive in the national march toward disestablishment of religion was the First Amendment to the Constitution, drafted by the First Congress in 1789 and ratified by the states in 1791. It provided: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The remaining chapters of the volume probe the original and evolving understanding of the First Amendment disestablishment guarantee in the first 150 years of the republic. The common foil for these chapters is the landmark Supreme Court case of *Everson v. Board of Education* (1947). This case not only incorporated the First Amendment establishment clause into the Fourteenth Amendment due process clause, making it binding on state and local governments. More importantly for this book, *Everson* offered an account of the history and original intent of the establishment clause, which several later chapters in this volume expose for its inadequacies. "Among the stupendous powers of the Supreme Court," Mark DeWolfe Howe once wrote, "is the power not only to make history, but also to declare history."²⁶ In few areas of constitutional law outside the establishment clause has the Court's "declaration of history" proved so controversial.

In his chapter herein, Carl Esbeck sifts through the debates in the First Congress of 1789, and sorts out the most plausible original understandings of the key words "respecting" "establishment" and "religion" and the links between the no establishment and free exercise guarantees of the First Amendment. He also takes on directly various modern interpreters who regard the First Amendment establishment as a hearty

²⁶ Mark DeWolfe Howe, *The Garden and the Wilderness* (Chicago: University of Chicago Press, 1965), 1.

endorsement of state establishments of religion, or a mere guarantee of freedom of conscience. He views the establishment clause as a jurisdictional limitation on the new federal government. Daniel Dreisbach continues the national story into the first decades of the nineteenth century, showing the continued dialectic between “separationist” and “accommodationist” interpretations and applications of the establishment clause, and the accepted discordance between federal laws and state laws on religious freedom. These debates became more acute in the later nineteenth and early twentieth centuries, Jeremy Gunn, Thomas Berg, and Steven Green all document, first at the state level, and then at the federal level as well, particularly as Congress sought repeatedly to develop a national law on religious liberty binding on the states.

The penultimate chapter by Kent Greenawalt maps the range of hard interpretive issues that continue to confront historians of the establishment clause and advocates of First Amendment freedoms to this day. The closing chapter by Martin Marty sorts through the remaining myths and fictions of “Christian America” and “secular America.” The no establishment clause, he argues, was not a rejection of religion and the church but a testimony to America’s faith in religion and in the capacity of every peaceable religion to stand on its own once it was granted full freedom.