I. INTRODUCTION

The First Amendment of the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." After the Fourteenth Amendment was ratified, a series of Supreme Court cases held that almost all of the provisions of the Bill of Rights were "incorporated" into the Fourteenth Amendment, and thereby applied as against the States as well as against the Federal Government. In particular, in *Cantwell v. Connecticut*, the Supreme Court held that the Free Exercise Clause protected a Jehovah's Witness engaged in public anti-Catholic diatribes from local prosecution for breach of the peace. Seven years later, in *Everson v. Board of Education*, the Supreme Court decided that the Establishment Clause also applied to the states, in a case involving the use of public school buses for the benefit of school children attending private Catholic schools. Since *Everson*, the Court has repeatedly directed its attention toward the intersection of public schools and the Establishment Clause, in an attempt to articulate the precise contours of the Jeffersonian "wall of separation between church and State" in this setting.

Of particular interest are the cases dealing with the teaching of Darwinian evolutionary theory in public schools. Cases dealing with school prayer or financial assistance may arouse controversy over the boundaries of establishment, but less often do they pose fundamental questions about the very essence of religion or the purpose of constitutionalizing religious tolerance. The issues were first broached in *Epperson v. Arkansas*, in which the Supreme Court struck down an Arkansas statute prohibiting the teaching of evolution in public schools. Justice Fortas, writing for the majority said that "there can be no doubt that Arkansas has sought to
prevent its teachers from discussing the theory of evolution because it is contrary to the belief of
some that the Book of Genesis must be the exclusive source of doctrine as to the origin of
man.... Since "pass[ing] laws which aid one religion, aid all religions, or prefer one religion to
another" violates the Establishment Clause, Arkansas' statute cannot stand. By contrast, Justice
Black, himself the author of the opinion in *Everson*, wondered if "forbidding a State to exclude
the subject of evolution from its schools infringes the religious freedom of those who consider
evolution an anti-religious doctrine... . Since there is no indication that the literal Biblical
doctrine of the origin of man is included in the curriculum of Arkansas schools, does not the
removal of the subject of evolution leave the State in a neutral position toward these supposedly
competing religious and anti-religious doctrines? Unless this Court is prepared simply to write
off as pure nonsense the views of those who consider evolution an anti-religious doctrine, then
this issue presents problems under the Establishment Clause far more troublesome than are
discussed in this Court's opinion."

If we strive to view these two positions charitably, we will find that they express
fundamentally different views about the relationship between the sacred and the secular, about
the epistemology of religious belief, and about the very purpose of constitutionalizing the
separation of church and state. If that is correct, then becoming clearer about the nature of these
differences makes a practical difference, for the two positions lead to very different results on the
issue of whether or not evolution (and many other subjects besides) can be taught in public
schools.

These competing conceptions have deep roots in the European Enlightenment, and since I
will argue that one of them has been largely overlooked, though it is the conception that best
accounts for the position taken by Justice Fortas in *Epperson*, we will be well served by what
may seem a rather excessive detour into ideological history. Though this Article will not explore
the appropriate methodology for constitutional interpretation (in particular, the question of
appeal to original intent versus appeal to normative theory) I will suggest that Black's conception
in *Epperson* is more likely to express an original understanding. Ironically, Fortas' view, I will
argue, is not a recent innovation, but in fact a still older conception of religious tolerance, albeit one the Founders did not themselves embrace. Whether it is one we should embrace, then, would depend upon our views regarding original intent versus normative theory as a source for constitutional interpretation, and on the inherent persuasiveness of this older view as normative theory.

These two conceptions are Spinoza's and Locke's, respectively. Though it will come as no surprise that I associate the Founders with Locke, the suggestion that Justice Black's "conservative" position in *Epperson* is the more Lockean of the two may surprise some. But the more startling proposition is that the majority, with its familiar, Jeffersonian-sounding strict separationism, represents a species of (no doubt unintentional) Spinozism. To see that, we must present and analyze Spinoza's religious and political thought in some depth.

II. SPINOZA

Spinoza's views are primarily articulated in two texts, the *Theologico-Political Treatise* and the *Ethics*. My focus will be primarily on the former; the later will be useful only insofar as it gives us access to Spinoza's "pantheism" and his commitment to rational egoism as a moral theory. The crux of his philosophy of religion and his political philosophy, however, are in the former. As Spinoza's views are strange and unfamiliar, I shall have to enter into a certain amount of detail.

The text as a whole is an extended mediation on the proper relations between church and state, given a certain understanding of what each of these are. The chief difficulty in interpreting Spinoza on church-state relations is reconciling his apparent commitment to established state churches with his commitment to religious tolerance and a preference for what appears to be an entirely secular public sphere. I shall begin by providing an account of Spinoza's views in political philosophy and philosophy of religion separately, and then proceed to discuss how they are to relate to each other in a Spinozistic community.
Spinoza's political thought is a species of social contract theory akin to and deeply indebted to Hobbes'.\[11\] Recall that for Hobbes, the law of nature as applied to human beings consists largely of the obligation to pursue one's own rational self-interest.\[12\] As one has a right to do whatever the law does not forbid, natural right for Hobbes embraces any actions consistent with rational self-interest and individual capacity. Given the possibility of conflicts of interest, the familiar war of all against all in the state of nature emerges, to be rectified by the transfer of all natural right and power to a sovereign by a social contract between potential citizens.\[13\] Since almost all natural right is transferred, citizens thereby construct for themselves an almost limitless duty of obedience the sovereign, who in turn is bound only by his own abilities and self-interest.\[14\] Though the authoritarian political implications of Hobbes' position are familiar, it also has an attractive austerity. By contrast, Locke's conception of natural right is more mysterious, since it entails reciprocal duties of respect and non-interference even in the state of nature, duties which survive the social contract and serve as a limit on state power. However attractive such a view is politically, it suffers from being unable to clearly account for the source and status of the fundamental rights and duties themselves which states are instituted to preserve. Hobbesian natural right, by contrast, is a natural right little different from the rights that animals have in the state of nature: we have no obligation but to survive and prosper if we can, at the expense of others if we must. No inexplicable moral constraints appear.

Hobbes further argues that the sovereign should be undivided and that its power be concentrated as much as possible, which is understandable given Hobbes' primary concern, which is to eliminate conflict.\[15\] If instead of a king a state was governed by a committee, the risk exists that factions might form within the committee and the very conflict that sovereignty is meant to eliminate might reappear within the heart of the sovereign itself.\[16\] This was no mere theoretical concern for Hobbes: the English Civil War had taught him that the separation of powers between Crown and Parliament had sowed the seeds of a bloody and destructive conflict. Far better that there be only one branch of government possessing all the relevant powers. And if
one must choose whether this one branch is a group, as Parliament was, or a person, as the Crown was, far better that it be an individual person.

This preference for the centralization of power informs Hobbes' views on the separation of church and state. Prior to the Act of Supremacy (1534),[17] each English citizen had to serve two masters: the Bishop of Rome and the King of England. Such an arrangement introduced precisely the weakening and conflict-breeding division into the heart of sovereignty that Hobbes feared. By placing the supreme religious authority in England into the hands of the monarch, the unity of the sovereign was assured and the potential for conflict between church and state minimized. On a Hobbesian view, there is no reason for, and much to fear from, tolerating rival religious organizations within the community and under the state. Therefore "the right of judging what doctrines are fit for peace, and to be taught the subjects, is in all commonwealths inseparably annexed . . . to the sovereign power civil, whether it be in one man, or in one assembly of men."[18] In every Christian commonwealth, the civil sovereign is the supreme pastor, to whose charge the whole flock of his subjects is committed, and consequently. . . it is by his authority that all other pastors are made, and have power to teach, and perform all other pastoral offices . . . ."[19]

Our first point of departure in understanding Spinoza is to recognize that on most of these essentials, he is a Hobbesian.[20] Whereas Hobbes views the sovereign as both a social construction and as an individual human being, Spinoza sees more clearly (in this respect anticipating Rousseau) that the sovereign is that body or institution which serves a particular function in the community.[21] It is for this reason that Spinoza is able to conceive of natural right and the social contract in substantially the same terms that Hobbes does, while being more readily able to imagine the transfer of natural right and natural power to an institutional framework instead of to a human being. [22] This more abstract, proto-Rousseauist conception of the sovereign allows Spinoza to better pose the question of what form the state should take, a question which, being underdetermined by social contract theory, can only be answered on pragmatic grounds.
Spinoza's conclusion is that a democratic republic is the ideal form for the sovereign to take, for reasons that will strike most readers as familiar.[23] Since the purpose of the state ultimately is to bring peace, order and welfare to its citizens, it is desirable that the state and the people be in as much accord as to interests, beliefs and goals as possible, and this is most readily achieved by a democratic republic that takes its direction from the citizens themselves.[24] It is important to note in passing that this is not a question of legitimacy; for that question is solved by the social contract itself. Rather it is a matter of what form will most likely achieve the purpose of the state once constituted.

Since Spinoza, like Hobbes, lacks the Lockean notion of natural rights the citizens preserve in civil society that can serve as a check on state power, the question of the state overstepping its proper boundaries simply cannot arise for Spinoza. The only limits the state must observe (as long as it continues to serve its minimal function of producing an environment preferable to the state of nature) are those it imposes on itself.[25] However, since Spinoza believes that a democratic republic will be the most successful of the available forms, such self-imposed limits will draw from the preferences of the public.[26] Thus the prospects of alienation between the public and the state are minimized.

Though Spinoza writes three centuries before the emergence of the twentieth century welfare state, his conception better captures what modern nation states have been doing for the better part of the past century than Lockean alternatives. Rather than asking, for example, if a state which operates an extensive, publicly funded pension plan is exceeding its contractarian mandate and violating natural rights through excessive taxation, as a neo-Lockean libertarian might,[27] the Spinozist would limit his consideration of, say, Social Security reform, to two questions: Does the public want it? and, Does it work? The advantage of the Spinozist approach is that it allows political discussion to retain its current character without hypocrisy and contradiction. For arguably, under a neo-Lockean approach, the answer to almost every actual political question will be that some existing program should be abolished or some proposed program should not be started because they lack fundamental legitimacy. Since in practice, no
one actually acts as if such state programs do lack fundamental legitimacy, the neo-Lockean stance becomes inevitably an insincere addenda to the discussion of the real political issues of the day. If taxes should be cut, it would be because this is good for the economy (if it is), not because taxation is theft. Since our actual political discourse will effectively proceed in light of former considerations, interjecting sweeping claims of the radical illegitimacy of a particular policy into discussion will in most cases be hypocritical. Spinoza's lines are drawn where we draw them; the neo-Lockean's lines are not.

Like Hobbes, Spinoza agrees that the state must exert exclusive control over the church:

[...]

This suggestion will naturally raise alarm in American readers accustomed to strict separation as a bedrock principle. However, just as we saw that Spinoza's conception of sovereignty is abstract in a way that Hobbes' is not, I believe that his conception of what a church is is as well. But to understand that we must turn to the details of Spinoza's views as outlined in the *Theologico-Political Treatise* and the *Ethics*.

In the *Ethics*, Spinoza argues for a metaphysics sometimes referred to as "pantheistic," though he repudiated this term. Briefly, reality consists of one great individual substance; the ordinary objects that we ordinarily think of as being individual substances in their own right are to be thought of instead as properties of the one substance, or "modes" as Spinoza calls them. If we had to reform our language to capture Spinoza's position, instead of saying that the laptop is on the desk, we would say that the world is laptopping above the place where the world is desking, as it were. In order to contend with the irreducible existence of mental states, Spinoza proposes that each mode has two aspects, or falls under two "attributes," Thought and Extension. However, since it would be anomalous if only some modes had both mental and
physical characteristics, while most had only physical characteristics, Spinoza avoids the problem of explaining what the relationship between Thought and Extension is by saying that the two attributes are pervasive and qualify all modes. Thus instead of saying that George W. Bush is thinking about Iraq, Spinoza would say that the world is thinking about Iraq in the same region where it is Bush-ing.

But for the pervasiveness of the mental in Spinoza's system, his position would appear to be a kind of variation on materialism, albeit with the peculiarity that there is only one material thing, of which each ordinary object is a mode. However, because Spinoza envisions that the one substance is pervaded with thought as well, he allows himself the bold suggestion that the world, so conceived, is what the monotheistic religions calls God.

This exotic metaphysics could be put aside were it not for the fact that it sheds light on one of Spinoza's more surprising claims about religious language. For if the physical world, a world knowable by natural science, is identical to God, it follows that there is a kind of equivalence between religious discourse and naturalistic discourse. Thus each true proposition of natural science ought to have a counterpart religious proposition as well. Though this equivalence does not require him to proceed in this way, Spinoza derives from this suggestion his agenda of Biblical interpretation. For if, per hypothesis, the Bible already speaks the truth about God, then that truth can best be understood by seeking corresponding naturalistic claims. For example, "God knows where every sparrow falls" expresses in religious discourse the same truth that is otherwise expressed by the statement "every sparrow falls at 32 feet per second per second in accordance with physical law." So the agenda of Spinozistic Bible criticism is to find the corresponding naturalistic truths the Bible expresses in religious language.

Since nothing is necessarily true except by the divine decree alone, it follows quite clearly from this that the universal laws of Nature are nothing but decrees of God, which follow from the necessity and perfection of the divine nature. Therefore, if anything were to happen in Nature contrary to her universal laws, it would necessarily be contrary to the divine decree...
This sets Spinoza far apart from the antireligious stance often associated with him, for on his view, properly understood, there is nothing wrong with religion at all, fundamentally. Why then does religious discourse even exist? Wouldn't it at least be more perspicacious to replace it with the language of natural science?

Not for all purposes. For on Spinoza's view, included within the discourse of natural science is a naturalistic ethics: rational egoism. Though Spinoza is not terribly clear on the metaethical relationship between descriptive and prescriptive statements, he seems to think that his rational egoist ethics is "true" in the same sense that the propositions of physics are true, even though we must act in order to comply with them. In a sense, for Spinoza, ethical commandments are as much laws of nature as the laws of physics are, though presumably they would have the form of hypotheticals, such as "if you lie to your neighbors, they won't trust you and you will lose all sorts of social advantages which you cannot help but want to have."

Spinoza recognizes that it is a fact of human psychology that such blandly stated facts seldom suffice to motivate the conduct that needs to be motivated. So we have religious texts and practices that express the same points in more effective form: Thou shalt not bear false witness. What is important for our purposes is that for Spinoza, the religious story and associated religious commandment, insofar as it can be naturalistically translated, is perfectly legitimate as it stands. Whether or not it should remain as it stands depends only upon what is effective. The cognitive test of scripture is whether it can be translated without residue into naturalistic terms (and of course that it fit the facts). The ethical test of scripture is whether it is effective at inducing readers into complying with the objectively correct and binding normative requirements that nature and human nature impose on us anyway.

With the preceding in mind, I suggest that we understand Spinoza as interpreting the Hobbesian church as nothing other than the sum total of activities and institutions which comprise the moral and practical life of the community. Thus Spinoza's requirement that the church be subordinate to the state reduces to the more basic Hobbesian claim that sovereignty ought not to be divided. Thus, for example, it would be perfectly appropriate to have the state
provide public education and even to use public education as a setting for teaching subjects which have a "moral" dimension (e.g., sex education). Similarly, it would be perfectly appropriate for states to "legislate morality" should such be actually helpful to the welfare of the community (e.g., drug laws). On my interpretation, given what Spinoza thinks religion is, this is all he could mean by the principle that the church should be subordinate to the state.

It is also important to realize in this connection that legislation on "religious" matters in this sense poses for Spinoza no serious questions about the inaccessibility of knowledge of the good, or the irreducible plurality of competing goods. If religious knowledge just is pragmatically useful information about the human condition, and the human condition in certain key respects does not significantly vary from one person to another, then "legislating morality" poses no serious problems. To see just how harmless this is, consider that an example of the sort of thing that Spinoza would consider religious knowledge and religious legislation would be health and safety standards.

The concern with individual autonomy still comes into play, but in a purely pragmatic way. For while the state may be in the best position to determine and enforce, e.g., health and safety standards, it is not particularly well situated to tell you what to have for dinner, not because it lacks the right to do so (all natural right having been conveyed to the sovereign) but because the most efficient way to get the public to have a good dinner is to let each member fix it him- or herself. In short, the rationale for personal liberty that Mill would articulate two centuries in the future is perfectly available to a Spinozist as well.\[46\]

Thus for Spinoza, not only could there be public education, but public education could have a legitimate function in inculcating not only "religious" morals, but also "religious" doctrine. These are in scare-quotes, not because Spinoza doesn't really regard them as genuinely religious in nature, but because so many people would find these inapposite labels for what are in effect useful social skills and confirmed scientific knowledge.

By contrast, the state ought not to promote vicious or dishonest conduct, or teach as doctrine what is patently false. Here too, a general equivalence of secular and religious discourse
obtains, so that we can also characterize such teachings as wicked and superstitious. Thus the teaching of the harmful superstitions advanced by particular religious sects ought, on Spinozistic grounds, be kept out of public schools. Only the true and the useful should be taught. More broadly, particular religious sects that teach harmful superstitions ought to be kept far away from state power, for the sake of the public welfare.

At this point, the reader influenced by a Lockean approach to religious tolerance and pluralism should be thoroughly rattled. Who is to say what the religious truth is? Who is to say what is conducive to salvation? The short answer is: who is to say what the health and safety standards ought to be? Presumably the public, through its elected officials and the staff of the administrative agencies to whom authority over such matters is delegated. The two kinds of issues for a Spinozist are absolutely on a par.

What about religious autonomy? For Spinoza, this question will be addressed in essentially the same way that autonomy interests are addressed more generally. First, not all conduct will be regulated in excruciating detail, since that would be inefficient and unnecessary. But insofar as the state retains the power to regulate, we could say that even in these areas, it regulates by omission. The state may decide that it will enforce regulations not permitting arsenic in prepared foods. The state may decide that a few words in public schools about good nutrition are helpful. The state may decide that it is not worth the candle to dictate daily menus for all citizens, however (and since we are imaging a democratic republic, it is hard to imagine the voters voting for such a thing anyway).

Along similar lines, Spinoza argues implicitly that regulating religious observances is not worth the candle. Religious belief is another matter. On Spinoza's view, the pursuit of truth (whether naturalistic or religious) requires a healthy community of inquirers, and that such a community cannot exist under a regime where the free expression of opinion is thwarted. Furthermore, Spinoza believes that it is a fact about human nature that opinion itself cannot be effectively regulated at all. Thus for the state to command a certain opinion is simply to create a class of advantaged citizens, those who already believe it, and a class of disadvantaged citizens,
those who do not and cannot. Even if the opinion is true, the state cannot increase the extent to which that opinion is known and adhered to. One may well doubt that Spinoza is altogether correct in his social psychology here; but for our purposes, what matters is that the result is that if you wish to merely believe some ridiculous superstition, the state will not interfere.\textsuperscript{49} If you want to engage in exotic rituals in private, the state will not interfere. The state will only interfere if these things result in conduct that is contrary to the public interest.

Recent historical research has suggested that Spinoza's immediate influence on European thought was far more extensive, and far more threatening, than previously believed. According to Jonathan Israel, in his magisterial study, \textit{Radical Enlightenment: Philosophy and the Making of Modernity, 1650-1750}, Spinoza represents a decisive rupture with previous thought.\textsuperscript{50} Schematically, though the Protestant Reformation had challenged the institutional unity of Western Christendom, the surviving confessions, seen from afar, retained in broad outlines a commitment to an Aristotelian conception of nature, a divine rights of kings conception of political legitimacy, and a Christian theology.\textsuperscript{51} The arrival of the New Science in general, and Cartesianism in particular, threatened to overturn at least the prevailing consensus about nature. Cartesianism (and its political cousin, Hobbesianism), however, were unsuccessful in generating a replacement ideology for legitimating either Christianity or monarchy, despite their attempts to combine scientific revolution with religious or political conservatism.\textsuperscript{52} While one response to Cartesianism and Hobbesianism was a redoubling of effort by the forces of the old synthesis, the primary effect was to generate even more drastic repudiations of the old synthesis, building on the partial accomplishments of Cartesianism and Hobbesianism.

In this context, Spinoza was crucial, for it was Spinoza that jettisoned the residual supernaturalism in Descartes, and reworked Hobbes' contractarianism to the service of democratic republicanism instead of monarchism.\textsuperscript{53} According to Israel, Spinoza rapidly became the rallying point for those seeking the most fundamental changes in European thought, society and politics.\textsuperscript{54} By the same token, the ultimate epithet to place on those alleged to be dangerous threats to stability and order was to call them "Spinozists."\textsuperscript{55} Though not all
"Spinozists" were Spinozists strictly speaking, anticlericalism, materialism, varieties of deism and atheism, and democratic republicanism all characterized a growing faction in European society from the mid-seventeenth century onwards.\[56\]

In this setting, Israel argues, a "third way" emerged which strove to combine (1) the best insights of the New Science with (2) a quasi-fideistic conception of the religious sphere, and (3) a championing of moderate, constitutional monarchy.\[57\] One can characterize this "Moderate Enlightenment," according to taste, as either an attempt by the Radical Enlightenment to moderate itself lest it be crushed by a reactionary backlash, or conversely, a perestroika-like attempt by the old guard to co-opt what was most attractive in the Radical Enlightenment challenge, thus delaying its own ultimate collapse. According to Israel, because the Moderate Enlightenment had prevailed by the mid-eighteenth century, subsequent historians have conflated the Moderate and Radical Enlightenments, in effect assigning the oppositional pathos of the Radicals to the Moderates, while missing the accommodationist and conservative aspect of the Moderates, and then writing the Radicals out of the story altogether.\[58\]

In part, this is because the term "Spinozist" came to be regarded as a term of opprobrium, by agreement between the Moderates and their more reactionary opposition: Conservatives would try to lump the Moderates and the Radicals together under the label, while Moderates would disavow it and shift it onto others.\[59\]

Though it is beyond the scope of this article to appraise such broad historical claims (backed as they are with 720 pages of detailed social, political and ideological history from a half a dozen countries and the better part of a century!), I will risk the hypothesis that Israel's thesis is broadly correct. What is intriguing for our purposes is that Israel clearly positions Locke as the central figure of the Moderate, not the Radical, Enlightenment. This has profound implications for our understanding of the Enlightenment's contribution to the original intent behind the U.S. Constitution.

III. LOCKE
With that in mind, let us turn then to a consideration of Locke's views on the nature of religious knowledge and the relationship between church and state.\textsuperscript{60} First, for Locke, unlike Spinoza, there is a distinction to be made between a natural and a supernatural realm, and while the senses, in conjunction with reason, are competent to disclose the truth about the former, their role in the latter is severely circumscribed.\textsuperscript{61} The senses can give us no knowledge of the supernatural realm, and only limited knowledge of divine action on earth by way of what can be observed of the prophets, Christ, miracles, etc., either directly or indirectly (through testimony and scripture); but these observations alone are not sufficient to establish any supernatural conclusions. Reason, by the same token, can show us that a certain religious hypothesis is incoherent, but it cannot unaided generate much religious knowledge on its own.\textsuperscript{62} Thus our religious lives depend ultimately on revelation, which may be tested for consistency with the deliverances of the senses and reason, but which is indispensible for any access to the religious sphere.

The result is that even if rational inquirers should achieve a perfect consensus about the operations of nature, an irreducible plurality of opinion about religious questions can persist even among them (i.e., after we have weeded out religious opinions that conflict with the deliverances of reason and the senses). Given that being in possession of the religious truth is of surpassing importance to human beings, we all face a residual uncertainty about who is in possession of the religious truth.

Religious intolerance has its roots in what Locke calls "enthusiasm." Locke's account of enthusiasm is simple. Degree of assent to a belief, on Locke's view, should be proportionate with the evidence in its favor. Failure to follow this principle is an epistemic vice.\textsuperscript{63} Locke thinks the cause of enthusiasm is ultimately laziness, for it is easier to commit to a belief without weighing evidence than it is to weigh evidence first. Interestingly, Locke sees a connection between the vice of failing to calibrate one's assent to one's evidence (what he calls "do[ing] violence to [one's] own faculties" and "tyranniz[ing] over [one's] own mind") and the vice of wishing to impose one's beliefs on others.\textsuperscript{64} Though it is not quite clear what Locke sees this connection as
being, there are several possibilities. One is that lacking the habit of offering reasons for oneself, one will lack the habit of offering reasons to others. Another is that the enthusiast accepts some general epistemic principle that says one ought to believe certain propositions without reasons, and then applies this principle indifferently to herself and to others. A third possibility that Locke does not appear to entertain is that agreement from others somehow compensates for lack of evidence of one's own.

In light of the temptations to enthusiasm, and lacking access to religious knowledge, religious toleration comes to have the character of a moral imperative. For suppose that the state were to adopt as its own the religious doctrines of a particular sect and impose them on the citizenry. Whatever the advantages of sheer uniformity of belief, there is no guarantee that the state is imposing religious truth, since it has no peculiar competence (being staffed by mere human beings) for discovering what this is. It might succeed in imposing the religious truth by accident, but it might as readily impose religious falsehood by accident. The harm done to the citizens would be twofold. First, if the state is not in possession of the religious truth, then imposition may lead citizens astray, imperiling their salvation.

For there being but one truth, one way to heaven, what hope is there that more men would be led into it if they had no rule but the religion of the court and were put under the necessity to quit the light of their own reason, and oppose the dictates of their own consciences, and blindly to resign themselves up to the will of their governors and to the religion which either ignorance, ambition, or superstition had chanced to establish in the countries where they were born? In the variety and contradiction of opinions in religion, wherein the princes of the world are as much divided as in their secular interests, the narrow way would be much straitened; one country alone would be in the right, and all the rest of the world put under an obligation of following their princes in the ways that lead to destruction. . . .

And even if it is in possession of the religious truth, it will be imposing insincerely discharged duties on those who would behave otherwise, but for the state's interference,
because no man can so far abandon the care of his own salvation as blindly to leave to the choice of any other, whether prince or subject, to prescribe to him what faith or worship he shall embrace. For no man can, if he would, conform his faith to the dictates of another. All the life and power to true religion consist in the inward and full persuasion of the mind; and faith is not faith without believing.\(^\text{[66]}\)

IV. THE ORIGINAL INTENT OF THE ESTABLISHMENT CLAUSE

A. Madison’s *Memorial and Remonstrance*

The Establishment Clause appears in the First Amendment, along with the Free Exercise Clause and the speech, press, petition and assembly provisions. A popular route to interpreting the Free Exercise and Establishment Clauses has been to turn to the philosophical views of their draftsman, James Madison, especially in his *Memorial and Remonstrance Against Religious Assessments* (1785).\(^\text{[67]}\) A second source often appealed to in understanding the religion clauses has been Thomas Jefferson's letter to the Danbury Baptists (1802) which we discuss below.\(^\text{[68]}\) Turning to Madison is more plausible than turning to Jefferson, for unlike Jefferson, Madison was actively involved in the drafting and defense not only of the First Amendment, but the Constitution as a whole. Both appear to endorse an Enlightenment conception of separation of church and state.

In *Memorial and Remonstrance*, a pamphlet opposing a proposed Virginia statute which would have established a tax to be spent subsidizing religious education, Madison offers a wide range of arguments against the bill. These arguments have often been perceived as offering an anticipatory commentary on the Religion Clauses of First Amendment, which Madison was to draft five years later. Though I will not outline all of Madison's arguments, many of which are familiar in all religious toleration literature,\(^\text{[69]}\) two points bear mentioning.

First, though Madison stresses (as a Spinozist would) the potentially corrupting and tyrannical influence of religion on the state,\(^\text{[70]}\) the weight of Madison's case rests on arguments that would be most persuasive to those already committed to some particular minority
religion. For example, he argues that religious denominations can and have flourished without state support. He argues that established churches tend to become corrupted by state-conferred privileges. He celebrates the role of the religiously tolerant community as a magnet for religiously oppressed minorities, a benefit lost if the community creates an established church. He argues that to cynically regard religion as an instrument of securing secular state interests is "an unhallowed perversion of the means of salvation." Finally, he suggests that a counter-majoritarian perspective is needed with religious liberties as it is with other basic liberties, e.g., press freedom, criminal procedural rights, etc., and though such a perspective benefits the secular minority if the majority professes some religion, it also benefits religious minorities. In short, though Madison fears the influence of a state church, the interests he wishes to protect are as often as not religious interests.

Second, Madison, albeit briefly, presupposes the religious knowledge skepticism Locke embraced and Spinoza rejected. "[T]he bill implies . . . that the Civil Magistrate is a competent Judge of Religious truth . . . [This] is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world..." In Madison, we hear echoes of many of the themes previously sounded by Locke. Since the stress in neither Madison nor Locke is exclusively on the threat to secular interests posed by religious intolerance, either we must relocate Locke and Madison in Witte's fourfold table of perspectives on separation and establishment from the Enlightenment (thus leaving that box empty!) to the Evangelicals, or else we must recognize both a blurring of, and a further subdividing of, these categories. I have proposed that a further subdivision of the Enlightenment into moderate and radical factions, following Israel, makes the most sense. The similarities between Locke (for Israel, a paradigm of the moderate Enlightenment) and Madison suggest that Madison be seen as a champion of the moderate Enlightenment, a perspective which embraces interests shared with both Evangelicals and with the radical Enlightenment. The crucial concept which serves as the common ground between the moderate Enlighteners and the Evangelicals is the irreducibility of religious pluralism and the unknowability of religious truth.
B. The Debates in the First Congress

However, it is important to recognize that the *Memorial and Remonstrance* is not a commentary on the First Amendment, but rather a commentary on a proposed state establishment statute. Though it provides insights into Madison's general principles and how he would apply them to state government, it is of less use than might appear in the federal context. Admittedly, if Madison was a strict separationist at the state level for the reasons he gives in the *Memorial and Remonstrance*, it is unlikely that he would be any less a strict separationist at the federal level. If incorporation through the Fourteenth Amendment merely echoed Madisonian principles first applied against Congress, now applying them against the states, all would be well. But what remains to be seen is if Madison's separationism reflected the sense of Congress in proposing the First Amendment, or the sense of the people in ratifying it. That there may be a discrepancy between Madison's private philosophy and the intent of the First Amendment can be seen in its legislative history.

Initially, Madison had proposed the following: "That in article 1st, section 9, between clauses 3 and 4, be inserted these clauses, to wit, The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or any pretext infringed" and "[t]hat in article 1st, section 10, be inserted this clause, to wit: No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." Much of the material in Madison's address to Congress was retained in the ratified Bill of Rights, but significantly, the addressee of the first clause was clarified. During the subsequent debates, the most fervent advocate of state established religion, New Hampshire, proposed the wording "Congress shall make no laws touching religion" instead of Madison's subjectless, passive voice prohibition. As for the second "no state shall violate the equal rights of conscience," this clause was quietly dropped. A glance at the language of the First Amendment reveals who won this debate, Madison or New Hampshire. New Hampshire prevailed, by replacing Madison's attempt to protect individual religious liberty at both the state and federal level, with a purely structural
provision carving out an exception to the Supremacy Clause. Under the First Amendment, states retained the right to establish state churches, since an attempt by Congress to pass a law establishing a different national church or disestablishing a state church would be to make a "law respecting the establishment of religion." Similarly, states retained the right to abridge the free exercise of religion. The relevance to the original intent inquiry is that Madison's *Memorial and Remonstrance* cannot without qualification interpret the First Amendment, since it is the record of the views of a man who partially lost rather than won the struggle to shape the First Amendment's religion clause contents. For our purposes, the Religion Clauses as written and ratified did not absolutely protect individual religious liberty, should they find themselves in the religious minority within their own state. Naturally, such a dissenter could try to work the political process to achieve state disestablishment, or at least to gain a religious exemption from whatever religious duties the state imposed. However, any state law would apply to the dissenter, and the First Amendment would not avail him if he were burdened by it. Nonetheless, given the role that Madison played in the drafting of the Clause, much of the language of which survived in the ratified text, we can see that much of Madison’s Lockean assumptions about religious knowledge, pluralism and tolerance are still discernable in it.\(^{79}\)

VI. JEFFERSON

Curiously, the most influential source for the interpretation of the Establishment Clause in modern times, Thomas Jefferson, had scarcely any role in the drafting or ratification of the Constitution or the Bill of Rights. As Philip Hamburger relates in his *Separation of Church and State*, Jefferson's attitudes toward the relationship between church and state crystallized during the Presidential election of 1800, when Jefferson and his Republicans came under strong rhetorical assault by Federalist ministers preaching against his candidacy from the pulpit.\(^{80}\) Republicans viewed this as an inappropriate incursion of clergy into the public sphere. Though this in itself did not raise any constitutional issues, it laid the groundwork for a new conception of the separation of church and state which saw the Establishment Clause as an
expression of a larger concern with keeping religious interests from participating in the public sphere altogether.

In October 1801, the Danbury Baptist Association wrote to Jefferson, seeking support for their efforts to overturn Connecticut statutes which infringed their religious liberty. Jefferson replied in support,

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.[81]

Though this brief note does not wear its meaning entirely on its sleeve, several points stand out. First, while the "freedom of conscience" gloss Jefferson places on the Religion Clauses dovetails with the views Madison defended in his *Memorial and Remonstrance*, they are at odds with the legislative history of the First Amendment, as we saw. For the amendment, as enacted, was designed in part to protect states like Connecticut from federal interference with their state established churches. Thus there is some irony in the Danbury Baptists seeking support from the federal president for their opposition to their own state church.[82] Second, as the context of the recent presidential election of 1800 shows, Jefferson's interest was not in protecting either the rights of the states to promote religion within their borders or to protect the individual's freedom of conscience, but rather with building a wall of separation between the world of religion, where his personal views were not well received, and the world of politics, where he lived. Third, to the extent that the wall metaphor is explained at all in the letter, Jefferson glosses it with a reference
to a sharp distinction between opinion and conduct, for "the legislative powers of government reach actions only, and not opinions."

This last remark suggests the affinities between Jefferson's conception and Spinoza's, on the one hand, and the differences between Jefferson's conception and Locke's and Madison's, on the other. To put it at its most stark, if there is a sharp distinction between opinion and conduct, presumably a law requiring Jews to attend Catholic services would not breach the wall; a law requiring Jews to believe what they hear at such services would. The absurdity of this idea is manifest, but it raises in an acute way the question of what sorts of conduct would have to be protected from regulation in order to simultaneously protect the opinions the conduct expresses. By contrast, the Lockean and Madisonian view is that a diversity of religious conduct (at least in so far as it is compatible with public peace) must be tolerated because some such conduct is required for salvation, and the government is in no position to know which conduct that is. Spinoza, by contrast, sees a sharp distinction between good opinion and good conduct, and has no compunctions against seeing the state regulate as extensively as it likes in the latter, while insisting only that the former be left untouched. Jefferson, like Spinoza, sees no merit to the argument that a plurality of religious opinions and practices should be left unmolested because one of them might be right, though the state can never know which one.

Indeed, Jefferson did not think that knowledge of ultimate matters, either religious or metaphysical, posed any daunting challenges to the human intellect, and in this he shows himself a child of the radical, not the moderate, Enlightenment. The evidence for this is best seen in two texts apart from the letter to the Danbury Baptists. First, in a letter to William Short, Jefferson argued for an approach to Biblical interpretation in general, and the interpretation of the historical Jesus in particular, which exactly coincides with Spinoza's. This letter followed a previous letter to Short dated October 31, 1819, in which Jefferson outlined his secular interpretation of Jesus, as well as his understanding of Epicureanism, and asserted "I too am an Epicurean." The outline of Epicureanism coincides closely with Spinozism in both its naturalistic metaphysics and hedonistic ethics; the only differences between them are (1) Jefferson says that
only matter exists, and make no reference to the attribute of Thought, (2) Jefferson affirms the possible existence of "gods", not as creators of the universe but as (presumably material) beings within it, and (3) that "Man is a free agent."

My aim... was, to justify the character of Jesus against the fictions of his pseudo-followers, which have exposed him to the inference of being an impostor. For if we could believe that he really countenanced the follies, the falsehoods and the charlatanisms which his biographers father upon him, and admit the misconstructions, interpolations and theorizations of the fathers of the early, and fanatics of the latter ages, the conclusion would be irresistible by every sound mind, that he was an impostor. I give no credit to their falsifications of his actions and doctrines, and to rescue his character, the postulate in my letter asked only what is granted in reading every other historian . . . . We find in the writings of his biographers matter of two distinct descriptions. First, a groundwork of vulgar ignorance, of things impossible, of superstitions, fanaticisms and fabrications. Intermixed with these, again, are sublime ideas of the Supreme Being, aphorisms and precepts of the purest morality and benevolence, sanctioned by a life of humility, innocence and simplicity of manners, neglect of riches, absence of worldly ambition and honors, with an eloquence and persuasiveness which have not been surpassed.... Can we be at a loss in separating such materials, and ascribing each to its genuine author? The difference is obvious to the eye and to the understanding.... The parts fall asunder of themselves, as would those of an image of metal and clay. [Jefferson goes on to suggest that Jesus may have used Jewish superstitions as a tool for securing compliance with his moral commandments, but that this gives us no reason to suppose that Jesus himself believed more than that he was inspired]. That Jesus did not mean to impose himself on mankind as the son of God, physically speaking, I have been convinced by the writings of men more learned than myself in that lore.[84]

Second, in a letter to John Adams, Jefferson tipped his hand on religious knowledge.
To talk of immaterial existences is to talk of nothings. To say that the human soul, angels, god, are immaterial, is to say they are nothings, or that there is no god, no angels, no soul. I cannot reason otherwise . . . without plunging into the fathomless abyss of dreams and phantasms. I am satisfied, and sufficiently occupied with the things which are, without tormenting or troubling myself about those which may indeed be, but of which I have no evidence. [85]

Strictly read, this paragraph is incoherent. The first two sentences claim that immaterial existences are "nothings", and that "the human soul, angels, [and] god" must be material if they are to exist at all. The last sentence backpedals by saying that immaterial existences are possible but there is no evidence for them. At the least, this entails that there is no evidence at all for any religious claims; at most it entails that we can know that all religious claims are false (unless they can be rephrased as claims about material existences). Neither view corresponds with the Lockean "who is to say?" conception of religious tolerance as rooted in ignorance of the religious truth, for the clear message of the quote, coherent or not, is that a reasonable person ought not to have religious views at all (unless they can be paraphrased into something secular). Though this does not evince a commitment to Spinoza's metaphysics, this is Spinoza's philosophy of religion in a nutshell.

VII. MODERN INTERPRETATION

The First Amendment initially did not protect religious dissenters at the state level because at its time of ratification, the First Amendment did not apply to the states at all. With the ratification of the Fourteenth Amendment, many have argued, and the Supreme Court has held, that many of the provisions of the Bill of Rights came to be incorporated into the Fourteenth Amendment and applied against the states. Though one could argue that the Reconstruction Congress intended to incorporate at least the Free Exercise Clause, in a world with no state churches, it is hard to see what the Establishment Clause could possibly mean in the state setting anyway. But with the rise of public education at the state and local level, as Philip Hamburger
has so admirably chronicled, suddenly the Establishment Clause took on new relevance, for the Catholic schools that sought state support were seeking something which was reminiscent of "establishment" all over again. Anxieties about the intersection between religion and public education initially led to attempts to amend the Constitution to expressly prohibit the state funding of religious education. These attempts were unsuccessful. In the end, judicial interpretation discovered (or invented) an incorporated Establishment Clause embedded within the Fourteenth Amendment.[86]

In *Everson*, the Court invoked two competing conceptions of what the ban on establishment comes to. The first conception is expressed in the following paragraph:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another... 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."[87]

This strict separationist model is noteworthy in three respects. First, it states that the ban on establishment prohibits not just "prefer[ing] one religion over another" but also "aid[ing] all religions."[88] That is, it requires more than mere neutrality among religions. Whether such a requirement can be met in the educational setting in any other way than by promoting only secular information and secular values is worth asking, and if that is the case, whether such an interpretation can be neutral between religion and non-religion, and not ultimately embody governmental hostility toward religion. Second, the authority of Jefferson is cited, in particular, the Danbury letter discussed above. As we saw, this letter, though strategically presented in the context of expressing support for a religious minority, also had as its background Jefferson's political interest in removing religious interests from the public sphere more generally, in the name of a secular culture. Third, the precedential authority cited, *Reynolds v. United States*, was a case which explicitly followed Jefferson in adopting a strong distinction between belief and conduct, while arguing that conduct (in that case, polygamy) could be regulated, while belief
could not be. It is worth wondering whether drawing a sharp distinction between belief and conduct in this way serves religious liberty, pluralism and tolerance, or whether it primarily serves the advancement of a majority culture, whether secular or not. I have suggested above that it is useful to see these strands as of a piece with a Radical Enlightenment sensibility, in which the exclusion of religion (in the ordinary sense) from the public sphere is designed to give free reign to a democratic republic whose purpose is to advance an ascertainable secular truth and uncontroversial secular good without interference from religious sects with their superstitious beliefs and harmful practices. The foundation of this model is not in some primary exclusion of religion in some broad sense from the public sphere. Rather, secular rationality is seen as being in possession of the religious truth, and the state is to be given authority over religious matters; hence the state should promote secularism as its "state church" as it were.

But this is not the last word. The Court in *Everson* also embraces another conception. "That Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." As the holding in the case shows, the neutrality considerations prevail over the strict separationist considerations; New Jersey is permitted to have its subsidized school transportation system for public and Catholic school children alike, despite the fact that this is "aid[ing] one religion." Not to put too fine a point on it, since the purpose of publicly funded or assisted schooling is to provide school children with intellectual skills and accurate information, doesn't the fact that the Catholic schools being aided teach presumably unwarranted and untrue claims (e.g., that a massive migration from Egypt to Palestine could occur without leaving any archaeological trace, that a woman could conceive 2000 years ago while being a virgin, or that a man could rise from the dead) make such schools an inappropriate recipient for public aid? Only if we are willing to say that these claims are unwarranted and untrue. If instead we take the position that no one is in a position to objectively judge whether such claims are reasonable and accurate or not, would it make sense to say that the state acts appropriately by taking a neutral stance toward them? And
this, as we saw, was the crux of the Lockean approach to religious epistemology. Neutrality and skepticism about cognitive powers go hand in hand.

VIII. DARWINISM IN PUBLIC SCHOOLS

And thus we come to evolution in public schools. The two key cases in this area are *Epperson v. Arkansas*[^91] and *Edwards v. Aquillard*.[^92] Though the facts in the two cases differ in certain respects, the holdings appear consistent with each other, and consistent with the suggestion that Spinozistic assumptions are driving the Court's conclusions. In *Edwards*, the Court held unconstitutional a statute requiring that public schools also teach "creation science" if they teach evolutionary theory.[^93] In *Epperson*, the Court held unconstitutional an Arkansas statute making it illegal to teach evolution in public schools.[^94] This statute did not require any specifically religious teaching.[^95] It is beyond serious question that the primary purpose of the statute was to prevent what was taught in public schools from undermining religious teachings received from non-state actors in church and in the home.[^96] Interestingly, the Court's rationale shared the dual nature of its rationale in *Everson*. However, while *Everson* enunciated a separationist rationale, while ultimately deciding the case on neutrality grounds, the reverse was true here. As the Court said, "The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."[^97] As Justice Black observes in his concurrence in the judgment, one would think that the statute, by taking both evolutionary and anti-evolutionary doctrines out of the public schools (the anti-evolutionary doctrines having never been there in the first place) that this would be the most "neutral" outcome.[^98] But instead, the Court goes on to say that "[t]his prohibition is absolute. It forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular doctrine."[^99]

This is puzzling, however. Consider a statute that prohibited the presentation of Mel Gibson's film *The Passion of the Christ* from being shown in a public classroom on the grounds that it advances an historical theory, that Caiaphas and Annas were largely responsible for the
death of Jesus, which is deemed antagonistic to a particular doctrine, Judaism. Surely such a prohibition would not fall afoul of the Establishment Clause! (Whether it fell afoul of the Free Exercise Clause might be another matter, and one could imagine factual scenarios in which it might).

Obviously the difference is that this "historical theory" would be regarded by almost all as religious in nature itself. Why then does the Court not regard the teaching of evolution as itself the advancing of a particular (anti-)religious theory? The answer must be that evolutionary theory carries with it the imprimatur of being very likely true, and at the very least, well-warranted. The state has a legitimate interest in disseminating the truth, and if this has as an incidental effect harm to religious beliefs which are not true, so be it. By contrast, if there were two religious theories that were incompatible, and at some point in time it became common practice for public school teachers to teach one of them to the detriment of a religious minority that adhered to the other, a statute prohibiting the teaching of the first religious theory would seem to be implementing Establishment Clause values, not thwarting them.

It would be interesting to wonder why possession of the truth makes a difference here. Suppose that it turned out that persuasive Roman testimony from authenticated ancient manuscripts turned up that substantiated just enough of Gibson's account as to make it (as to the anti-Semitic aspect) well-warranted among scholarly experts. Presenting such material in a public school which contained a significant number of Christian and Jewish students would be inflammatory, and could lead to a serious deterioration in the school environment, the learning experience, etc. "But it's the truth!" Here a Nietzschean question presents itself: is truth the only value? Does the state have an overriding interest in Enlightening its citizens regardless of consequences?

Exploring this analogy is itself enlightening. For those whose religious convictions are not threatened by Darwinism, the probable fact that Darwinism is true, and that its advocates are not themselves harmed by its propagation, can lead to insensitivity to those who are, thus diminishing the impact of the neutrality argument. But it is far from clear that the interest in
promoting the truth necessarily supercedes, say, the interest in avoiding certain kinds of social conflicts. A similar issue arises with the problem of hate speech and freedom of expression. Freedom of expression is a value, but it is not the only value, and securing the conditions of mutual tolerance may well be a higher one.

Unfortunately, while the Lockean approach may have been viable at the time the Founders wrote, this alternative may no longer be available to us. Consider what the Lockean neutrality approach would mean to a society striving to adhere to something analogous to the Establishment Clause in a public school setting, with the state of science and religion being roughly as it was in Locke's day. One would not teach positive religious doctrines of course. And arguably one would not teach the new Copernican astronomy, since this was considered antagonistic to the doctrines of some churches. Beyond that, most of accepted science and much of accepted history could be taught (perhaps Middle Eastern history would be a sensitive subject, but one can easily imagine a sanitized version that would command broad acceptance). Today, that is not so clear. As the court in *McLean v. Board of Education*, said about another statute restricting the teaching of evolution, "compliance is impossible unless the public schools elect to forego significant portions of subjects such as biology, world history, geology, zoology, botany, psychology, anthropology, sociology, philosophy, physics and chemistry."[102] In short, we now know too much to be able to adopt the Lockean stance, rooted as it is in skepticism. The remaining alternatives are limited. We can embrace the Spinozistic model of a fundamentally secular public sphere as our interpretation of the Establishment Clause, rooted not in original intent but in the inevitable interactions of normative theory and modern social conditions. Or, we can abandon the project of Enlightened citizenry by abandoning public education. Or, we can abandon the very Establishment Clause values which generate the difficulty. Which path we take has implications not only for the future of our own culture and political system, but for the example we wish to set for other cultures only now beginning to grapple with the tensions between traditional religious commitments and the forces of democracy and science that have already transformed us.
The Second Amendment’s “right to bear arms” has been held to be not incorporated. *Presser v. Illinois*, 116 U.S. 252 (1886). However, this holding has been challenged recently in *U.S. v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 2362 (2002). The U.S. Supreme Court has never held that the Third Amendment is incorporated; however, the Second Circuit has in *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982). The Fifth Amendment right to a grand jury indictment is not incorporated. *Hutardo v. California*, 110 U.S. 516 (1884). The Seventh Amendment right to a jury trial in civil cases is not incorporated. *Minneapolis & St. Louis Railroad Co. v. Bombolis*, 241 U.S. 211 (1916). The Supreme Court has not ruled on whether the excessive fines prohibition of the Eighth Amendment is incorporated. The Supreme Court has held the rest of the Bill of Rights incorporated. For a discussion, *see Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

310 U.S. 296 (1940).


According to John Witte, Jr., there are four groups whose basic stances on the relationship between church and state that have influenced American politics and jurisprudence: the Puritans, who prefer less separation in the interests of promoting religion, the Evangelicals, who prefer more separation in the interests of protecting religion from state interference, the Civic Republicans, who prefer less separation in order to provide moral foundations for good government, and the Enlightenment, which prefers more separation to protect government from religious influences. John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 371, 377-388 (1996). Locke is typically associated with the Enlightenment. The thesis of my paper is that the Enlightenment is not of a piece, that Locke and Madison are representatives of the “moderate Enlightenment,” which has more in common with the Evangelicals, whereas Spinoza and Jefferson are representatives of the "radical Enlightenment," which has more in common with the Establishment Clause jurisprudence of the Warren and Burger Court eras.


See generally id. at ch. 14. I set aside the obligation that covenants be kept, as Spinoza rejects this as a law of nature.
See generally id. at ch. 17. It is important to appreciate that the sovereign is not a party to the contract, but only its product, and thus has no binding obligations to the citizens. Id. at ch. 18, para. 4.

Id. at ch. 18.

Id. at ch. 19.

Id. at ch. 19.

1 Eliz., c.1, §8.

Hobbes, Leviathan at ch. 42, para. 66.

Id. at ch. 42, para. 69.


Id.

Spinoza, *Theologico-Political Treatise* at ch. 19.


Explaining what inanimate objects' thoughts are like is thus an inescapable problem for Spinoza.

I set aside the question of the precise nature of this equivalence relation: it appears to be at least as strong as the logical equivalence captured by the biconditional, but weaker than synonymy.

Spinoza, *Theologico-Political Treatise* at ch. 6.
Spinoza offers detailed account of the nature of Biblical prophecy and its authority which fit comfortably with both Jewish and Islamic requirements, but at best awkwardly with Christian requirements. Unsurprisingly, on Spinoza's view, Jesus is assimilated to the prophetic model. Jefferson's interpretation of Jesus was similar. See Richard Mason, *The God of Spinoza: a philosophical study* ch. 9 (Cambridge U. Press 1997).


I set aside here the complications introduced by Spinoza's determinism, for while how we act may be predetermined, that we must act in the human sense in order to comply with our ethical duties is not something Spinoza denies.

Spinoza, *Theologico-Political Treatise* ch. 4. When we have our naturalistic hats on, the reason why we shouldn't lie is because others won't trust us; when we have our religious hats on, others not trusting us is an expression of God's displeasure and the medium He uses to punish us. For Spinoza, both perspectives are correct, and they are in some sense equivalent with each other.

*Id.* ch. 6.

*Id.* ch 4.

*Id.* ch 19.
This point is perhaps made more clear when we consider that at certain times in European history, the Catholic Church in effect had jurisdiction over certain legal issues, e.g. marriage and inheritance, while monarchs had jurisdiction over others, e.g., torts. During such periods, there was one sovereign as to inheritance law and another as to tort law.


As long as other state interests are not implicated--Spinoza would probably have had no objection to the prohibition against use of psilocybin mushrooms upheld in Smith, even though they constituted in part a religious observance, and surely religious toleration would not extend so far as to include toleration of Aztec-style human sacrifices. There is a line somewhere.

In terms of his contractarianism, the state lacks the right to regulate in this area because the people lack the capacity to transfer their power to regulate their own beliefs to others.

Spinoza, *Theologico-Political Treatise* ch. 17, 20

Spinoza seems to insufficiently appreciate the power of cognitive dissonance, which may pressure a person to come to actually believe what she is required to espouse, and multi-generational effects, to wit, that what a parent insincerely espouses may be picked up and espoused by trusting children.

Ch. 1.

*Id.*

Id. at ch. 2.
This was especially the case in Germany. See id. at ch. 29.

I will pass over as too familiar to require extensive discussion Locke's contractarian account of the genesis and legitimacy of the state itself.


Locke argues that the existence of God can be demonstrated, but this will not suffice to determine which monotheistic religion, let alone which denomination of Christianity, is more nearly in possession of the truth. *Id.*
Presumably in either direction—an excess of skepticism in the face of persuasive evidence, as we find in the example of Holocaust denial, is an epistemic vice just as a willingness to believe that for which evidence is lacking is an epistemic vice, as we find in belief in alien abductions.

Id. at ch. 19, §2.


Id. at 50.


The argument of paragraph 11, that religious establishments lead to civil conflict, seems to be a familiar one that all advocates of religious tolerance share. Madison, *id.* at 34.

"In some instances [ecclesiastical establishments] have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny . . ." *Id.* at 33.

*Id.* at 32.

*Id.* at 32-33.
Id. at 33-34. One can imagine non-religious advantages that might accrue to the majority by the presence of religious diversity, but Madison's emphasis seems to be at least as much on the benefits to the religious minorities themselves.

Id. at 32.

Id. at 35-36.

Id. at 32.

Id. at 442.

Id. at 443.

This episode raises interesting questions about the original understanding of federalism. For a useful account, see Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 3-133 (Yale U. Press 1998). Briefly, on Amar’s interpretation, the Founders conceived of state government as having the function of expressing popular sovereignty, rather than defending individual rights. By contrast, the more “libertarian” understanding of the function of government as defending the individual’s Lockean rights only appears after the Civil War, in the Reconstruction Congress’ three amendments limiting state governments’ power. Arguably, this distinction is better understood as a difference of preferred political process rather than of ultimate goals. If we read the Founders as conceiving of state governments, not as expressions of popular will as opposed to protectors of individual liberty, but rather as protectors of individual liberty by way of popular sovereignty, the seeming distinction between the Founders and Reconstruction becomes one of means and not ends. On this view, the appropriate recourse for protecting individual religious freedom would be the state, just as Madison had sought to


[82] By the end of the twentieth century, almost all Establishment Clause caselaw would concern individuals at odds with state and local entities, seeking federal redress. The mechanism for this, of course, is “incorporation” of the Establishment Clause into the Fourteenth Amendment.


[84] Jefferson, *id.* at 1435-38. I can find no direct evidence that Jefferson read Spinoza. However, these ideas were in circulation among the English Deists, who are the "men more learned" Jefferson is likely referring to (e.g., Charles Blount, John Toland, Anthony Collins, Matthew Tindal and Bernard Mandeville). Jonathan Israel has argued that Spinoza, not Hobbes, was the crucial influence on them; Blount, for example, published selections of Spinoza's *Theologico-Political Treatise* under his own name. Israel, *id.* at 599-627.
Jefferson, id. at 1443-45.

Hamburger, id. at 193-251, 287-359.

*Everson*, 330 U.S. at 15-16 (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

*Id.*


*Everson, id.* at 18.

393 U.S. 97 (1968).


*Id.* at 594.

393 U.S. at 109.


*Id.* at 103.

*Id.* at 104.

*Id.* at 112-113 (Black, J., concurring).
Since much of what I say below appears favorable to the "neutrality" approach that the Court in effect rejects in both Edwards and Epperson, I should make clear that I do not find the argument that evolutionary theory is "just another religious perspective" because it does not measure up to some preconceived notions about scientific method. These arguments are misguided for reasons that are well outside the scope of this Article, and defenders of the position that either creation science should be permitted equal time, or that evolutionary theory should be removed from the curriculum need to find arguments which do not rely on downgrading the epistemic credentials of evolutionary theory. Since the Lockean conception of neutrality is ultimately underwritten by skepticism about the religiously relevant truth, and I do not share that skepticism, some other basis for neutrality will have to be found. Infra, I hint at the possibility of non-epistemic grounds for neutrality.
