

JUSTICE STORY AND RELIGIOUS FREEDOM JURISPRUDENCE

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INTRODUCTION

Justice Joseph Story was guided by a hatred of religious persecution and a love of freedom of religious belief. Both through the opinions that he authored during his time as an Associate Justice of the United States Supreme Court, as well as the treatises that he authored as a law professor at Harvard Law School, his work has influenced religious freedom jurisprudence in American law. This Essay explores the contours of his impact on American religious liberty jurisprudence. It proceeds as follows.

Part I provides a background to this discussion, presenting Justice Story's life and legacy as well as his personality and judicial philosophy. Next, Part II proposes the channels through which Justice Story has influenced religious liberty jurisprudence, discussing relevant opinions he wrote as a Supreme Court Justice as well as provisions of his *Commentaries on the Constitution* that touch on the religion clauses of the First Amendment specifically. Part III evaluates Supreme Court opinions that have used Justice Story's *Commentaries* as support in developing First Amendment jurisprudence and assesses how each respective judicial opinion evaluated has used Justice Story's *Commentaries* in its development of First Amendment jurisprudence. The Essay concludes with a summary of the effect that Justice Story, through his sources of influence, has had and likely will continue to have on American jurisprudence.

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I. JUSTICE STORY'S BACKGROUND

A. *Life and Legacy*

Joseph Story was born on September 18, 1779, in Marblehead, Massachusetts.¹ Marblehead was a busy port town in Essex County at that time, located on a rocky peninsula that juts into Massachusetts Bay, approximately eighteen miles northeast of Boston, Massachusetts.² Joseph's parents were Elisha Story and Mehitable Pedrick Story.³

Elisha Story had moved from Boston to Marblehead in 1770 with Ruth Ruddock Story, his first wife.⁴ While before the Revolutionary War, most citizens of Marblehead were employed in the fishing and shipping industries, Elisha Story was the "only physician in the village."⁵ Even though Elisha Story was part of the "aristocracy" of Marblehead,⁶ he was also a patriot who actively participated in the Boston Tea Party in 1773, was a "full-fledged member of the Sons of Liberty," helped to steal British cannon picketed on the Boston Common, and both fought and served as a surgeon in many early, key battles of the Revolutionary War.⁷

By 1778, Elisha and Ruth Ruddock Story had eight children together, but that year Ruth and the youngest both tragically died in childbirth.⁸ The next year, Elisha married the "beautiful and equally vivacious and energetic" nineteen-year-old Mehitable Pedrick.⁹ Joseph Story was the eldest child of this marriage, and he was followed by ten additional children, four brothers and six sisters.¹⁰ The intelligent Mehitable was industrious and efficient in the management of the Story household during a time of economic scarcity.¹¹ She encouraged Joseph Story in the pursuit of excellence, telling him, "Now, Joe, I've sat

1 *Joseph Story*, BRITANNICA, <https://www.britannica.com/biography/Joseph-Story> [<https://perma.cc/QU2P-E94J>].

2 *Marblehead*, BRITANNICA, <https://www.britannica.com/place/Marblehead> [<https://perma.cc/YEV8-ATYA>].

3 R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 5 (G. Edward White ed., 1985).

4 *Id.* at 7.

5 *Id.*

6 *Id.*

7 *Id.* at 10; *see also* 1 *LIFE AND LETTERS OF JOSEPH STORY* 9–12 (William W. Story ed., Boston, Little & Brown 1851).

8 NEWMYER, *supra* note 3, at 9. *But see* Letter from Joseph Story to William W. Story (Jan. 23, 1831), *in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 2 (William W. Story ed., Boston, Little & Brown 1852) (stating that Ruth Ruddock Story died in 1777).

9 NEWMYER, *supra* note 3, at 9–10.

10 *Id.* at 10.

11 *Id.*

up and tended you many a night when you were a child, and don't you dare not to be a great man."¹²

"The Story household was deeply and meaningfully religious."¹³ The family "dutifully attended" the Second Congregational Church where Joseph Story's uncle, Isaac Story, was the minister,¹⁴ but Elisha (who was "Arminian in principle") and Isaac (who was Calvinist) often argued over the points of their faith, albeit without alienation.¹⁵ It seems Joseph Story was influenced in religion much more by his father than by his uncle. Each day in the Story household included morning and evening family prayers, and Joseph remembered "with great pleasure" that "[o]n Sunday, after the public afternoon service was over, all the family, including the servants, were assembled in one room, and [Elisha] then read a printed sermon of some English divine, and concluded the day with reading a portion of the New Testament, and with prayer."¹⁶ Joseph Story later opined, "I am sure that I was greatly a gainer by those domestic services."¹⁷ Not only was Elisha Story deeply religious, but he also demonstrated tolerance of other religions, a trait that profoundly influenced Joseph.¹⁸ Joseph recalled one of his earliest impressions of his father:

[H]e spoke with great kindness and charity of the Roman Catholics, among whom he said there were many pious and excellent men. I was too young at the time to know who Roman Catholics were, or what was their creed. But toleration of Popery was at that time almost a deadly sin among the good old Calvinistic Puritans, and I honored his opinion the more, because it formed such a contrast to that of others who were about him. I trace back to this source *my early and constant hatred of religious persecution, and my love, my inextinguishable love of freedom of opinion and inquiry in matters of religion.* They have now become the guiding maxims of my life.¹⁹

It is thus unsurprising that Joseph Story converted to Unitarianism when he was at Harvard College, although he did retain traces of his early Calvinism.²⁰ As a Massachusetts Unitarian, he viewed God as "a personal God, not a cosmic force, a New Testament God of benevolence, forgiveness, and love. Story never spoke much of miracles, . . .

12 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 7, at 22.

13 NEWMYER, *supra* note 3, at 13.

14 *Id.* at 12, 12–13.

15 Letter from Joseph Story to William W. Story, *supra* note 8, at 5.

16 *Id.* at 5–6.

17 *Id.* at 6.

18 *See id.* at 5.

19 *Id.* (emphasis added).

20 NEWMYER, *supra* note 3, at 29.

but he believed in salvation and life after death—the greatest miracle of all.”²¹

While Joseph Story learned much of English grammar, literature, and elocution from his mother and on his own, his formal education began at the Marblehead Academy, where he was introduced to rudimentary arithmetic and Greek and Latin grammar, but where he enjoyed little other than athletics and the company of the female students.²² In 1794, when Joseph was fifteen years of age, his father withdrew him from the academy after the academy’s instructor subjected Joseph to a severe and unjustified public discipline.²³

In the spring term of 1795, following a six-week period of arduous and monumental self-preparation for entrance examinations, Joseph began his studies at Harvard College.²⁴ He found college life “very delightful as well as instructive.”²⁵ In fact, he was “most thoroughly devoted” to his studies, and “scarcely wasted a single moment in idleness.”²⁶ He eventually graduated second in his class.²⁷ But because of his zeal for books, his health suffered while he was at Harvard College: “When I entered college I was very robust and muscular, but before I left I had become pale and feeble and was inclining to dyspepsia.”²⁸

Following his graduation from Harvard College, Joseph Story returned to Marblehead to study law with the eminent Samuel Sewall, who was then a member of Congress and later became Chief Justice of the Supreme Court of Massachusetts.²⁹ After Sewall was appointed as a judge, Story moved to nearby Salem, Massachusetts, and completed his legal education with Justice Samuel Putnam.³⁰ His legal education included reading *Blackstone’s Commentaries* and works by Lord Justice Coke, but at that time there “were scarcely any American Reports . . . to enable the student to apply the learning of the Common Law to his own country, or to distinguish what was in force [in the United States], from what was not.”³¹ This made learning the law a Herculean task, which Story would have quit in despair if he had not felt the conviction that his “destiny was to earn [his] bread by the sweat of [his] brow.”³²

21 *Id.*

22 *Id.* at 20–21.

23 *Id.* at 21.

24 See Letter from Joseph Story to William W. Story, *supra* note 8, at 13–14; 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 7, at 43.

25 Letter from Joseph Story to William W. Story, *supra* note 8, at 17.

26 *Id.* at 16.

27 NEWMYER, *supra* note 3, at 28.

28 Letter from Joseph Story to William W. Story, *supra* note 8, at 16.

29 *Id.* at 18.

30 *Id.*

31 *Id.* at 19, 18–20.

32 *Id.* at 19.

And since Sewall was absent in Congress for about half the year, the learning process was “recluse and solitary,” with “no opportunity to ask for any explanation of difficulties, and no cheering encouragement to light up the dark and intricate paths of the law.”³³ Often, Story would spend fourteen hours per day for months on end mastering these books, taxing himself to the point of nervous exhaustion.³⁴ He even confessed to weeping bitterly over the difficulty of the study.³⁵ But at long last Story was admitted to the Essex County bar in July of 1801, and not knowing where else to go, he set out to open a law practice in Salem.³⁶

In December of 1804, Story married Mary Lynde Fitch Oliver, the daughter of a then-deceased minister.³⁷ Although he “anticipated so much happiness” from this marriage, Mary tragically fell ill and died in June of 1805.³⁸ This was a severe blow that “quite unmanned” Story.³⁹ To add to this crushing grief, Story’s father, Elisha, also died within the next two months.⁴⁰ Story later wrote to his son William that he “never look[ed] back upon this period of [his] life without feeling a sense of desolation.”⁴¹

Also in 1805, Story was elected to the Massachusetts legislature, and he was annually reelected as a member of the legislature until he was appointed to the Supreme Court in 1811.⁴² Because of a vacancy, he was chosen to serve one session in the United States Congress from 1808 to 1809, but thereafter he declined to seek reelection to Congress, as he wanted to focus on being successful as a lawyer.⁴³ He was also the state attorney for Essex County from 1807 to 1809.⁴⁴ As for his political leanings at this time, Story was a Jeffersonian Republican in predominantly Federalist Massachusetts, although he at times leaned toward Federalist doctrines and was at odds with Jefferson.⁴⁵

In 1808, Story married Sarah Waldo Wetmore, the daughter of a judge in the Boston Court of Common Pleas.⁴⁶ Sarah had been close

33 *Id.* at 18.

34 *Id.*

35 *Id.* at 20.

36 *Id.* at 18, 20.

37 *Id.* at 25–26.

38 *Id.* at 26.

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *See id.* at 29–30.

44 2 MUNICIPAL HISTORY OF ESSEX COUNTY IN MASSACHUSETTS 845 (Benjamin F. Arington ed., Lewis Hist. Publ’g Co. 1922).

45 Letter from Joseph Story to William W. Story, *supra* note 8, at 26–34.

46 *Id.* at 34; NEWMYER, *supra* note 3, at 53.

friends with Story's first wife, "and the esteem and affection, which had begun during his previous marriage, now matured into love."⁴⁷ But heartbreak filled the early years of their marriage, as they buried three daughters and a son before any of the children had reached the age of seven.⁴⁸

Despite these sorrows, Story continued to excel in his legal and political career pursuits. In 1810, he argued and won *Fletcher v. Peck* before the United States Supreme Court, in which he represented Peck.⁴⁹ In January of 1811, Story was appointed Speaker of the House of Representatives of Massachusetts.⁵⁰ And in November of 1811, President James Madison appointed him, unexpectedly and without any solicitation on Story's part, as an Associate Justice of the Supreme Court of the United States.⁵¹ Justice Story was thirty-two, the youngest Justice ever appointed to the Supreme Court.⁵² During his tenure on the Court, he authored such landmark opinions as *Martin v. Hunter's Lessee*,⁵³ *Prigg v. Pennsylvania*,⁵⁴ and *Swift v. Tyson*.⁵⁵ His duties as a Justice also included circuit riding in New England.⁵⁶

In addition to his work on the Supreme Court, Justice Story gradually became increasingly involved with Harvard University. In 1818, Justice Story was appointed to Harvard University's board of overseers, and in 1827 he became a member of the corporation.⁵⁷ In 1829, Justice Story also became the head of the then-fledgling Harvard Law School, and began teaching law as the Dane Professor of Law.⁵⁸ Eulogized in 1851 as Harvard Law School's actual founder, Justice Story brought "dynamic and imaginative leadership" to the school.⁵⁹ Justice Story had an "appetite for scholarship, a clarity of expression, and an abundance of energy," in addition to "charm, conviviality, attraction to controversy, and flair," and his students fondly "remembered him as the teller of delightful anecdotes."⁶⁰ Harvard Law School had begun as a

47 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 7, at 169.

48 Letter from Joseph Story to William W. Story, *supra* note 8, at 34.

49 *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

50 Letter from Joseph Story to William W. Story, *supra* note 8, at 35.

51 *Id.*

52 *Id.*; see *Joseph Story*, OYEZ, https://www.oyez.org/justices/joseph_story [<https://perma.cc/KGD8-R5WG>].

53 *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

54 *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

55 *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), *overruled by* *Eric R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

56 See NEWMYER, *supra* note 3, at 83–92.

57 *Id.* at 165.

58 *Id.*

59 See *id.* at 239.

60 G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 91 (3d ed. 2007).

full-time law school in 1817, but in 1828, the year before Justice Story joined the faculty, only one student was enrolled.⁶¹ By the fall term of 1829, however, the student body had grown to twenty-eight, and nearly a thousand students ultimately graduated from the law school throughout Justice Story's tenure as professor.⁶² Under his leadership, "they had the most up-to-date and relevant legal education available in the United States and a remarkable record of achievement."⁶³ His work elevated the school to a national law school, with students both coming from across the nation and carrying their legal education all over the United States.⁶⁴ The Harvard Law School graduates throughout Justice Story's tenure came to occupy "conspicuous and influential places in Society."⁶⁵

Over a span of sixteen years, while both a Justice and a professor, Justice Story wrote and published hefty treatises on the subjects that he taught, including his multivolume *Commentaries* on nine different subjects, namely: the Constitution, Bailments, Agency, Partnership, Bills of Exchange, Promissory Notes, Conflict of Laws, Equity Jurisprudence, and Equity Pleadings.⁶⁶

In addition to his other duties, Justice Story served as the president of a Massachusetts branch of the National Bank for over twenty years.⁶⁷ This position was not without conflicts with his role as a Justice, but these seem mostly not to have caused him concern. Remarkably, Justice Story "repeatedly attempted to use his influence with Treasury Department officials to secure large bank deposits in the branch bank of which he was president."⁶⁸ Additionally, he did not recuse himself from cases involving the Bank of the United States while he was president of the Massachusetts bank branch, and even helped draft a reply to the 1832 message from President Jackson vetoing the charter of the National Bank.⁶⁹

In early 1845, Justice Story informed his friends of his decision to retire from the Supreme Court.⁷⁰ By this point, he viewed himself as a "dead minority" on a Court with a majority that held a Jacksonian

61 NEWMYER, *supra* note 3, at 239–40.

62 *Id.* at 249.

63 *Id.* at 269.

64 *Id.* at 264.

65 *Id.* at 266, 266–68.

66 *Id.* at 281.

67 WHITE, *supra* note 60, at 42.

68 *Id.*

69 *Id.*; *cf. id.* ("[H]e also participated in the decision in the famous *Charles River Bridge* case of 1837, notwithstanding the fact that Harvard University, of which he was both a member of the faculty and a Fellow of the Corporation, received annual income from one of the litigants.").

70 NEWMYER, *supra* note 3, at 380.

ideology, so while he remained on the Court he felt he had the “painful alternative of either pressing an open dissent from the opinions of the Court, or, by [his] silence, seeming to acquiesce in them.”⁷¹ So after thirty-three years on the Court, he planned to make an official announcement later that year after he completed his circuit.⁷² After retirement, Justice Story intended to devote himself fully to teaching at the now prosperous Harvard Law School, writing further treatises as well as a biography of Chief Justice Marshall, and spending time with his students and his wife, children, and grandchildren.⁷³ But following a “strenuous effort to complete his circuit, successful to the point of leaving his last opinion written up in his desk,” he fell ill and, on September 10, 1845, Justice Story died.⁷⁴ He was buried in Mount Auburn Cemetery among his children.⁷⁵

B. Personality and Judicial Philosophy

Justice Story was described as approachable and fond of feasting, drinking, and good company; he was witty, charming, and exuberant, but also combative in his temperament and attracted to controversy.⁷⁶ He had an “appetite for scholarship, a clarity of expression, and an abundance of energy.”⁷⁷ In fact, his “outstanding characteristic was his remarkable nervous energy.”⁷⁸ He was a “bombastic, pugnacious child, a restlessly ambitious youth,” and as “an adult dogged by misfortunes,” he found respite from his anxieties in constant activities.⁷⁹

Justice Story viewed the judicial branch of the United States government as an aristocratic check on the excesses of democratic legislatures.⁸⁰ Thus, he agreed with the concept of an active judiciary.⁸¹

As part of this view, Justice Story sought to increase the publication and dissemination of legal sources, seemingly in order to increase the public’s perception of the Court’s authoritativeness. The judicial world Justice Story faced was a world that lacked “a body of established authorities from which judges could derive rules for the resolution of

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 381.

⁷⁴ *Id.*

⁷⁵ *Id.* at 382.

⁷⁶ WHITE, *supra* note 60, at 41–43.

⁷⁷ *Id.* at 91.

⁷⁸ *Id.* at 41.

⁷⁹ *Id.* “From an early age he had sought out and engaged in political controversy, needling his acquaintances, and occasionally, in his youth, becoming involved in fist fights.” *Id.* at 42.

⁸⁰ *Id.* at 61.

⁸¹ *See id.* at 62–63.

cases coming before them.”⁸² There were no public law libraries, and a judge riding circuit to county courthouses would carry along his law books, of which there were few at best.⁸³ Before 1775, there were only forty-eight law books published in the American colonies, and “until 1790 there were few published reports of judicial decisions.”⁸⁴ Even leading up to Justice Story’s appointment to the Supreme Court, “only the Supreme Court and a handful of state courts had printed records of their earlier cases. Under such circumstances judges were accustomed to deciding cases on an impressionistic basis and to seeing their decisions rapidly vanish into obscurity.”⁸⁵

Thus “[c]onfronted with an absence of established American law,” Justice Story sought to create it himself through “publication and dissemination of court decisions” by reporters who were “sympathetic toward [his] jurisprudential views.”⁸⁶ Accordingly, Justice Story befriended Henry Wheaton, the Supreme Court reporter, encouraging him to publish and disseminate the Court’s decisions (and even helping him summarize the Court’s decisions and adding anonymous notes to Wheaton’s early volumes), and actively ensured that Wheaton was sympathetic toward his jurisprudential views.⁸⁷

An additional way Justice Story helped shape American law was through historical scholarship presented in his aforementioned treatises.⁸⁸ “The treatises constituted an American version of small codes.”⁸⁹ One of his treatises was not “the law” of that subject, “yet the treatise’s synopsis of legal principles was, practically speaking, a sufficient surrogate for the law,” and thus became authoritative in itself.⁹⁰

II. JUSTICE STORY’S CHANNELS OF INFLUENCE

Although the Supreme Court did not decide any cases under the First Amendment religion clauses while Justice Story was on the

82 *Id.* at 45.

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.* at 46.

87 *See id.* at 46–47.

88 *See id.* at 47–48; *supra* note 66 and accompanying text.

89 *Id.* at 48 (“They were not, technically, regarded as ‘authorities’ in the same sense as were decisions of courts or statutes, but at a time when other published resources were scarce, they became for countless practitioners the starting points for research.”).

90 *Id.* *But cf.* NEWMYER, *supra* note 3, at 184 (arguing that Justice Story wrote his *Commentaries* in order to mobilize his formulation of the law and revised history in order to combat prevalent ideologies with which he disagreed, and thus that his treatises were propagandic).

Court,⁹¹ he has influenced American religious freedom jurisprudence through a few opinions he authored that decided church-state issues during that time.⁹² Additionally, Justice Story discussed the First Amendment in the third volume of his *Commentaries on the Constitution*.⁹³ Some consider this work “the earliest authoritative interpretation of the Constitution.”⁹⁴ The following Sections present and discuss each of these sources of influence in turn.

A. *Terrett v. Taylor* (1815)

Justice Story’s unanimous majority opinion in *Terrett v. Taylor* held that the State of Virginia could not rescind the corporate charter of the Episcopal Church nor expropriate land that the Virginia legislature had previously granted to that church.⁹⁵ Throughout the colonial period, the Virginia colony had “maintained perhaps the most rigid and exclusive establishment of religion in America. The Church of England, the predecessor of today’s Episcopal Church, was ‘by law established.’”⁹⁶ In contrast to the “official advantages” enjoyed by the

91 The Supreme Court’s first decision interpreting the Free Exercise Clause was *Reynolds v. United States*, 98 U.S. 145 (1879), and its first decision interpreting the Establishment Clause was *Bradfield v. Roberts*, 175 U.S. 291 (1899), both decided decades after Justice Story’s time on the Court. See Michael W. McConnell, *The Supreme Court’s Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic*, 37 TULSA L. REV. 7, 7 (2001).

92 See *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815); *Vidal v. Girard’s Ex’rs*, 43 U.S. (2 How.) 127 (1844); see also JOHN WITTE, JR., JOEL A. NICHOLS & RICHARD W. GARNETT, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 314–15, app. 2 tbl.A.2 (5th ed. 2022). See generally McConnell, *supra* note 91.

Justice Story also authored *Town of Pawlet v. Clark*, 13 U.S. (9 Cranch) 292 (1815), a case similar in facts and holding to *Terrett*, but involving church property in Vermont that was originally granted by the Crown. He also appears to have participated, but did not author the opinion, in *Permoli v. City of New Orleans*, 44 U.S. (3 How.) 589 (1845) (declining to apply the First Amendment’s Free Exercise Clause to the states), superseded by constitutional amendment, U.S. CONST. amend. XIV, as recognized in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (“The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.”).

93 See 3 JOSEPH L. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1864–73 (Boston, Hilliard, Gray & Co. 1833).

94 Jay Alan Sekulow & Jeremy Tedesco, *The Story Behind Vidal v. Girard’s Executors: Joseph Story, the Philadelphia Bible Riots, and Religious Liberty*, 32 PEPP. L. REV. 605, 620 (2005) (“In his *Commentaries* and other writings, Story made clear his belief that American society rested on the foundation of Christianity, and that the government had a duty to foster and encourage Christianity, without violating individual conscience, among the people.”).

95 *Terrett*, 13 U.S. (9 Cranch) at 55.

96 McConnell, *supra* note 91, at 8.

Anglican Church in Virginia,⁹⁷ religious dissenters in the colony were persecuted by the royal government.⁹⁸ And of course, along with the advantages of establishment came “interference and domination” of the Anglican Church by the Virginia government.⁹⁹

At the time of the Revolution in 1776, the legislature of Virginia “confirmed and established” to the Episcopal Church the title to the lands formerly held by the Anglican Church.¹⁰⁰ In 1784, despite “vehement opposition” from Baptists and Presbyterians, the Virginia legislature passed an act making the Episcopal Church a legal corporation.¹⁰¹ The act minutely detailed the church’s form of government and granted the corporation the real and personal property of the formerly established Church of England.¹⁰² Over the next few years, the Virginia legislature repealed the act of 1784 and replaced it with provisions allowing all religious societies to retain whatever property belonged to them at the time and authorizing them to appoint trustees who would govern the property according to their own religion’s rules.¹⁰³ Gradually, however, by the turn of the century, a Jeffersonian majority in the Virginia legislature became convinced that church incorporation and church retention of property granted by the state violated the religious freedom principle of church-state separation.¹⁰⁴ Thus, in 1798, the Virginia legislature repealed all of the aforementioned statutes, and in 1801 “asserted their right to all the property of the Episcopal churches in the respective parishes of the state.”¹⁰⁵

When litigation over this legislation reached the United States Supreme Court, Justice Story was assigned to write the opinion. He first

97 *Id.* at 8-9 (stating that the established church had “grants of land, financial support through mandatory tithes, enforcement of compulsory worship, and prohibition of competitors,” as well as “a position of social prestige.”).

98 *Id.* at 8-9 (“More Virginians were indicted between 1720 and 1750 for missing church than any other crime, and cheating on church tithes was almost as common a charge. Until the 1750s, public worship outside the established church was generally not permitted. . . . [I]t was not until 1760 that [the Presbyterians] gained formal permission to form their own churches and select their own ministers. As late as 1775, Baptist ministers—the most obstreperous dissenters—were jailed and sometimes horsewhipped for preaching the gospel.”).

99 *Id.* at 9 (“Anglican churches were controlled by the colonial governor and council, as well as local elected vestries. The government had power to select clergy and to dictate matters of doctrine and practice. The Church of England in Virginia was an arm of the royal government.”).

100 *Terrett*, 13 U.S. (9 Cranch) at 47.

101 McConnell, *supra* note 91, at 11.

102 *Id.*

103 See *Terrett*, 13 U.S. (9 Cranch) at 47-48.

104 McConnell, *supra* note 91, at 12.

105 *Terrett*, 13 U.S. (9 Cranch) at 48.

addressed the church incorporation issue under the Virginia bill of rights:

[T]here can be no doubt that it was competent to the people and to the legislature [of Virginia] to deprive [the Episcopal Church] of its superiority over other religious sects, and to withhold from it any support by public taxation. . . . [Y]et it is difficult to perceive how it follows as a consequence that the legislature may not enact laws more effectually to enable all sects to accomplish the great objects of religion by giving them corporate rights for the management of their property, and the regulation of their temporal as well as spiritual concerns.¹⁰⁶

While Justice Story went on to recognize that the Virginia constitution prohibited a religious establishment,¹⁰⁷ it seems that he saw the church corporation issue as a free exercise, rather than an establishment issue. He wrote that free exercise of religion would not be restrained by granting each sect equal aid to accomplish church functions via corporate powers, and thus, “the abolition of all religious corporations” was not required.¹⁰⁸

This reasoning illustrates the wide contrast between the (by that time) Federalist-leaning Justice Story and the Virginia Jeffersonians in conceptualizing church-state separation. For instance, President James Madison, a religious liberty champion heavily influenced by the preaching of Baptists experiencing persecution,¹⁰⁹ in addition to writing his famous *Memorial and Remonstrance*, in 1811 vetoed an act of Congress “incorporating the protestant Episcopal Church in the Town of Alexandria in the District of Columbia.”¹¹⁰ His reasoning for the veto was on Establishment Clause grounds:

Because the Bill exceeds the rightful authority, to which Governments are limited by the essential distinction between Civil and Religious functions, and violates, in particular, the Article of the Constitution of the United States which declares, that “Congress shall make no law respecting a Religious establishment.” . . . This particular Church, therefore, would so far be a religious establishment by law; a legal force and sanction being given to certain articles in its constitution and administration.¹¹¹

106 *Id.* at 48–49.

107 *See id.* at 49.

108 *Id.*

109 JOHN EIDSMOE, *CHRISTIANITY AND THE CONSTITUTION: THE FAITH OF OUR FOUNDING FATHERS* 105 (1987).

110 Letter from James Madison, President of the United States, to the House of Representatives (Feb. 21, 1811), <https://founders.archives.gov/documents/Madison/03-03-02-0233> [<https://perma.cc/T2Z2-EX8R>].

111 *Id.*

Similarly, a week later, President Madison vetoed a bill giving a Baptist Church a land grant likely because its meeting house had been accidentally built on federal land.¹¹² He reasoned that “the Bill . . . comprizes a principle and precedent for the appropriation of funds of the United States, for the use and support of Religious Societies; contrary to the Article of the Constitution which declares that Congress shall make no law respecting a Religious Establishment.”¹¹³

This conception—that anti-establishment principles encompassed the prohibition of church incorporation—was strong in Jeffersonian Virginia at this time.¹¹⁴ In fact, when the same issues presented in *Terrett* arose again in 1840, the Virginia Supreme Court of Appeals ignored the United States Supreme Court’s decision in *Terrett*, affirmed the seizure and sale of the land formerly granted by the legislature to an Episcopal church, and further stated that “incorporations of religious sects, providing for church government of the members, and the election or appointment and institution of ministers, are without the scope of legislative power, and incompatible with the principles of the [Act Establishing Religious Freedom], now incorporated in the constitution.”¹¹⁵ A subsequent Virginia constitutional convention even added the following provision to the Virginia Constitution: “The General Assembly shall not grant a charter of incorporation to any church or religious denomination, but may secure the title to church property to an extent to be limited by law.”¹¹⁶

That provision survived with the same language in Article 4, Section 14 of the Virginia Constitution until it was repealed by an amendment in 2006 in response to a federal district court decision finding the provision unconstitutional under the Free Exercise Clause of the First Amendment made applicable to the states by the Fourteenth Amendment.¹¹⁷

But the State of West Virginia, which separated from the State of Virginia during the Civil War, retains the prohibition on church

112 See Letter from James Madison, President of the United States, to the House of Representatives (Feb. 28, 1811), <https://founders.archives.gov/documents/Madison/03-03-02-0252> [<https://perma.cc/C3ZC-ZDKB>].

113 *Id.*

114 See *Selden v. Overseers of the Poor of Loudoun*, 38 Va. (11 Leigh) 127, 132–33 (Va. 1840) (stating that between 1804 and 1830, when applications had occasionally been made to the legislature for the incorporation of a religious sect, the applications were rejected by substantial majorities due in large part to objections based on “incompatibility with the principles of religious freedom” *Id.* at 133).

115 *Id.* at 135, 135–36.

116 VA. CONST. art. IV, § 32 (1851).

117 VA. CONST. art. IV, § 14(20), para. 2 (1971); *Falwell v. Miller*, 203 F. Supp. 2d 624 (W.D. Va. 2002).

incorporation in its constitution.¹¹⁸ In fact, a ballot measure proposing to amend the West Virginia Constitution by “remov[ing] the prohibition on incorporating religious denominations and churches and authoriz[ing] the state legislature to provide for the incorporation of churches or religious denominations by law” in the 2022 West Virginia general election was defeated.¹¹⁹ Nearly fifty-five percent of West Virginians who voted on the measure cast a vote against its passage, despite nearly unanimous bipartisan support for the measure in both the Senate and House of Delegates of the West Virginia legislature.¹²⁰ Thus, it seems that under this sort of view, granting churches corporate status and government land should have presented an establishment, not a free exercise, issue in *Terrett*.

Justice Story next addressed the expropriated lands issue. Holding that the statutes granting and confirming title of lands to the use of the church was “not inconsistent with the constitution or bill of rights of Virginia,”¹²¹ Justice Story wrote that “it is very clear to our minds that [the Virginia legislature] vested an indefeasible and irrevocable title.”¹²² Thus, the State of Virginia could not divest and expropriate the church property.¹²³

Since the Fourteenth Amendment was still many years in the future, *Terrett* did not appear to present a First Amendment issue. While the case certainly presented church-state, religious freedom issues, because it only dealt with state law, it would seem that Justice Story’s influence through this source would be limited to persuasive precedent at best. However, in *Everson v. Board of Education*, the case that first applied the First Amendment’s Establishment Clause against the states, the Supreme Court cited *Terrett*, among other early cases, for the proposition that the Court had elaborated the “meaning and scope of the First Amendment . . . in the light of its history and the evils it was

118 W. VA. CONST. art. VI, § 47 (“No charter of incorporation shall be granted to any church or religious denomination. Provisions may be made by general laws for securing the title to church property, and for the sale and transfer thereof, so that it shall be held, used, or transferred for the purposes of such church, or religious denomination.”).

119 *West Virginia Amendment 3, Incorporation of Religious Denominations and Churches Measure* (2022), BALLOTEDIA, [https://ballotpedia.org/West_Virginia_Amendment_3,_Incorporation_of_Religious_Denominations_and_Churches_Measure_\(2022\)](https://ballotpedia.org/West_Virginia_Amendment_3,_Incorporation_of_Religious_Denominations_and_Churches_Measure_(2022)) [<https://perma.cc/3JBW-P3DN>].

120 *Id.*

121 *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 51 (1815).

122 *Id.* at 50, 50–51 (“We have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito*. Such a doctrine would uproot the very foundations of almost all the land titles in Virginia, and is utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property regally acquired.”).

123 *See id.* at 55.

designed forever to suppress . . . prior to the application of the First Amendment to the states by the Fourteenth,”¹²⁴ and that same application and broad interpretation given by those prior cases to the Free Exercise Clause should be given to the Establishment Clause.¹²⁵

It is a puzzle what exactly to make of *Everson*’s characterization of *Terrett*. It seems incorrect to say that *Terrett* applied the First Amendment to a pre-Fourteenth Amendment state law issue, and nothing in *Terrett* seems to hint that Justice Story was elaborating the “meaning and scope” of the First Amendment. What is clear is that *Everson* drew upon Justice Story’s broad conception of free exercise doctrine—that churches should be allowed equal opportunity to incorporate and be secure in their vested property rights—in expanding the understanding of establishment doctrine.

B. *Vidal v. Girard’s Executors (1844)*

In *Vidal v. Girard’s Executors*, Justice Story authored an opinion that upheld the provisions of the will of a benefactor who sought to bequeath a college for orphans established and administered by the City of Philadelphia, but where the will included a provision barring clergy from teaching.¹²⁶ By way of background, Stephen Girard was the richest man in America when he died.¹²⁷ His was a story of rags to riches, not without controversy,¹²⁸ but as he aged his philanthropy and civic-mindedness increased.¹²⁹ Thus, when Mr. Girard passed away “wifeless, childless, and on bad terms with his more distant relatives, he directed his fortune to the welfare of orphans.”¹³⁰ His nearly seven million dollars was all, by his will, to be put to use improving Philadelphia and establishing a college for “poor male white orphan

124 *Everson v. Bd. of Educ.*, 330 U.S. 1, 14–15, 15 n.21 (1947) (citing *Terrett*, 13 U.S. (9 Cranch) 43; *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872); and *Davis v. Beason*, 133 U.S. 333 (1890) as direct support; and *Reynolds v. United States*, 98 U.S. 145 (1879); and *Reuben Quick Bear v. Leupp*, 210 U.S. 50 (1908) as related support).

125 *Id.* at 15.

126 *Vidal v. Girard’s Ex’rs*, 43 U.S. (2 How.) 127 (1844).

127 See McConnell, *supra* note 91, at 20.

128 See *id.* (“Among his successful enterprises were banking, finance, smuggling, bribery, privateering, opium running, and trading in mislabeled goods. He cheated his brother in a business deal, and cheated his fellow Philadelphians [sic] by selling cheap French wine as expensive port, explaining to an associate that they could not tell the difference.”).

129 *Id.* at 21, 20–21 (having come to America as a French orphan himself, “[m]uch of Girard’s late-blooming philanthropy was directed to orphaned youths. It is reported that on his daily walk from the city to his suburban estate, he would carry a collection of children’s shoes in different sizes, strung from a pole, so that he could provide footwear to barefoot urchins he would encounter on his route.”).

130 *Id.* at 21.

children.”¹³¹ Two provisions of the will are distinctive here: The first was that the “Mayor, Aldermen, and Citizens of Philadelphia” were given his estate to hold in trust and administer according to the terms of his will.¹³² The second was as follows:

I enjoin and require that no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college.

In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever; but, as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce; my desire is, that all the instructors and teachers in the college shall take pains to instil [sic] into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow-creatures, and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer.¹³³

It is unclear what exactly the impetus was behind Mr. Girard’s desire to keep clergy out of the school and leave matters of religion for the orphans to encounter after reaching adulthood. Some scholars have argued that this provision was written “in recognition of the Bible in schools controversy, and in an attempt to prevent that controversy from affecting the school he desired to establish.”¹³⁴ At a time when violent riots between Protestants and Catholics were breaking out across major cities in the United States over theological teaching and the use of the King James Bible in the public schools, this concern may have motivated Mr. Girard.¹³⁵ An alternative explanation (though they are not mutually exclusive) for such a provision in a will is the French disestablishment school of thought, exemplified by a suspicion of “organized religion as a source of superstition and lack of republican free-thinking,” and described as “freedom *from*” rather than “freedom *of*” religion.¹³⁶ The former description contrasts with the latter, predominant view in America at the time, namely, that “disestablishment was

131 *Vidal*, 43 U.S. (2 How.) at 129, 128–129.

132 *Id.* at 129.

133 *Id.* at 133 (emphasis added).

134 Sekulow & Tedesco, *supra* note 94, at 639.

135 *See id.* at 620–38.

136 McConnell, *supra* note 91, at 23.

essential to liberate religion from government control” and that Protestant Christianity was an “essential support for republican government.”¹³⁷

Whatever his reasons, the provisions of the will—and the prospects of who would receive his fortune—resulted in intense and enormously publicized litigation, brought by Mr. Girard’s French relatives, challenging the will’s validity, including ten days of oral argument before the Supreme Court by some of the best legal talent of the day.¹³⁸

One of the main arguments against the will’s validity was that “the foundation of the college upon the principles and exclusions prescribed by the testator, is derogatory and hostile to the Christian religion, and so is void, as being against the common law and public policy of Pennsylvania.”¹³⁹ In a unanimous opinion, Justice Story affirmed that “the Christian religion is a part of the common law of Pennsylvania.”¹⁴⁰ But this assertion was limited such that:

[A]lthough Christianity be a part of the common law of the state, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public.¹⁴¹

Thus, Justice Story wrote that for Mr. Girard’s will to be in violation of this legal principle, there had to be “plain, positive, and express provisions, demonstrating not only that Christianity [was] not to be taught; but that it [was] to be impugned or repudiated.”¹⁴² But Justice Story found that the will did not plainly impugn or repudiate Christianity because, under the express provisions of the will, it did “not say that Christianity shall not be taught in the college,” a layman was not forbidden to teach the principles of Christianity, and the Bible was not forbidden from being read and taught.¹⁴³ Such language implies that Justice Story would have found the provision in Mr. Girard’s will unenforceable if it expressly “impugned or repudiated” Christianity through terms that forbade these activities.

This all led to what in our day seems like a remarkable result: that a school administered by a public entity could not forbid the teaching

137 *Id.* at 23, 22–23.

138 *See id.* at 23.

139 *Vidal v. Girard’s Ex’rs*, 43 U.S. (2 How.) 127, 197 (1844).

140 *Id.* at 198, 201. This idea had been a point of sharp contention between Justice Story and Thomas Jefferson, who attacked the idea that Christianity was a part of the common law, with both publishing writings on the subject. *See* NEWMYER, *supra* note 3, at 182–84.

141 *Vidal*, 43 U.S. (2 How.) at 198.

142 *Id.* at 199.

143 *Id.* at 199, 199–201.

and use of the Bible and Christian moral principles in the classroom.¹⁴⁴ But this result reflected a common view of the day that the church-state separation principle was “a constraint on religious groups but not religious individuals.”¹⁴⁵ Under this view, religious groups, as churches, could not be an established religion in any state, but individuals could form a democratic majority and legislate nonsectarian Christian things—such as Bible reading in public schools—and the common law could reflect the Biblical principles held by the majority.¹⁴⁶

While this pre-Fourteenth Amendment state-law case did not involve the First Amendment, that does not mean that Justice Story’s opinion in *Vidal* has not had effect. In fact, the “citing references” tab of *Vidal*’s report in Westlaw reveals that, in addition to citations in nearly 400 lower federal and state courts, *Vidal* has been cited in twenty-two Supreme Court opinions.¹⁴⁷ In Justice Stevens’s dissent in *Van Orden v. Perry*, for instance, he pointed out that “for nearly a century after the founding, many accepted the idea that America was not just a *religious* Nation, but ‘a Christian nation,’” and cited *Vidal* as additional support for this assertion.¹⁴⁸ This stands as a testament to the legacy and respect that this case enjoyed, for although *Vidal* was decided in a time of uproar over the use of the Bible and religious instruction in publicly funded schools,¹⁴⁹ it was not until the 1960s, nearly 120 years later, that religious practices and instruction in public schools began to be greatly curtailed under a revised conception of the First Amendment’s requirements.¹⁵⁰ Of course, it is not clear whether religious practices and instruction in public schools were continued throughout that period because it was the general consensus that *Vidal*

144 See *id.* at 200–201.

145 PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 276 (2002).

146 See *id.* at 228.

147 *Vidal v. Girard’s Ex’rs*, Citing References Tab, WESTLAW, westlaw.com (search “43 U.S. 127,” then hover over Citing References tab).

148 *Van Orden v. Perry*, 545 U.S. 677, 728 & n.30 (2005) (Stevens, J., dissenting) (citing *Vidal*, 43 U.S. (2 How.) at 198–99; *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892)).

149 See Sekulow & Tedesco, *supra* note 94, at 620–38.

150 See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962) (finding nonsectarian prayer prescribed by a New York school district to be said in each school classroom impermissible, even though participation was not required if parents objected); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (finding voluntary participation in daily reading of Bible in version of reader’s choice and reciting of Lord’s Prayer unconstitutional in a public school); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (finding statutes forbidding publicly funded teaching of theory of evolution in public schools unconstitutional); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (finding act forbidding the publicly funded teaching of theory of evolution unless theory of creation science was also taught unconstitutional); *Lee v. Weisman*, 505 U.S. 577 (1992) (finding the inclusion of clergy who offer prayer in an official public school graduation ceremony unconstitutional).

informed the meaning of the First Amendment or whether *Vidal* merely reflected the common understanding of what the First Amendment required. But it remains a fact that the religious practices and instruction *Vidal* appeared to require in publicly administered schools continued in the mainstream for well over a century.

Further, in a time when history and tradition tests are now the prevailing method of constitutional interpretation,¹⁵¹ *Vidal* could enjoy a resurgent impact in assisting determinations of the historical practices and understandings of at least religious exercise and establishment principles relating to religion in schools and possibly historical practices and understandings of the First Amendment itself. For instance, it could be used as evidence of historical practices and understandings in current litigation over whether Oklahoma can mandate that the Bible be taught in its schools, and whether Louisiana can require the Ten Commandments be posted in each public school classroom.¹⁵² And more states are considering similar legislation. Currently, the states of Alabama, Georgia, Idaho, Kentucky, Missouri, Montana, North Dakota, Ohio, Oklahoma, Tennessee, and Texas are considering legislation that would require that the Ten Commandments be displayed in every public school classroom and that would give public school employees and students opportunities to participate in daily periods of scripture reading and prayer.¹⁵³ Thus, *Vidal* may once again be cited and analyzed in a whole lot of court motions and briefs—and possibly opinions—in the near future.

151 See, e.g., *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427–28 (2022) (stating that the Court “long ago abandoned” interpreting the Establishment Clause using the endorsement test and instead now uses “reference[s] to historical practices and understandings” in interpreting the Clause (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014))); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (requiring the government to demonstrate that a regulation it seeks to justify is “consistent with this Nation’s historical tradition of firearm regulation”); *United States v. Stevens*, 559 U.S. 460, 469–71 (2010) (rejecting a cost-benefit analysis to determine unprotected categories of speech under the First Amendment and instead adopting a test looking at historical evidence and long-settled traditions).

152 See, e.g., Murray Evans, *Lawsuit Asks Oklahoma Supreme Court to Stop Walters’ Mandate, State Spending on Bibles*, THE OKLAHOMAN (Oct. 17, 2024, 4:15 PM), <https://www.oklahoman.com/story/news/courts/2024/10/17/lawsuit-in-state-supreme-court-seeks-to-stop-walters-bible-mandate/75718031007/> [<https://perma.cc/44ZJ-PUNL>]; Kevin McGill, *Court Ruling Stops Louisiana from Requiring Ten Commandments in Classrooms for Now*, AP NEWS (Nov. 20, 2024, 4:07 PM), <https://apnews.com/article/louisiana-schools-ten-commandments-cf59c57adfa049111c67a6cda1efb796> [<https://perma.cc/RRU8-NFW4>].

153 Jorge Gomez, *Multiple States Consider Bills to Restore Public Religious Expression*, FIRST LIBERTY (Feb. 21, 2025), <https://firstliberty.org/news/bills-to-restore-religious-expression/> [<https://perma.cc/Y9MS-U3YN>].

C. *Commentaries on the Constitution of the United States (1833)*

Called “monumental,” “technical,” “legalistic,” and “the leading nationalist work on the Constitution” until the 1950s; praised by the likes of John Marshall, Daniel Webster, James Kent, Joseph Hopkinson, and Jared Sparks; likened to Blackstone’s *Commentaries*; widely cited and received internationally; and used as “the reference for lawyers and judges for the rest of the century,” Justice Story’s *Commentaries on the Constitution* occupy an elevated place in American legal scholarship.¹⁵⁴

His analysis of the First Amendment religion clauses in the *Commentaries* is contained in Volume III, Sections 1864–73, with highlights from relevant parts provided in the following paragraphs. In his discussion of the First Amendment, Justice Story differentiated between general government support of Christianity (for which he advocated) and the individual liberty protected by the Free Exercise Clause:

The promulgation of the great doctrines of religion, the being, and attributes, and providence of one Almighty God; the responsibility to him for all our actions, founded upon moral freedom and accountability; a future state of rewards and punishments; the cultivation of all the personal, social, and benevolent virtues;—these never can be a matter of indifference in any well ordered community. It is, indeed, difficult to conceive, how any civilized society can well exist without them. And at all events, it is impossible for those, who believe in the truth of Christianity, as a divine revelation, to doubt, that it is the especial duty of government to foster, and encourage it among all the citizens and subjects. This is a point wholly distinct from that of the right of private judgment in matters of religion, and of the freedom of public worship according to the dictates of one’s conscience.¹⁵⁵

Justice Story went on to give his perception of the original public understanding of the First Amendment:

Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that *Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship*. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.¹⁵⁶

154 Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1590 (1989); NEWMYER, *supra* note 3, at 184, 192, 193, 194.

155 3 STORY, *supra* note 93, § 1865.

156 *Id.* § 1868 (emphasis added).

He thus thought that the First Amendment encompassed accommodation, indeed, encouragement of Christianity from the government, and rejected blanket equality of state treatment toward various religions as well as a strictly secular state. But he was careful to contrast the “duty of supporting religion” with the prohibition against the forcing of others’ consciences or the punishing of religious dissenters for their chosen form of worship.¹⁵⁷ He quoted the Virginia Bill of Rights and John Locke to support recognition of the rights of conscience.¹⁵⁸

Turning from free exercise to establishment principles, Justice Story wrote that the purpose of the Establishment Clause “was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.”¹⁵⁹ This he saw as the solution to religious persecution.¹⁶⁰ “The history of [England] had afforded the most solemn warnings and melancholy instructions on this head; and even NewEngland [sic], the land of the persecuted puritans . . . where the Church of England had maintained its superiority, would furnish out a chapter, as full of the darkest bigotry and intolerance.”¹⁶¹ Justice Story concluded his discussion of the Establishment Clause by highlighting its character as a federalism principle:

[T]he whole power over the subject of religion is *left exclusively to the state governments*, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Armenian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship.¹⁶²

157 *Id.* § 1870.

158 *Id.*

159 *Id.* § 1871.

160 *Id.*

161 *Id.*

162 *Id.* § 1873 (emphasis added).

III. THE UNITED STATES SUPREME COURT'S USE OF JUSTICE STORY'S COMMENTARIES IN ITS FIRST AMENDMENT JURISPRUDENCE

Although Justice Story's *Commentaries on the Constitution* is merely a three-volume treatise (albeit given some authoritative weight)¹⁶³, its sections expounding the First Amendment religion clauses have enjoyed some influence in modern Supreme Court opinions. This Part presents sample First Amendment religion cases from the modern era with opinions that have relied upon or engaged with Justice Story's *Commentaries* and analyzes the scope of influence his *Commentaries* appear to have with each opinion presented.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, a group practicing the religion of Santeria, which includes animal sacrifice as a worship ritual, announced its intent to establish a Santeria church in Hialeah, Florida.¹⁶⁴ In direct response, the city adopted ordinances prohibiting, with exceptions for state-licensed activities, sacrifice or slaughter of animals in any type of ritual.¹⁶⁵ The Supreme Court held that the ordinances prohibiting ritual animal sacrifices violated the First Amendment's Free Exercise Clause in large part because they singled out the Santeria activities and only burdened conduct tied to religious belief.¹⁶⁶

Writing the majority opinion, joined as to its judgment by all the Justices, Justice Kennedy cited Justice Story's *Commentaries* as support for the proposition that "it was 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.'"¹⁶⁷ The Court thus appeared to use the *Commentaries* to elucidate the Framers' intent in drafting the Free Exercise Clause. Though not supplying the rule of law for the decision, the *Commentaries* were relied upon by the Court for the reasoning behind the rule.

Almost a decade earlier, the Court in *Lynch v. Donnelly* was trying to determine whether a city's Christmas display that included a crèche or Nativity scene was permissible under the Establishment Clause.¹⁶⁸ Even though a Nativity scene has religious significance, the Court held that the city's display of a crèche did not violate the Establishment Clause because it lacked a purposeful effort to advance a particular

163 See *supra* notes 88–90, 154 and accompanying text.

164 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525–26 (1993).

165 See *id.* at 527–28.

166 *Id.* at 524, 534–36.

167 *Id.* at 532 (quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.)).

168 *Lynch v. Donnelly*, 465 U.S. 668, 670–71 (1984).

religious message and had a legitimate secular purpose in depicting the historical origins of the holiday.¹⁶⁹ The Court noted that a “notion that these symbols pose a real danger of establishment of a state church is farfetched.”¹⁷⁰

Chief Justice Burger, writing the majority opinion, quoted Justice Story’s *Commentaries* in stating that “[t]he real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.”¹⁷¹ This was direct support for Chief Justice Burger’s explanation of the purpose of the Establishment Clause. Thus, when combined with the majority’s citation to Justice Story’s *Commentaries* in *Church of Lukumi*, the Court has relied on the *Commentaries* as historical evidence for the Framers’ purpose in drafting both religion clauses of the First Amendment.

But in *County of Allegheny v. ACLU*, another case involving government Christmas displays, Justice Blackmun, writing for a majority of the Court, cited Justice Story’s *Commentaries* as prototypical support for a proposition that he then rejected.¹⁷² Justice Blackmun used the statement from Justice Story’s *Commentaries* that “at the time of the First Amendment’s adoption . . . ‘the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state’” as an example of “religious sentiments of those responsible for the adoption of the First Amendment.”¹⁷³ Justice Blackmun then continued on to reject the idea that the Establishment Clause should be interpreted in light of Founders’ favoritism for Christianity.¹⁷⁴ It seems that Justice Blackmun did not reject the *Commentaries* as authoritative on what the general sentiment regarding government support was at the time of the First Amendment’s adoption; rather he rejected the view that that general sentiment should be used to interpret the First Amendment’s meaning today.

Both the majority and the dissent in *Wallace v. Jaffree* quoted Justice Story’s *Commentaries*.¹⁷⁵ For the majority, Justice Stevens quoted a couple sections of the *Commentaries* in support of the assertion that it

169 *Id.* at 680–81.

170 *Id.* at 686.

171 *Id.* at 678 (quoting 3 STORY, *supra* note 93, § 1871 (all but first alteration in original)).

172 *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 605 n.55 (1989), *abrogated by* Town of Greece v. Galloway, 572 U.S. 565 (2014).

173 *See id.* (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1874 (Little, Brown, & Co. 3d ed. 1858)).

174 *Id.* (citing *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985)).

175 *See Wallace*, 472 U.S. at 52 n.36 (quoting 2 STORY, *supra* note 173, § 1874); *id.* at 104–05 (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 630–32 (Little, Brown, & Co. 5th ed. 1891)) (Rehnquist, J., dissenting).

had previously been thought that the Establishment Clause “merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.”¹⁷⁶ In dissent, Justice Rehnquist quoted the same provisions of the *Commentaries* as evidence of the Establishment Clause’s “well-accepted meaning”: prohibitions on a national religion and preference among denominations and sects.¹⁷⁷ So while the majority quoted the provisions for how the Establishment Clause had been understood in a more limited sense in the past than now, and the dissent quoted the provisions as evidence of how the Clause should be understood now based on how it was understood by the Founding generation, both opinions seem to agree that those provisions of Justice Story’s *Commentaries* accurately reflect what was the original public understanding of the Establishment Clause.

In *McCreary County v. ACLU*, Justice Souter, writing for the majority, held that, under the circumstances of the case, a display of Moses’ Ten Commandments in a courthouse violated the Establishment Clause.¹⁷⁸ In making the point that the Framers of the First Amendment would probably object to a claim that “monotheism with Mosaic antecedents should be a touchstone of establishment interpretation,” Justice Souter wrote that “Justice Story *probably reflected the thinking of the framing generation* when he wrote in his *Commentaries* that the purpose of the Clause was ‘not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects.’”¹⁷⁹

All of the Justices discussed in the above paragraphs, with all but one writing for a majority of the Court, seem to have relied on the First Amendment sections of Justice Story’s *Commentaries* as accurate portrayals of either (1) the Framers intent in drafting the religion clauses or (2) the original public meaning of the clauses or (3) both, even though some disagreed that that original conception of the Amendment should inform First Amendment interpretation today.

Even liberal Justice Brennan, joined by fellow liberal Justice Marshall in dissent in *Marsh v. Chambers*, while rejecting the claim that Justice Story’s views deserved deference in the modern Court, seemingly

176 *Id.* at 52 & n.36 (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1874 (Little, Brown, & Co. 2d ed. 1851)).

177 *Id.* at 104–05, 106 (quoting 2 STORY, *supra* note 175, at 630–32, 470–71).

178 See *McCreary Cnty. v. ACLU*, 545 U.S. 844, 881 (2005).

179 *Id.* at 880 (emphasis added) (quoting 3 STORY, *supra* note 93, § 1871); see also *Van Orden v. Perry*, 545 U.S. 677, 727–29 (2005) (Stevens, J., dissenting) (arguing the same point and presenting the same section of Justice Story’s *Commentaries* as an accurate portrayal of the “original understanding,” *id.* at 728).

referred to a quote from the *Commentaries* on the purpose of the First Amendment as “a narrow piece of history” that through “a proper respect for the Framers” should be expanded so as to “last for the ages.”¹⁸⁰ Even conceding that Justice Brennan did not say that Justice Story’s views equated with the original public meaning of the First Amendment, but that he could have merely been referencing Justice Story’s personal views as the “narrow piece of history,” note that he still found, at very least, Justice Story’s quote useful in assessing where the Constitution has come from in order to interpret it in more modern and relevant ways.

Leave it to Justice Thomas then, writing in his concurrence in *Cutter v. Wilkinson*, to question whether Justice Story’s *Commentaries*’ discussion on the First Amendment is actually a reliable “indicator of the original understanding.”¹⁸¹ But laying aside that issue, he still proceeded to make a constitutional argument based upon the section of the *Commentaries* that describes the Establishment Clause as a federalist provision leaving exclusively the “whole power over the subject of religion” to the state governments.¹⁸² And in concurrence in *Elk Grove Unified School District v. Newdow*, Justice Thomas had cited that same section of the *Commentaries* as support for his assertion that it was “the prevailing view that the Constitution left religion to the States.”¹⁸³ Whether or not he meant “prevailing view” to mean the same as original public meaning, the fact remains that he relied on Justice Story’s *Commentaries* for support of his legal conclusion.

CONCLUSION

There appear to be three ways in which Justice Story’s main three channels of influence on religious liberty jurisprudence—specifically *Terrett v. Taylor*, *Vidal v. Girard’s Executors*, and the First Amendment sections of his *Commentaries on the Constitution*—have had effect.

First and foremost, both *Terrett* and the *Commentaries* have been relied upon as accurately portraying the purposes and intent behind,

180 *Marsh v. Chambers*, 463 U.S. 783, 817 (1983) (citing 3 STORY, *supra* note 93, § 1871) (Brennan, J., dissenting).

181 *Cutter v. Wilkinson*, 544 U.S. 709, 731, 730–31 (2005) (Thomas, J., concurring) (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 856 (1995) (Thomas, J., dissenting) (noting that Justice Story’s *Commentaries* “were written a half century after the framing. Rather than representing the original understanding of the Constitution, they represent only his own understanding”)).

182 *Id.* at 731 (quoting 3 STORY, *supra* note 93, § 1873).

183 *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring) (emphasis added) (citing 2 STORY, *supra* note 175, § 1873).

and the original public meaning of, the religion clauses of the First Amendment.¹⁸⁴

Second, Justice Story's *Commentaries* have been relied upon, not necessarily to elucidate the original public meaning of the First Amendment, but because a provision therein was found useful in advancing a First Amendment argument. For Justice Brennan, Justice Story's views in the *Commentaries* seemingly provided a historical point of reference of archaic understandings of the First Amendment with which to contrast the victories and advancements in the modern understanding of the First Amendment.¹⁸⁵ For Justice Thomas, perhaps Justice Story's views presented in his *Commentaries* were used to make an argument simply because they were from an eminent legal scholar of distinction and legacy; maybe they were used because they, along with many other sources, represented the prevailing view; or maybe, despite his reservations, they were actually used as evidence of original public meaning; regardless, Justice Thomas has in fact relied on the *Commentaries* in support of First Amendment interpretation arguments.¹⁸⁶

Third, and perhaps most relevant going forward, all three sources of influence likely have had, and likely will have, effect as landmarks to which to look for evidence of historical practices and understandings of religious freedom.¹⁸⁷

* * *

In addition to his many other accomplishments, Justice Story has left an impact on First Amendment religion jurisprudence more apparent now than when he died nearly 180 years ago. His sources of influence remain, bearing testament to his legacy through their use as support for First Amendment religion arguments. Ultimately, it falls to us, through the use and study of these, his sources, to perpetuate his legacy of influence on First Amendment religion jurisprudence.

184 See *supra* Parts II.A., III (discussing, in order of appearance, *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989), *abrogated by* *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Wallace v. Jaffree*, 472 U.S. 38 (1985); and *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005)).

185 See *supra* note 180 and accompanying text.

186 See *supra* notes 181–82 and accompanying text.

187 See, e.g., *supra* notes 151–53 and accompanying text.