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USES AND ABUSES OF TEXTUALISM AND ORIGINALISM IN ESTABLISHMENT CLAUSE INTERPRETATION

Carl H. Esbeck

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Abstract: The U.S. Supreme Court's decision in *Everson v. Board of Education of the Township of Ewing* (1947) is commonly regarded as ushering in the modern era of first amendment jurisprudence in church-state relations. Instead of looking to the record of the debates and minutes of the First Federal Congress of 1789, the *Everson* Court adopted the principles animating the disestablishment struggles in Virginia and other newly formed States to give substantive content to the Establishment Clause. Indeed, there was not in the *Everson* majority even so much as an acknowledgment that the text ("… make no law respecting an establishment …") was the hard-won effort of Federalists in the House and Senate sitting in New York City laboring from June to September 1789 to report to the States constitutional amendments that eventually became the Bill of Rights.

This article takes up the curious tale as to why the more obvious text and the drafting record in the House and Senate were ignored by the Court in *Everson* which instead said it was drawing on the various disestablishment struggles in the States, most notably Virginia which had disestablished in early 1786. Advocacy groups and the academy were slow to respond, for *Everson* is now over sixty years old. But the presses are now busy turning out monographs arguing that *Everson* got matters wrong and church-state relations ought to be adjusted to conform to the congressional record so as to give life to the drafters' original meaning. The well-known disarray in the Supreme Court's contemporary jurisprudence with respect to the Establishment Clause has only added fuel to the controversy. The conflagration has even broken out in popular circles where there is interest in legislative prayers, memorial crosses, monuments to the Ten Commandments, and "under God" in our patriotic pledges.

Constitutional conservatives are pressing two theories. One is that the Establishment Clause was not intended to prohibit support for religion so long as no religion is preferred over others. This is called "nonpreferentialism." A second theory is that the clause was only intended to deny the national government power to disturb how States arranged their church-state affairs. Justice Clarence Thomas has repeatedly pressed this latter view, as recently as June 2010. I call this "specific federalism." Neither theory is supported by the text or the congressional record. This article makes that case.

A reconstruction of the historical record is hardly exclusive to conservatives. As the scholarship has unfolded liberals are just as eager to array the congressional debates on their side. One recent initiative has been to relegate the Establishment Clause to safeguarding only liberty of conscience. A more common claim, seemingly sensible to the uninitiated, is that the free exercise and no-establishment principles are in "tension," as if the Establishment Clause was somehow promulgated to hold organized religion in check rather than to hold the government in check. Again, this article demonstrates why both these claims do violence to the text and debates of 1789 in the House and Senate. Still another thesis would remove original meaning of the Establishment Clause when applied to the states to 1868, and in doing so remake the clause into an individual right.

The most difficult arguments, however, are not those based on the congressional debate that yielded the final text of the two religion clauses of the first amendment. Rather, the hardest events to reconcile are those actions by the first generation of federal officials who were supposed to be attentive to the restraints of the Establishment Clause. For example, some actions by early Presidents and Congresses entailed proclamations for days of fasting and prayer, creating the salaried offices of chaplain in the House and Senate, and funding Christian missions to Indian tribes. But in a post-*Everson* era government officials cannot be the nation's clergy. Many of

* Carl H. Esbeck is the *R.B. Price* Professor and *Isabelle Wade & Paul C. Lyda* Professor of Law at the University of Missouri.

these actions by first-generation officials confuse the role of the state with the role of the church. Here the light shown on the original meaning of no-establishment turns on which officials were most attentive to constitutional constraints and which historical events ought to matter the most as interpretative guides. Without claiming to have any more than started the task, Part VI suggests how to begin to order and weight these contradictory actions of early federal officials.

America's singular contribution to political theory is the institutional separation of church and state in the service of religious freedom. But what are the details of this separation in the Twenty-First Century? For better or ill, the post-*Everson* Court finds itself focused on the Establishment Clause. Answers to textual and original-meaning inquiries with respect to that clause cannot resolve all of the modern interpretive questions about church and state. However, they do narrow the range of issues that are properly disputed by firmly closing the door to certain errant interpretations of the Establishment Clause. With distractions such as "specific federalism" and "tension between the clauses" confidently put aside, the federal courts can focus on determining those government actions that bring about the sorts of evils associated with religious establishments in 1789. Because there was never an establishment in America at the national level, the article concludes that the *Everson* Court acted properly when it sought to be guided by the ideas that prevailed during the disestablishment struggles in Virginia and other States.

INTRODUCTION

The text and original meaning[1] of the Establishment Clause[2] as drafted by the First Federal Congress was diminished in its importance when the United States Supreme Court handed down its decision in *Everson v. Board of Education of the Township of Ewing* in 1947.[3] Instead of looking to the record of the debates and minutes of the First Congress, the *Everson* Court adopted the principles animating the disestablishment struggle in Virginia, and somewhat less so the disestablishment experiences in other newly formed states, to give substantive content to the Establishment Clause.[4] The dissenting justices in *Everson* would have taken the matter even a step further by generally conflating the beliefs of James Madison of Virginia with the meaning of the Establishment Clause.[5]

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[1] The focus of originalism has evolved from the "original intent" of the drafters, to the "original understanding" of those who gave their approval to the law in question, to the "original meaning" of the final text that also considers the conduct of those who first applied the Constitution. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1134-48 (2003). It is not that original intent or original understanding are no longer relevant. Rather, they remain major factors under the umbrella of original meaning.

[2] The First Amendment reads as follows:

> *Congress shall make no law respecting an establishment of religion*, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I (the Establishment Clause appears in italics).

[3] 330 U.S. 1 (1947).

[4] *Id*. at 11-13.

> No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty. But Virginia . . . provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religion, or to interfere with the beliefs of any religious individual or group.

Id. at 11. In order to capture the states' disestablishment history in a single phrase, the Court drew upon Thomas Jefferson's letter of January 1802 wherein he had written the Danbury Baptist Association in Connecticut that "the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" *Id*. at 16 (citation omitted). However, Jefferson's metaphor was not precise enough an image to actually resolve the difficult church-state cases of the sort that were litigated after *Everson*. As matters develop from *Everson* going forward, the meaning the Court would give to "the wall" metaphor was to be found in the ideas animating the Virginia and other state disestablishments.

[5] *Id*. at 33-43, 52, 57, 63 (Rutledge, J., dissenting, joined by Frankfurter, Jackson, and Burton, JJ.).

> No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history. The history

The imputation of the disestablishment experience in Virginia to the adoption of the Establishment Clause by the First Federal Congress is open to question as a matter of history. Not only were these two experiences very different law-making events separated by four years, the Virginia House of Delegates of 1784-1785 and the First Congress of 1789 were elected by very different constituencies, composed of quite different legislative officials, bearing different responsibilities, and harboring different ambitions and interests. The one common denominator in the two events was the active involvement of James Madison, a highly capable statesman with well-developed and strongly held views on church-government relations. Even Madison, however, was not singularly focused on religious freedom as Congress assembled itself in New York City in the spring of 1789. As a member of the House of Representatives and someone who had the ear of the President, Madison was as much or more devoted to the implementation of a federated government of robust powers to replace the ineffectual Confederation Congress. When he did focus on religious freedom, Madison had the good sense to take into account that the First Congress was an altogether different audience than his earlier one in Virginia[6] and that the rights-declaring task before Congress was the far simpler one of agreeing on what powers to deny to the national government with respect to religion, speech, press, and so on, as opposed to what powers to grant it.[7]

> includes not only Madison's authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination. In the documents of the times, particularly of Madison, who was leader in the Virginia struggle before he became the Amendment's sponsor, but also in the writings of Jefferson and others and in the issues which engendered them is to be found irrefutable confirmation of the Amendment's sweeping content.

Id. at 33-34 (footnotes omitted). Justice Rutledge went so far as to attach as an appendix to the *Everson* opinion Madison's *Memorial and Remonstrance*, a petition written in June 1785 to oppose a special tax to pay the salaries of Christian clergy in Virginia. *Id*. at 63-72. For a detailed account of the Virginia disestablishment and a breakdown of the historical, theological, and prudential argumentation of Madison's *Memorial and Remonstrance*, see Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776-1786*, 7 GEO. J.L. & PUB. POL'Y 51 (2009) [hereinafter "Esbeck, *Virginia Disestablishment*"].

[6] *See* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 105 (2002) (noting that Madison's amendment proposed to Congress in June of 1789 "was a far cry from Madison's position in 1785 [in Virginia] that religion was 'wholly exempt' from the cognizance of civil society.") [hereinafter "HAMBURGER"].

[7] Historian Thomas Curry captures the state of mind with respect to the First Congress:

> In endeavoring to determine the exact significance [the First] Congress and the [ratifying] states attached to the opening segment of the First Amendment, one must bear in mind the overall context of its enactment and ratification. Its guarantees did not represent the triumph of one particular party or specific viewpoint over a clear or entrenched opposition, but rather a consensus of Congress and nation. . . .
>
> Americans in 1789 . . . agreed that the federal government had no power in [religious] matters, but some individuals and groups wanted that fact stated explicitly. Granted, not all the states would have concurred on a single definition of religious liberty; but since they were denying power to Congress rather than giving it, differences among them on that score did not bring them into contention.

Notwithstanding the criticism which has been laid concerning *Everson*'s lack of fidelity to the text and original meaning of the Establishment Clause, the *Everson* Court is certainly correct that formation of America's foundational principles concerning disestablishment—and in time church-government relations more generally—took place at the state rather than at the national level. The reason was simple enough: because there never was a national religion to disestablish the Court looked to the experiences in the states. At the outset of the American Revolution nine of the original thirteen states had established churches, as did Vermont and the land controlled by Massachusetts that would eventually become the State of Maine.[8] Of these eleven, six of the disestablishments took place after the Constitutional Convention of 1787: South Carolina (1790), Georgia (1798), Vermont (1807), Connecticut (1818), New Hampshire (1819), Maine (1820), and Massachusetts (1832-33).[9] Accordingly, during the fifty-seven years from 1776 to 1833 there were a total of eleven state disestablishments, each with similarities as well as some differences to those in their sister states. Rather than by operation of the First Amendment with its Establishment Clause, it was interior to each of these eleven states where the church-government issues were first joined, as well as where the winners and losers in the often hard-fought struggles for disestablishment were eventually declared.

Following the Supreme Court's opinion in *Everson*, a reoccurring argument has been that the text of the Establishment Clause, as well as the original intent of the First Federal Congress which debated and redrafted the clause from June through most of September 1789, should reclaim some role—albeit perhaps a role short of controlling—with respect to its modern substantive meaning. While it has been over sixty years now since *Everson* was decided, these historical arguments show little sign of abating. If anything, they are being pressed with increased vigor.[10] Moreover, the reliance on history as well as the text is not exclusive to constitutional conservatives. As the cases and scholarship have unfolded, liberals are just as eager to array the historical record on their side. As often as not, the divide is over which side has the better grasp of the history, as well as which historical events should matter the most.

The nature of these textual and original-meaning arguments concerning the Supreme Court's modern application of the Establishment Clause can usefully be

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THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 193-94 (1986) [hereinafter "CURRY, FIRST FREEDOMS"].

[8] Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. REV. 1385, 1457-1540 (2004) [hereinafter "Esbeck, *Dissent and Disestablishment*"]. Neither Rhode Island nor Pennsylvania ever had a tax-supported church, although Protestant Christianity was certainly favored in various ways. Delaware and New Jersey had abandoned their establishments while still British colonies. *Id*. at 1459-73.

The War for Independence had the effect of delaying these disestablishments. With some exceptions, dissenters during the war put aside the cause against established churches to meet the common enemy. Once the war had passed, dissenters had a stronger case for religious freedom for they had fought alongside other patriots for liberty from Great Britain and now sought liberty from religious imposition.

[9] *Id*. at 1458.

[10] *See, e.g.*, Harry F. Tepker, *'Revisionist History' as Original Meaning: Justice Thomas' Incorporation & the Establishment Clause*, 62 OKLA. L. REV. __ (2010); Lee J. Strang, *Introduction to Symposium: The (Re)Turn to History in Religion Clause Law and Scholarship*, 81 NOTRE DAME L. REV. 1697 (2006).

organized around six lines of inquiry. Answers to these inquiries cannot resolve all of the modern interpretative questions about church and state, but they do narrow the range of issues fairly disputed as well as firmly close the door to certain errant interpretations of the clause.

This Article makes six inquiries into the text and original meaning of the Establishment Clause. First, what does the 1787 Constitution as drafted during the Philadelphia Constitutional Convention tell us about religion and religious freedom? This inquiry appears in Part I. The 1787 Constitution is silent on religion *qua* religion, and is not expansive on the matter of religious freedom. I argue that this near silence is not evidence of indifference toward religion let alone hostility. Rather, because the delegates envisioned a limited role for the Constitution the document primarily focuses on who decides questions about religion and law, not on providing substantive answers. At the outset religious questions were left primarily in the hands of the several states. This further served the delegates' desire to avoid where possible controversies that would hinder ratification.

Second, as the states debated ratification of the 1787 Constitution, how did this alter or add to the document's approach to religious freedom? This is addressed in Part II. The Federalists insisted that the national government had no power over relations between church and government, for all authority not delegated to the national government in the Constitution was denied to it. The Antifederalists were of the same mind but wanted that assurance put in writing. Accordingly, I argue that a widely held concern for denying national authority over religion was one of the primary reasons that Federalists were compelled to promise that the First Federal Congress would take up the matter of a Bill of Rights.

Third, what did the members of the First Congress, drafting and debating the Establishment Clause from June to September 1789, originally intend the text of the clause to mean? Because three-quarters of the states had to ratify what eventually became the First Amendment, one also needs to explore the extent to which the state-by-state ratification process contributed to the original understanding of the Establishment Clause. These matters are taken up in Part III. It is here that I argue against two widely held theories said to capture the original meaning of the Establishment Clause: that government may support religion so long as it does so without preferring some religions over others, and that the clause was specifically designed to preserve state sovereignty over church-government relations by a federalist text uniquely embedded in the Establishment Clause. The former theory is called "nonpreferentialism" and the latter I call "specific federalism."

Fourth, what is the plain meaning of the text of the Establishment Clause once the wording was finally agreed to by the House and Senate on September 24-25, 1789? Although the text alone cannot answer all of the interpretative debates, rules of grammar as well as the plain meaning of the chosen words do lay down parameters that delegitimize certain over-readings of the Establishment Clause. These matters appear in Part IV of this Article. It is here that I argue against a theory that conflates the religion clauses to a single meaning, namely: that no-establishment and free exercise together protects only liberty of conscience. I also point out that the plain text does not prohibit legislation respecting religion, only legislation "respecting an establishment" of religion. The more narrow scope means that statutory religious exemptions that merely

accommodate voluntary religious observance are generally permitted by the Establishment Clause. The clause does not advance religion by leaving it alone.

Fifth, what might the 1787 Constitution's overall frame of government and its underlying political theory, now as amended by the Bill of Rights, contribute to the meaning of the Establishment Clause? For example, the Bill of Rights vested no new powers in the federal government. It did just the opposite by limiting such powers. Therefore, I argue that the "negative" nature of the Bill of Rights, which further restrain the powers of the national government, necessarily means that the Establishment and Free Exercise Clauses are incapable of being in tension with or cancelling out one another. Rather, the two clauses have to be complimentary, each in its own way restraining the government and thereby working to enlarge religious freedom. I turn to this question in Part V.

Sixth, early applications of the Establishment Clause by officials in all three branches of the federal government should also be considered to the degree such actions shed light on the text's original meaning. I briefly address this topic in Part VI.

To the extent that a hierarchy is useful, the fourth of these lines of inquiry is thought to be the most important for judicial interpretive purposes, followed by the third and fifth inquiries, respectively. The idea is that courts should not fall back either on the congressional debate or on rules of construction unless the plain text of the Establishment Clause is ambiguous. This ordering also works to give due weight to those state legislators who, when asked to ratify each of the proposed articles of amendment, were presented with a fixed text and a take it or leave it proposition.[11] With respect to the original meaning of the text, most of what state legislators had to go on when considering the merit of each proposed amendment was grammar and the ordinary definition of the words at that time, all situated within the framework of the new government constituted by the 1787 Constitution.

I. RELIGION AND RELIGIOUS FREEDOM DURING THE CONSTITUTIONAL CONVENTION OF 1787

There is a near absence of the mention of either religion *qua* religion or religious freedom in the original Constitution of 1787. Since constitutions often announce fundamental propositions on which a nation's government is being founded, religion might well have been mentioned. That it was not is worthy of asking why.

[11] The state legislatures could ratify some of the proposed articles of amendment and reject others, but with respect to each individual article of amendment a state had to accept or reject the entire article as written. Indeed, in September 1789 Congress sent the states twelve proposed articles of amendment. *See* JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA, BEGUN AND HELD AT THE CITY OF NEW-YORK, MARCH 4TH, 1789, AND THE THIRTEENTH YEAR OF THE INDEPENDENCE OF THE SAID STATES 163 (first session, 1789) (Early American Imprints, Series I: Evans #22207 reprinted 2002), *also available at* http://www.archive.org/stream/journalfirstses00senagoog#page/n7/mode/1up [hereinafter "SENATE JOURNAL"]. The first two articles of amendment were not ratified, whereas the articles numbered Third through Twelfth were ratified by three-quarters of the states by the end of December 1791. The ten ratified amendments were renumbered, and they took on the popular name of the "Bill of Rights." *See infra* notes 330, 332 and accompanying text. The two rejected articles were about constitutional structure, not rights. One of these two rejected proposals was later ratified in 1992 and is now the Twenty-Seventh Amendment.

A nation's constitution usefully can do three things. First, there is organizing the government's branches, assigning these offices their competencies while carefully diffusing authority among them to avoid concentrations of power. Second, there is defining the relationship between government and individual citizens, including the vesting of certain rights. And, third, there is declaring those first principles around which the body politic is drawn together and the nation-state is founded. However, a constitution need not do all these things nor do them in a comprehensive way. Certainly the Constitution of 1787 sought primarily to accomplish only the first of these objectives in a thorough manner, a Bill of Rights being added two years later in response to the second of these three tasks. However, the original Constitution's incompleteness with respect to our nation's founding principles was in large part calculated. The gap in significant part reflects the difficulty in achieving agreement on such principles. That is, avoiding topics on which there is no consensus is one way, indeed a common way, to get contending parties to sign on to a single document.

The 1787 Constitution does take into account religious freedom—as distinct from religion *qua* religion—but only in three places. The various oaths of office set forth in the Constitution permit an affirmation in lieu of the new office holder swearing a prescribed oath.[12] This was done to accommodate the then widely known scruples of Quakers, as well as Anabaptists such as Mennonites and German Brethren, who could not swear or take an oath.[13] The Sunday Clause[14] permits the President, contemplating a veto or "pocket veto," to take advantage of the fully allotted ten days and yet honor the Christian Sabbath by not having to attend to the official duty of affixing a veto when the ten-day deadline happens to fall on a Sunday.[15] Finally, of greater moment in 1787 than now, the Religious Test Clause[16] relieves federal officials from the sort of religious prerequisites then extant in most of the states.[17]

As is readily apparent, religious freedom is not safeguarded by the original Constitution in any comprehensive way. But that is likely because the Constitution (unlike the Bill of Rights) deals sparingly with individual rights generally, even omitting those as basic as freedom of speech, freedom of the press, due process of law, and property rights. So the fact that religious freedom was not comprehensively safeguarded

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[12] *See*, *e.g.*, U.S. CONST. art. I, § 3, cl. 6, and art. VI, cl. 3.

[13] The prohibition is taken from a biblical passage in *Matthew* 5:33-37.

[14] U.S. CONST. art. I, § 7, cl. 2 ("If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevents its Return, in which Case it shall not be a Law.").

[15] *See* David K. Huttar, *The First Amendment and Sunday*, 7 ENGAGE 166, 169 (October 2006) (noting that the Sunday Clause is not an accommodation to the President's Sabbath day, whatever the day of the week happens to be the Sabbath of the sitting President; rather, the clause specifically singles out Sunday as the presumed Sabbath of the President).

[16] U.S. CONST. art. IV, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."). *See* Note, *An Originalist Analysis of the No Religious Test Clause*, 120 HARV. L. REV. 1649 (2007).

[17] In the period 1787-1789, eleven of the original thirteen states had religious tests for becoming a state official. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 81 (2d ed. 1994) [hereinafter "LEVY"]. Accordingly, it would seem that many Americans at that time did not oppose religious tests, but they wanted their own state government to determine the matter when there was such a requirement.

puts it in good company. The Constitutional Convention's primary task was to create a framework for who decides fundamental political and moral questions. Nevertheless, a smattering of rights are given special mention such as the availability of a jury trial for those accused of a crime[18] and preservation of the writ of habeas corpus,[19] as well as prohibiting bills of attainder[20] and ex post facto legislation.[21] The few rights singled out for special mention in the 1787 Constitution appear to have little by way of a common theme, there being no obvious explanation with respect to why these were mentioned and others not.

Not only are there just the three above-mentioned items on religious freedom, but the original Constitution also has nothing to say about religion *qua* religion excepting that the Constitution's Article VII dates the completed Convention to September 17, 1787 "in the Year of our Lord." One must regard the Western use of a calendar that begins with the birth of Jesus Christ as but a trifle mention of religion. However, as Historian William Lee Miller points out, such trifles in the aggregate do contrast the American Revolution with, for example, the anti-Christianity of the French Revolution.[22] The American founders were not repudiating their Christian past, hence they absent-mindedly used the Christian calendar and unthinkingly assumed Sunday would be the President's Sabbath. Similarly, the Convention delegates worked six-day weeks from late May to mid-September, with only Sunday excepted.[23] While it is well-documented that the American founders were quite intentional about breaking with the European past of a confessing state, they also viewed Protestant religion as a friend to republicanism and as an aid to the expansion of liberty.[24]

Not just the document they produced, but the debate by the Convention delegates had little to say about religion. However, it is not like God never got so much as a passing mention. As delegates were gathering awaiting the arrival of a quorum, on May 14, 1787, George Washington rose to exhort the delegates by declaring: "If, to please the people, we offer what we ourselves disapprove, how can we afterward defend our work? Let us raise a standard to which the wise and the honest can repair; the event is in the hand of God."[25] When the Convention was about to break up over the issue of popular representation in both houses of Congress, as opposed to "one state, one vote" in the upper house, Benjamin Franklin famously called for daily sessions of the Convention to begin with prayer. His motion, while receiving a second, was heard with the politeness due the venerable statesman, but with so little enthusiasm that the matter was never brought to a vote.[26]

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[18] U.S. CONST. art. III, § 2, cl. 3.
[19] U.S. CONST. art. I, § 9, cl. 2.
[20] U.S. CONST. art. I, § 9, cl. 3, and art. I, § 10, cl. 1.
[21] U.S. CONST. art. I, § 9, cl. 3 (national government); art. I, § 10, cl. 1 (state governments).
[22] WILLIAM LEE MILLER, THE BUSINESS OF MAY NEXT: JAMES MADISON & THE FOUNDING 113-14 (1992) [hereinafter "MILLER, MAY NEXT"].
[23] RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 367 (2009) [hereinafter "BEEMAN"].
[24] MILLER, MAY NEXT, *supra* note 22, at 114-15.
[25] GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 210 (1885). The quote is attributed to an account rendered by Gouverneur Morris, who was present on the occasion as a delegate from Pennsylvania.
[26] Franklin explained that with age he had come to realize that God rules in the affairs of men. BEEMAN, *supra* note 23, at 178. Roger Sherman seconded Franklin's motion. Alexander

While such references were few, they were not to the impersonal God of Deism but to an unspecified yet monotheistic God that is involved in the world's current events. Nevertheless, the small number of such occasions and a document nearly bare of religion *qua* religion has prompted a few enthusiasts for modern secularism to dub the Philadelphia Convention's product the "Godless Constitution."[27] Unlike most state constitutions in that day, the 1787 Constitution's Preamble does not mention God, nor was this or anything like it apparently suggested by any of the delegates. And unlike the *Declaration of Independence* (e.g., "that all men are created equal; that they are endowed by their Creator with certain inalienable rights" and ending with a "firm Reliance on the Protection of divine Providence."), there is little explicit in the Preamble or the operative provisions of the 1787 Constitution about overarching presuppositions—secular or religious—on which the new consolidated government is being founded. What is apparent from the 1787 document itself is that the frame of the new government was a federalist republic of limited delegated powers. The atom of sovereignty was split, creating a new government of enumerated powers with the states retaining residual sovereignty. It was also clear that the republic was to be one under a written constitution that was supreme over state and other federal laws. James Madison's hope to extend a republic over a vast geographic area is there. Such a republic had never in history succeeded. To achieve this vision, throughout the document is acknowledged that, given the flawed nature of the human character, power is not to be concentrated in any one office or branch but balanced and checked by others. Hence, that people are prone to be corrupted by power caused the government to be separated into three branches. One of those branches was composed of a bicameral legislature, each house designed to yield a very different reflection of the people's will. Another branch was composed of an independent judiciary. Finally, and perhaps only implicit in the document, was that government opposition was not treasonable but a differing point of view to be tolerated in a running debate to get things right.

Beyond these important features, the first principles on which the government was founded are not altogether evident from the text alone. It is true that the Preamble famously said that "We the people" were the ones who "do ordain and establish" this new central government. But elsewhere in the operative provisions of the Constitution the matter of U.S. citizenship and who gets to vote is left to each state to decide, which is to say that giving definition to "the people" who are doing all this "ordaining" and "establishing" is a power vested not in the central government but in the several states.[28] This was no small matter for female citizens denied the right to vote or slaves denied

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Hamilton suggested that the proposal would have been useful had it been the practice from the beginning of the Convention, but to implement the practice now could cause alarm among citizens under the mistaken belief that their work was floundering. Hugh Williams said he opposed the motion because there was no funding to pay the clergy. This was a bit of a reach as there was any number of local clergy likely willing to provide the service free. Edmund Randolph sought to help Franklin by moving to have a sermon preached on the Fourth of July, and thereafter have prayers each morning. Franklin seconded Randolph's motion, but this as well was never brought to a vote. *See* BEEMAN, *supra* note 23, at 177-79; STEVEN WALDMAN, FOUNDING FAITH: PROVIDENCE, POLITICS, AND THE BIRTH OF RELIGIOUS FREEDOM IN AMERICA 127-29 (2008) [hereinafter "WALDMAN"].

[27] *See, e.g.*, ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: A MORAL DEFENSE OF THE SECULAR STATE 27 (2d ed. 2005).

[28] BEEMAN, *supra* note 23, at 255-56.

citizenship, voting rights, and even something as fundamental as inclusion in the human race.

The Preamble's silence on religion and other first principles is attributed by Historian Richard Beeman to Edmund Randolph of Virginia, and his role as chair of the Committee of Detail and initial drafter of a provisional Constitution during the Convention's recess from July 27th to August 6th. The Committee of Detail was given the task of assembling all the decisions the Convention had made to date into a coherent document.[29] Within the Committee, to Randolph fell the task of putting pen to paper and producing a first draft.[30] Concerning Randolph's view of the Constitution as a whole, and the Preamble in particular, Beeman says:

> The other notable aspect of Randolph's approach to the task of constitution writing was his insistence that a lengthy preamble similar to that contained in the Declaration of Independence was not necessary. He considered the Constitution to be a legal, rather than a philosophical, document, and by his reasoning, "preamble seems proper not for the purpose of designing the ends of government and human polities." Randolph believed that elaborate displays of theory, though perhaps necessary in the drafting of the state constitutions, were inappropriate to the task now at hand. For Randolph, the business of constitution making was not an excursion back to fundamental principles or an articulation of the natural rights of man. Rather, it was a matter of taking those fundamental principles and natural rights already articulated in the Revolutionary state constitutions and interweaving them with the delegated powers written into a federal constitution. . . . Although what we call the "preamble" . . . went through several different transformations . . . in the end, the framers of the Constitution supported Randolph's fundamental premise.[31]

We see then that the absence of an explicitly stated religious presupposition was in character with a silence concerning first principles generally.

Three additional matters must be figured into this "Godless Constitution" assertion. First, it is widely underappreciated how close the Philadelphia Constitutional Convention came to failure. This first happened over the issue of popular representation in both houses of Congress versus the small states refusing to go forward unless the Convention gave each state an equal vote. This impasse was resolved by the Great Compromise first urged by Connecticut, but not until July 16th.[32] Other issues sharply divided the delegates from navigation laws to slavery, and ratification by the required nine states also nearly failed but for a late concession by Federalists that the First Federal Congress would consider a Bill of Rights.[33] With so many details with respect to the mere frame of the new government to quarrel about, why would the delegates drill down

[29] *Id.* at 246-47.
[30] *Id.* at 266-69.
[31] *Id.* at 271. *See also id.* at 278.
[32] *Id.* at 218-25.
[33] *See infra* notes 71, 88-89, 119, 125-27 and accompanying text.

to first principles and multiply their divisions? Some disputed things are best left unresolved and thus unstated. Religion was one of them.[34]

Second, the near silence with respect to the character of the nation's first-order principles does not necessarily mean indifference to human presuppositions, including religious ones, let alone a deliberate decision to reject a theistic worldview ("The Godless Constitution").[35] As the new central government was one of popular sovereignty (i.e., a republic), many first principles were left in the hands of the states and, indeed, citizens individually for their future deliberation and, if a majority should later think necessary, a fundamental principle's explicit addition to the positive law. To the degree that the American people held religious values (it is undisputed that many did hold moral values derived from religion, whether or not the person held formal membership in a particular church[36]), then those religiously derived values (along with other values) would inexorably get reflected not in the written Constitution, but in elections, legislation, monetary policy, rules on trade, foreign policy, national defense, and the general habits and traditions of the people. That means there was a natural assumption that many of the underlying theories of governance might change over time from the ground up (as the character of those who are voting citizens changed), subject to the structure of the three-branch federalist republic that is fixed in the frame of the written Constitution. And even the charter's structural frame of checks and balances is subject to alteration by not one but two ways for supermajorities to amend the written Constitution.[37] This was done, for example, by the Seventeenth Amendment implementing the popular election of U.S. Senators with an attendant diminution of power previously vested in the states.

The Constitutional Convention of 1787 focused less on lofty theory and more on the organizational structure of the new central government, as well as on how it was to share sovereignty with the states. On that score, the Convention's work is typically celebrated as brilliant: the Madisonian vision was that power be widely diffused with potential factions balanced one against the other.[38] Individual liberties were thought best safeguarded indirectly by this finely balanced diffusion of enumerated powers, thereby limiting the reach of government, which in turn left ample social space for individuals to live in freedom and to enter into independent-sector associations with others. On the other hand, the ratification struggle that ensued in some states insofar as the 1787 Constitution lacked a bill of rights was a deficiency that is thought, for the most part,[39] to have been richly corrected by the First Federal Congress submitting a Bill of Rights to the states. Religious freedom, as distinct from religion *qua* religion, was doubly

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[34] JAMES H. HUTSON, RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC 77 (1998) [hereinafter "HUTSON"].

[35] *Id.* at 77 ("That religion was not otherwise addressed in the Constitution did not make it an 'irreligious' document any more than the Articles of Confederation was an 'irreligious' document.").

[36] BEEMAN, *supra* note 23, at 180.

[37] Either two-thirds of each House of Congress can propose amendments which must then be ratified by three-fourth of the states, or a convention sought by two-thirds of the states can propose amendments which must in turn be approved by three-fourth of the states. U.S. CONST. art. V.

[38] *The Federalist Papers, No. 51, reprinted in* 1 THE FOUNDERS' CONSTITUTION 330, 331 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter "FOUNDERS' CONSTITUTION"].

[39] The matter of slavery had to await the Civil War (1861-1865), however, followed by ratification of the Thirteenth Amendment in 1865. The matter of woman's suffrage had to await adoption of the Nineteenth Amendment in 1920.

addressed in the proposed Third Article of Amendments (later re-numbered the First Amendment), and thus religious freedom was obviously a matter thought to be of high order.

Third, the absence of religion *qua* religion in the Constitution proper also makes sense when one appreciates that in 1787 church-government relations (as distinct from religious conscience) were thought highly divisive, varied considerably from state to state, and were widely regarded as a state-level matter.[40] One can easily imagine the delegates thinking why take up religious disestablishment, let alone confessional religion as such, when the delegates had more than enough to disagree about when it came to the basic frame of the new government. A few states had recently (or were in the process of) reexamining the church-state question for their own citizens.[41] Virginia had concluded a very public and bruising struggle over disestablishment in 1784-1786.[42] In most of New England, however, the Congregational Church establishment was still secure in the early 1790s, albeit there was heated agitation by outnumbered dissenters, mostly Baptists.[43] It is no accident that much of the criticism due to the absence of any mention of God in the Constitution came from New England with its Puritan view of America's exceptionalism as a "City on a Hill" and the "New Israel."[44] Other Christians regard such thinking as civil religion, which is to say idolatry. This further illustrates why the framers were being wise, not hostile toward religious freedom, to avoid such references in the Constitution.

There was considerable church-state variance up and down the Atlantic seaboard, as the statesmen sent to the 1787 Constitutional Convention were keenly aware because they travelled widely (unlike most other Americans) and thus came into frequent contact with the church-state arrangements in other states. This religious pluralism was manageable when it had to be contended with internal to each state. Once the 1787 Constitution was ratified, however, the religious pluralism under state authority would, as a social reality, become the aggregate pluralism of all thirteen states. That multiplication would bring about a sudden and possibly sharp increase in religious diversity. So it is easy to see how the founders thought it best to view religion *qua* religion (and even religious freedom generally) to be too controversial to address explicitly in the Constitution, a state rather than a federal responsibility, or both.

Political scientist Frank Lambert has a variation on the silence of the Constitution concerning church-government relations. His view is that the Constitution's silence was a quite intentional way of dealing with the relationship between government and religion.[45] Silence was the delegates' way of affirmatively saying that religion as such

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[40] HUTSON, *supra* note 34, at 77 ("The Convention . . . wanted the Constitution to be what present-day legislators call a 'clean bill,' a measure stripped of as many provocative provisions as possible to make it as broadly palatable as possible.").

[41] Esbeck, *Dissent and Disestablishment*, *supra* note 8, at 1458 (measured by the authority to impose a religious tax, North Carolina disestablished in 1776 and New York in 1777).

[42] For an overview of the then recent disestablishment in Virginia, see Esbeck, *Virginia Disestablishment*, *supra* note 5, at 51.

[43] Esbeck, *Dissent and Disestablishment*, *supra* note 8, at 1432-47, 1498-1523.

[44] Vincent Phillip Munoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 617-18 (2006) [hereinafter "Munoz, *Original Meaning*"].

[45] *See* FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 249-50 (2003) [hereinafter "LAMBERT"].

was *not* within the jurisdiction of the government—at least, not within the jurisdiction of the new central government being created by the 1787 Constitution. Silence, maintains Lambert, was not an evasion of the question. Rather, silence was the means of deciding that religion was, so far as the federal government was concerned, a matter for the free marketplace of ideas. The various churches were on their own to compete for new converts and had to work to keep a hold on their existing flock. Historian William Lee Miller agrees that by virtue of the 1787 Constitution religion was "thrown out into the great sea of public discourse, to sink or swim altogether on their own, without any safety net whatsoever in the nation's fundamental law."[46] Steven Waldman also thinks the "absence of God from the Constitution was pro-religion . . . . The Constitution demanded a paradigm shift, away from public responsibility [for religion] and toward private."[47] Lambert hastens to add that the delegates did believe that a virtuous citizenry was necessary to maintain a republic and that traditional religion was central in teaching the people the basic tenets of virtuous living.[48] But the Convention delegates, it is argued, broke with the past in its belief that religion needed the sustaining hand of government. Rather, statesmen like Madison, as well as religious dissenters in America, saw that government actively working to sustain religion had just the opposite effect: corruption of religious institutions and decline of religion's affection among the people. In sum, Lambert argues that the Constitution's silence on religion is not inaction on the church-government question but an intentional siding with the disestablishmentarian viewpoint.[49]

A major problem with the perspective of Lambert, Miller, and Waldman is that at no time during a Convention session did the delegates articulate this view of the matter. Moreover, it is not fanciful to suppose that the matter just never came up, whether in formal sessions or during informal discussion groups. In this view, the delegates just quietly assumed that moral virtue was widely nurtured by religion, but the business of religion was no business of the new federalist government. A half year into his presidency, a presbytery comprised of New Hampshire and Massachusetts Presbyterians wrote to President George Washington worried that the country was in moral peril because the new nation's charter did not expressly rely upon God's providence.[50] Washington wrote back giving his expectation that the American "publick councils" will continue to look to God to guide the country, but then gently suggested that the exhortation of "true piety" be not a temporal duty of the government, but to "the guidance of the Ministers of the Gospel, this important object is, perhaps, more properly committed."[51] Still, it is curious indeed that no delegate gave public expression of this view at the Convention or in their private papers.

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[46] MILLER, MAY NEXT, *supra* note 22, at 110.
[47] WALDMAN, *supra* note 26, at 134.
[48] LAMBERT, *supra* note 45, at 248.
[49] *Id.*; s*ee* MILLER, MAY NEXT, *supra* note 26, at 109-10, 112-16.
[50] Letter from the Presbytery of the Eastward, convened in Newberry-Port (New England) to President George Washington (Oct. 28, 1789), George Washington Papers 1741-1799 at the Library of Congress, *available at* http://memory.loc.gov/mss/mgw/mgw2/038/0930077.jpg (replace the file 0930077.jpg after the last "/" of the above hyperlinks with 0940078.jpg and 0950079.jpg for the second and third pages of the letter, respectively) (last visited July 2, 2010). *See* WALDMAN, *supra* note 26, at 134-35.
[51] Letter from President George Washington to the Presbytery of the Eastward, convened in Newberry-Port (New England) (Nov. 2, 1789), George Washington Papers 1741-1799 at the

A second problem is that Lambert, Miller, and Waldman under-appreciate the extent to which the delegates' silence was because the matter of church-government relations was thought wholly within the jurisdiction of the states. Silence easily could have meant that the subject of church-government affairs was not a question within the Convention's purview. The subject remained in the jurisdiction of the states, where it had been for one hundred and eighty years.

This much can be said with assurance: the principal aim of the Convention of 1787 was to get an agreement on those matters on which agreement was possible and most pressing: namely, replacing the Articles of Confederation with a more robust central power to regulate interstate and foreign commerce, acquire the means to generate federal revenue and pay war debts, administer an orderly expansion into western lands and deal with Native Americans, maintain a national defense with a navy and, if necessary, quickly raise an army, and speak with one voice with respect to international trade and foreign relations. Accordingly, it made good sense that the matter of church-government affairs and most matters of religious conscience be avoided lest the 1787 Convention in Philadelphia fail or the Constitution's ratification by the states become bogged down in religious division.

Although limited, the matter of religion did generate specific proposals during the Constitutional Convention. As mentioned above, the Religious Test Clause limited the power of the national government with respect to the choice of federally selected officials. It thereby limited state power with respect to the choice of three types of state-selected federal officials (Senators, Representatives, and Electors comprising the Electoral College). On August 20, 1787, the Test Clause was proposed by Charles Pinckney of South Carolina and referred to the Committee for Detail.[52] Not reported out favorably by the Committee, the clause was later brought before the Convention for consideration on Pinckney's own motion.[53] Roger Sherman argued that the limitation was unnecessary because of "the prevailing liberality being a sufficient security against such tests."[54] Gouverneur Morris of Pennsylvania and Charles Cotesworth Pinckney of South Carolina spoke in favor of the motion in unreported remarks.[55] When brought to a

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Library of Congress, *available at* http://memory.loc.gov/mss/mgw/mgw2/038/0960080.jpg (last visited July 2, 2010).

[52] 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 445-46 (Jonathan Elliot ed., 2d ed., William S. Hein & Co., Inc. 1996) (1836) ("No religious test or qualification shall ever be annexed to any oath of office, under the authority of the United States.") [hereinafter "ELLIOT'S DEBATES"]. *See* LEVY, *supra* note 17, at 80; BEEMAN, *supra* note 23, at 288-89. When the Convention first convened in late May 1787, Charles Pinckney is said to have presented to the delegates a comprehensive plan for the Constitution. BEEMAN, *supra* note 23, at 93-98, 269-70. The scope and influence of the Pinckney Plan is disputed. BEEMAN, *supra* note 23, at 93-98; LEVY, *supra* note 17, at 80 n.1. One provision of the Pinckney Plan, as reported after the fact by Pinckney, was much stronger than his Religious Test Clause proposed in mid-August. Paralleling in some respects the later First Amendment, Pinckney's proposal was represented by him to be: "The legislature of the United States shall pass no law on the subject of religion." 5 ELLIOT'S DEBATES, *supra* note 52, at 131. *See* LAMBERT, *supra* note 45, at 251; LEVY, *supra* note 17, at 80 n.1.

[53] 5 ELLIOT'S DEBATES, *supra* note 52, at 498 (Pinckney altered the terms of his initial proposal to read as follows: "but no religious test shall ever be required as a qualification to any office or public trust under the authority of the United States.").

[54] *Id.*

[55] *Id.*

vote, only the delegation from North Carolina opposed the clause with Maryland divided. The delegates were seemingly unconvinced that there was yet a "prevailing liberality" with respect to religion.

The Religious Test Clause gives rise to an individual religious right, albeit modest in scope. More importantly, the Religious Test Clause shows that religious division was something that the framers did not want to risk, for the Test Clause is more than just an individual right. The clause also does important work as an anti-divisive measure because it keeps candidates for federal office from being disqualified along religious or denominational lines. The same is true of the sworn oath of office, which would act as a religious test if these offices could not also be filled by oath-shunning Quakers and Anabaptists. Thus, these two explicit religious conscience clauses had about them a feature of church-government separation as well, in the sense that the government aspires to avoid citizens dividing over political questions along religious lines.

The constitutional framers had reason to believe that, at the federal level, should there be an attempt to impose a religious test, achieving consensus on the terms of such a test with reference to specific Christian doctrines would certainly be difficult and likely impossible.[56] At the time of the Philadelphia Convention, a geographically extended republic was still experimental and thought by many to be unstable.[57] The framers knew, for example, how sectarian division contributed to the failure of the English Commonwealth (1649-1660), which divided over types of Calvinism. It was believed that for an extended republic to take sides in disputes over creeds and other specific forms of liturgical observance was to dangerously risk dividing the body politic just at the moment in history when political unity was most needed. Hence, eliminating a religious test for public office at the national level helped to not stir up the people, as well as to aid religiously plural Americans (albeit overwhelmingly Protestant) to begin to develop affection for their new central government.

Also in mid-August 1787, James Madison and Charles Pinckney together proposed that Congress be given express power "to establish a University, in which no preferences or distinctions should be allowed on account of religion."[58] Pinckney had earlier proposed such a power, but without reference to religion. The matter was referred to the Committee on Detail. The matter later came before the Convention for consideration.[59] James Wilson of Pennsylvania spoke favorably in unrecorded remarks. Gouverneur Morris of Pennsylvania suggested that Congress already had such an authority given its exclusive power over the federal seat of government. No one spoke to the prohibition of a religious test for student admission. The motion lost by four states in favor and six states opposed.[60] It is suggestive of religion's major influence on civil society in the new nation that in 1787 all the existing colleges were founded either by a

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[56] Oliver Ellsworth, *The Landholder, No. 7* (Dec. 7, 1787), *reprinted in* 4 FOUNDERS' CONSTITUTION, *supra* note 38, at 640. Ellsworth was a delegate to the Connecticut constitutional convention. He wrote several letters in favor of ratification, of which No. 7 was a defense of the Religious Test Clause.

[57] HERBERT J. STORING, WHAT THE ANTIFEDERALISTS WERE *FOR* 15-16 (1981) [hereinafter "STORING"].

[58] 5 ELLIOT'S DEBATES, *supra* note 52, at 544. *See* WALDMAN, *supra* note 26, at 129; BEEMAN, *supra* note 23, at 288-89.

[59] 5 ELLIOT'S DEBATES, *supra* note 52, at 440.

[60] *Id*. at 544. *See* WALDMAN, *supra* note 26, at 129; BEEMAN, *supra* note 23, at 288-89.

Protestant church or denomination. The proposal was defeated, perhaps indicating that the Madison/Pinckney idea could become religiously divisive and thus should best be avoided, that higher education was not thought to be a national responsibility, or both. Whatever the cause of the proposal's defeat, it is hardly indicative of a people indifferent to religion and religion's bearing on the character of higher education for the nation's most promising youth.

When a closely negotiated document, as well as the records of the delegates' debate at the Philadelphia Convention giving rise to that document, is silent or nearly silent on a given subject matter of undeniable interest to many, it is slippery ground indeed to read much into that silence. One is just as likely to interject one's own present-day bias into the vacuum. There is little serious dispute that America benefitted from people of faith and inherited some good ideas from Western Christianity. On the other hand, America's government was never in any theologically serious way a Christian nation. Lastly, as the delegates were keenly aware, the signed Constitution had no legal effect.[61] As stated in its own Article VII, the Constitution would have to be ratified by at least nine of the thirteen states. So the several states would soon have their opportunity to impress their own original meaning onto the text. It is to those several debates that we now take up in Part II.

II. RELIGION AND RELIGIOUS FREEDOM DURING THE STATE RATIFICATION OF THE 1787 CONSTITUTION

Once the document was signed by 38 of the 55 delegates that attended at least part of the Convention the summer of 1787,[62] the draft Constitution was sent to the Confederation Congress meeting in New York City. The draft was accompanied by a resolution of the delegates and a letter signed by George Washington as president of the Constitutional Convention.[63] The resolution stated the recommendation that Congress should not itself consider the merits of the Constitution, but to transmit the draft to each of the states for the calling of a state convention formed for the sole purpose of considering the Constitution's ratification. The Confederation Congress set September 26th to begin its discussion of how to deal with the draft Constitution.[64] Meanwhile, newspapers printed copies of the Constitution, and the draft was circulating widely among the people and began to stir up considerable interest. Ten or more of the delegates who had signed the Constitution in Philadelphia traveled to New York City and were on hand as their state's delegate to the Congress. Opponents also were present at the

[61] BEEMAN, *supra* note 23, at 370.
[62] *Id.* at 359, 363 (explaining that of the 41 delegates present on September 17, 1787, Edmund Randolph, George Mason, and Elbridge Gerry did not sign).
[63] Resolution dated September 17, 1787, signed by George Washington, president of the Convention to the Confederation Congress, *reprinted in* 1 FOUNDERS' CONSTITUTION, *supra* note 38, at 194. Gouverneur Morris, as a member of the Committee of Style, also prepared a letter addressed to the Confederation Congress. It sought to defend the Convention's reporting of a proposed Constitution that went well beyond just amending the Articles of Confederation. Morris also sought to argue why the Articles had proven insufficient, and thus the necessity for and virtues of the Convention's report of a more consolidated and empowered central government. *Id.* at 195 (reproducing the letter); *see* BEEMAN, *supra* note 23, at 351-53.
[64] BEEMAN, *supra* note 23, at 371.

Confederation Congress, such as Richard Henry Lee of Virginia,[65] as well as former Convention delegates from New York not signing the draft Constitution, Robert Yates and John Lansing, and they had well-formulated reasons why the Congress should not even forward the draft to the states.[66] Debate ensued over three days, September 26-28, 1787.

The signing delegates, including James Madison, were now not only seasoned debaters with respect to the terms of the draft Constitution and how its parts worked as an integral governmental framework but also could make a forceful case for the country's need to replace the Articles of Confederation. Thus, late on September 28th the Congress adopted a resolution to the effect that "said report [of the Philadelphia Convention], together with the resolutions and letter [both signed by Washington] accompanying the same be transmitted to the several state legislatures in order to be submitted to a convention of delegates chosen in each state by the people."[67] This was a compromise. The Confederation Congress eschewed any mention of the proposed Constitution's merits, even calling it a "report" rather than a proposed Constitution.

Not a single state legislature refused to call for a special state convention as requested in the resolution signed by Washington. Rather, each legislature set an election date for the selection of convention delegates, as well as set the beginning date for the ensuing state convention. To the degree there was resistance, it was by setting a late starting date for the state convention. On the whole, this was a good omen for those favoring ratification because the legislature in each state would naturally be hostile to giving up some of its sovereignty to the newly proposed consolidated government. State conventions gave credence to the idea that the draft Constitution, should it be ratified, issued forth from "the People" rather than being a creature issuing forth from the states.

Some of the earliest debates for and against the Constitution were during the local campaigns by those seeking selection as delegates to their state convention. The ratification contest over the Constitution's merits took place at three levels: (i) the aforementioned delegate campaigns; (ii) state-by-state in the ratification conventions; and (iii) by way of opinion pieces in newspapers and separately distributed speeches and pamphlets sometimes published in serial form when the author's arguments were issued in installments. Many of the more thoughtful opinion papers were reprinted and thus received multi-state distribution. There were also letters; many of them were written with the intent that they be made public.[68] Those favoring ratification of the Constitution took for themselves the name "Federalists," and thereby managed to hang the unattractive moniker "Antifederalists" on those opposing—"anti-ratificationists" would have been more accurate and fair.

Pennsylvania was the first to select its delegates and convene its state convention. However, Delaware was first to bring the matter of ratification to a vote at its convention,

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[65] Letter from Richard Henry Lee to Edmund Randolph, Governor of Virginia, dated October 16, 1787, 1 ELLIOT'S DEBATES, *supra* note 52, at 503-05.

[66] Letter from Robert Yates and John Lansing to Governor Clinton of New York, *id.* at 480-82 (reproducing letter sent when Yates and Lansing quit as delegates to the Constitutional Convention).

[67] 1 FOUNDERS' CONSTITUTION, *supra* note 38, at 198; *see* BEEMAN, *supra* note 23, at 369-73.

[68] NEIL H. COGAN, ED., THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 72-80 (1997) (collecting newspapers, pamphlets, and letters addressing religious freedom during the debate over ratification of the Constitution) [hereinafter "COMPLETE BILL OF RIGHTS"].

and all 30 delegates were unanimous in their support.[69] The table below shows the state-by-state march toward ratification. Whereas a minimum of nine states were needed, the Constitution received eleven affirmative votes before the Confederation Congress called for federal elections in the latter half of 1788 to form the new government—and thus the Confederation's demise in early 1789.

After five quick victories, including success in New Jersey, Georgia, and Connecticut,[70] the momentum slowed with Massachusetts where the Antifederalists regained their footing and began their counteroffensive in earnest. Federalists in Massachusetts, South Carolina, New Hampshire, Virginia, and New York, were eventually able to achieve ratification only upon the convention's acceptance of recommended amendments to the Constitution. Antifederalists pressed for ratification on *condition* that amendments were first agreed to, but the Federalists were able to hold the list of amendments to *recommendations* only.[71] North Carolina voted not to ratify but nevertheless recommended amendments.[72]

Ratification of the 1787 Constitution[73]

	State	Date	Passed?	Amendments Recommended?
1	DEL	December 7, 1787	Yes	No
2	PA	December 12, 1787	Yes	No*
3	NJ	December 18, 1787	Yes	No
4	GA	January 2, 1788	Yes	No
5	CT	January 4, 1788	Yes	No
6	MA	February 6, 1788	Yes	Yes*
--	RI	March 24, 1788	No	No
7	MD	April 26, 1788	Yes	No*
8	SC	May 23, 1788	Yes	Yes
9	NH	June 21, 1788	Yes	Yes*
10	VA	June 25, 1788	Yes	Yes*
11	NY	July 25, 1788	Yes	Yes*
--	NC	August 1, 1788	No	Yes*

[69] 1 ELLIOT'S DEBATES, *supra* note 52, at 319. *See* BEEMAN, *supra* note 23, at 375-83.
[70] 1 ELLIOT'S DEBATES, *supra* note 52, at 320-21 (New Jersey), 321-22 (Connecticut), and 323-24 (Georgia). *See* BEEMAN, *supra* note 23, at 383-85.
[71] BEEMAN, *supra* note 23, at 386-403.
[72] 1 ELLIOT'S DEBATES, *supra* note 52, at 331-32. *See* BEEMAN, *supra* note 23, at 403-05.
[73] BEEMAN, *supra* note 23, at 375-405; *The Convention Timeline, available at* http://www.usconstitution.net/consttime2.html (last visited June 12, 2010). On August 1, 1788, North Carolina proposed amendments, but it did not ratify the Constitution. 1 ELLIOT'S DEBATES, *supra* note 52, at 331-32. North Carolina would eventually ratify on November 21, 1789. *Id.* at 333. Rhode Island proposed amendments on June 16, 1790, after its subsequent ratification, 1 ELLIOT'S DEBATES at 333-37, but those amendments were too late to have any bearing on Congress' drafting of the Bill of Rights. For the dates of ratification in New Jersey and South Carolina, see 1 ELLIOT'S DEBATES, *supra* note 52, at 321, 325.

* Pennsylvania and Maryland considered amendments, but they were all voted down. Among the rejected amendments in both states was one to protect religious freedom. Massachusetts considered recommending an amendment to protect religious freedom, but it did not pass. New Hampshire, Virginia, New York, and North Carolina had among their recommended amendments one protecting religious freedom.

During the ratification period there was a smattering of criticism of the Religious Test Clause on the basis that it would permit federal office holding by those other than Protestants.[74] On the other hand, there were principled defenses of the Test Clause based on the choice of one's religion being viewed as a matter of conscience. The defenders also argued the near impossibility of the thirteen states agreeing on a single creedal test and that voters were entirely free as they cast their ballots to individually impose a religious test if that was their criteria for selecting qualified officials.[75] Criticism of the absence of any mention of God in the Preamble, and thus the near silence of the Constitution on religion *qua* religion, did arise.[76] But this issue likewise did not figure large in the contest. As the overall struggle for ratification unfolded, these two objections were inconsequential to the question of whether the newly created consolidated government would have any authority to restrict religious conscience or an implied power over church-government relations.

The Antifederalists had a position on government's role in supporting religion *qua* religion, but it was rather subtle as well as uneven due to regional differences.[77] At

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[74] MILLER, MAY NEXT, *supra* note 22, at 110-11; LAMBERT, *supra* note 45, at 253-54, 257-58; LEVY, *supra* note 17, at 86, 91-92; WALDMAN, *supra* note 26, at 133-34, 139. For example, fear that the Religious Test Clause would permit office holding by "pagans and Roman Catholics" was voiced in North Carolina. On the other hand, the Baptist preacher Isaac Backus, a delegate to the Massachusetts convention, read into the Test Clause a near prohibition on a national establishment of religion. MILLER, MAY NEXT, *supra* note 22, at 111; LAMBERT, *supra* note 45, at 457; WALDMAN, *supra* note 26, at 134. These are illustrative of the extremes, but they were not widespread.

[75] LAMBERT, *supra* note 45, at 258.

[76] *Id.* at 253-57; WALDMAN, *supra* note 26, at 133-34; Munoz, *Original Meaning*, *supra* note 44, at 617-18. In 1789, well after ratification was secure, Benjamin Rush is reported to have said to John Adams, that "[m]any pious people wish the name of the Supreme Being had been introduced somewhere in the new Constitution." DAVID FREEMAN HAWKE, BENJAMIN RUSH: REVOLUTIONARY GADFLY 357 (1971). Rush was a Federalist and a strong supporter for ratification of the Constitution. *Id.* at 347-56. Rush's post-ratification observation of the wishes of others, that he does not name and fails to number, carries no weight beyond the face of it. The wish for explicit mention of the Deity certainly did not generate a movement opposed to ratification, nor did it diminish Rush's ardor for the new charter. *See id.* at 355 (noting the open letter by Rush circulated in early 1788 repeating arguments in support of the Constitution, but giving no mention to its lacking a reference to God). During most of the ratification period, John Adams was overseas as the American foreign minister to Great Britain. Nonetheless, he wrote a letter to America for public circulation in support of ratification. DAVID MCCULLOUGH, JOHN ADAMS 380-81 (2001). Adams privately stated various reservations about the Constitution, but none had to do with its failure to mention God. *Id.* at 379-80, 397-98.

[77] STORING, *supra* note 57, at 22-23, 64. While favoring the protection of religious conscience, many Antifederalists were establishmentarians. That is, they reasoned in a circular fashion that saw republican self-government possible only if there is a virtuous citizenry, that public virtue is largely learned by properly constituted religion, and that therefore religion should be actively supported by the government. The "properly constituted religion" became the church, established by law, whereas dissenters, if loyal to the state and otherwise acting within reason, could be

the time of the ratification struggle (1787-1788), the Anglican Church in the Southern states had either been disestablished or was very weak. In New England, however, the Congregational Church was still strong and tax-supported. There were no establishments remaining in the Middle states. Antifederalists conceded that a national establishment was not possible because of state-by-state religious differences.[78] These sharp regional differences tended to reinforce the Federalists' argument that the proposed Constitution should—and did—leave the matter of church-government relations and religious conscience in the hands of each state. For the Antifederalists, however, it was more that they harbored uneasiness because of what the Constitution did not say; namely, the document did not expressly deny central power over church-state relations. This unease gave rise to the question of whether the implied powers of the proposed federal government really did grant authority to disturb the religious settlements in the states.

The overriding concern of the Antifederalists with respect to religion, therefore, had to do with wanting to explicitly preserve jurisdiction over church-government relations as vested solely in the states, as well as to disable any implied federal power to invade religious conscience. New England Federalists agreed in principle, for they too did not want their Congregational Church establishments disturbed by the federal government. But they did not see any language in the Constitution that gave rise to the fear that it vested power to do so. Quite apart from the Federalist/Antifederalist divide, there was a palpable unease among Americans more generally with respect to whether the Constitution implied powers that could impair religious liberty.[79] That more general unease was only exacerbated by the absence of a Bill of Rights. It was this popular unease that first threw the Federalist on the defensive in Massachusetts.

The Federalists thereby found themselves making a twofold argument. First, the newly proposed government neither had authority over the matter of religion *qua* religion. And, second, a Bill of Rights was unnecessary to reaffirm this lack of federal authority. With respect to this second argument, if a fallback position was forced upon them, as it was in Massachusetts, South Carolina, New Hampshire, Virginia, New York, and North Carolina, the Federalists urged ratification now and promised the addition of a Bill of Rights thereafter.

The principle that the 1787 Constitution created a government of enumerated powers and thus all that is not delegated is denied was first articulated by James Wilson, the highly able Constitutional Convention delegate from Pennsylvania, in a speech given on October 6, 1787.[80] Wilson delivered his famous speech before a crowd outside the Pennsylvania State House. It was so well-reasoned that the speech was printed and

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tolerated. As establishmentarians, they "saw no inconsistency between liberty of conscience and the public support of the" established church. *Id*.

Disestablishmentarians agreed that republican self-government was only possible with a virtuous citizenry, and that the primary teacher of virtue was religion. However, they broke with establishmentarians over the wisdom and need for government support of religion. Active government support of religion, argued disestablishmentarians, corrupted the church and caused virtuous citizens to reject a faith which has been co-opted and now served the needs of the state rather than God.

[78] Munoz, *Original Meaning*, *supra* note 44, at 617.

[79] WALDMAN, *supra* note 26, at 138-39. In current terminology, we would call these Americans the independent swing voters.

[80] 1 FOUNDERS' CONSTITUTION, *supra* note 38, at 449. *See* BEEMAN, *supra* note 23, at 379; STORING, *supra* note 57, at 65.

distributed throughout the states as Americans became immersed in the ratification debate. Wilson argued that because the proposed federal government had no powers other than those expressly delegated, it would be superfluous and even absurd to expressly deny powers never delegated. Wilson served as a delegate to the Pennsylvania state convention. He responded to an argument being circulated to the effect that the draft Constitution failed to secure religious conscience. Wilson replied: "I ask the honorable gentlemen, what part of this system puts it in the power of Congress to attack those rights? When there is no power to attack, it is idle to prepare the means of defense."[81]

Delaware, New Jersey, and Georgia did not keep a record of the debate at their ratification conventions.[82] In Pennsylvania, Antifederalists proposed amendments to the Constitution,[83] and one proposed amendment did address religious liberty.[84] Following the reasoning of James Wilson, the Federalist majority successfully turned backed all proposed amendments to the Constitution.[85]

In Connecticut, we have only a partial record of the ratification debate. The fragmentary record merely records two Federalists who each commented favorably on the Religious Test Clause,[86] and there was one comment opining that given a prevalent spirit of liberty it was unlikely that the United States would ever establish one religion.[87]

Massachusetts was where the Federalists' momentum ground to a halt. There were 355 delegates and many came without their minds made up. Governor John Hancock and revolutionary hero Samuel Adams were uncommitted. Moreover, Elbridge Gerry was present in Boston although he was not a state delegate. Gerry was one of three former delegates present in Philadelphia on September 17th who had refused to sign the Constitution. Thus, he was quite familiar with the terms of the proposed Constitution, including its vulnerabilities. As the debate in Massachusetts dragged into a third week, two tactical decisions by the Federalists were crucial to their success: they agreed to permit the convention to recommend amendments along with ratification, and they convinced John Hancock and then Samuel Adams to support this ratification with promised amendments.[88] Nine amendments were recommended.[89] An amendment protective of conscience did not pass.[90]

Massachusetts had a strong Congregational Church supported by a local religious tax (which they called a personal "assessment") to finance the churches. The dissenting Baptists had 20 delegates at the convention, including the Rev. Isaac Backus, a longtime

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[81] 2 ELLIOT'S DEBATES, *supra* note 52, at 455.
[82] LEVY, *supra* note 17, at 87.
[83] 2 ELLIOT'S DEBATES, *supra* note 52, at 545-46.
[84] COMPLETE BILL OF RIGHTS, *supra* note 68, at 12 ("The rights of conscience shall be held inviolable, and neither the legislative, executive, nor judicial powers of the United States shall have authority to alter, abrogate, or infringe any part of the constitutions of the several states, which provide for the preservation of liberty in matters of religion.").
[85] 1 ELLIOT'S DEBATES, *supra* note 52, at 319-20.
[86] LEVY, *supra* note 17, at 86.
[87] 2 ELLIOT'S DEBATES, *supra* note 52, at 202.
[88] BEEMAN, *supra* note 23, at 386-89.
[89] 1 ELLIOT'S DEBATES, *supra* note 52, at 322-23.
[90] COMPLETE BILL OF RIGHTS, *supra* note 68, at 12 ("[T]hat the said Constitution be never construed to authorize Congress to infringe . . . the rights of conscience . . . .").

vocal opponent of the mandatory assessments.[91] The Baptists, however, supported ratification and said nothing about church-government relations.[92] That would not have happened if the Baptists had thought that the proposed Constitution offered yet a new threat to the freedom of their churches. One can only infer that Congregationalists and Baptists alike understood that the proposed Constitution vested no power in the United States over church-government relations. Ratification followed by the narrow margin of 187 to 168.[93]

Like Pennsylvania, there were amendments to the draft Constitution proposed in Maryland that were all voted down by a convention dominated by Federalists. Also as in Pennsylvania, the amendments were not rejected because the delegate majority disagreed with them. They were rejected because Federalists wanted to unconditionally ratify the Constitution.[94] Juridically a conditional ratification was not ratification of the Constitution but a rejection of it. One of the amendments proposed in Maryland read as follows: "That there be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty."[95] The amendment deals separately with church-government relations and individual religious liberty, as does the First Amendment eventually made part of the Bill of Rights. Once again, this shows that people thought about the matter of religious freedom as needing to address two distinct relationships: individual religious conscience and church-government relations. Maryland approved the Constitution without proposing amendments.

Rhode Island's state convention was next to bring the matter of ratification to a vote, and it was the first state to reject the Constitution. It would not be until May 29, 1790 that Rhode Island would yield to the inevitable and ratify,[96] making it the last of the thirteen states to do so. By then the Washington Administration had already been in office for more than a year. Defiant to the end, on June 16, 1790, Rhode Island recommended several amendments to the Constitution.[97] This was, of course, too late to influence the Bill of Rights which Congress had already passed and President Washington had reported to the states for their consideration in September 1789.[98] One of Rhode Island's amendments protected religious conscience and required that no one religion be preferred over others.[99] From its founding by the fiery Roger Williams, Rhode Island had never had an establishment. Indeed, the state took pride in its stand against any material support for organized religion. Thus, Rhode Island was at the very least inattentive in that the proposed amendment prohibited only the preferring of one religion over others, rather than prohibiting any and all establishments as consistent with Rhode Island's history and current sentiments. Rhode Island's amendment copied that of

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[91] Esbeck, *Dissent and Disestablishment*, *supra* note 8, at 1432-47.
[92] LEVY, *supra* note 17, at 87-88.
[93] BEEMAN, *supra* note 23, at 389-90.
[94] LEVY, *supra* note 17, at 88.
[95] 2 ELLIOT'S DEBATES, *supra* note 52, at 553; COMPLETE BILL OF RIGHTS, *supra* note 68, at 11.
[96] *Id.* at 334-35. *See* BEEMAN, *supra* note 23, at 391-92.
[97] 1 ELLIOT'S DEBATES, *supra* note 52, at 335-37.
[98] LEVY, *supra* note 17, at 92.
[99] Rhode Island adopted the same religious freedom language, 1 ELLIOT'S DEBATES, *supra* note 52, at 334, recommended by North Carolina on August 1, 1788, *id.* at 331; 4 ELLIOT'S DEBATES, *supra* note 52, at 244, which in turn had repeated the Virginia proposal of June 26, 1788, 1 ELLIOT'S DEBATES, *supra* note 52, at 327; 3 ELLIOT'S DEBATES, *supra* note 52, at 659. *See also* COMPLETE BILL OF RIGHTS, *supra* note 68, at 12-13.

North Carolina and Virginia. Perhaps the copying explains Rhode Island's inattention; we do not know. In any event, it is most unlikely that Rhode Island intended its selection of amendment language to be a backhanded way of vesting Congress with the power to create multiple establishments where all churches are supported equally.[100]

Next to ratify was South Carolina.[101] Like Massachusetts, South Carolina recommended several amendments. It then ratified on May 23, 1788. However, none of the amendments had to do with religious establishment or conscience. During debate, a Rev. Francis Cummins was quoted in a Charleston newspaper as disparaging "religious establishments; or the states giving preference to any religious denomination."[102] At the time South Carolina had a general Protestant establishment, but it was weak and was formally disestablished in 1790.[103]

The New Hampshire convention first met in February 1788. Fearing defeat, the Federalists were able to obtain a recess until early June. No record was kept of the debate, but the convention again took up its work on June 2nd and the convention ratified on June 21, 1788.[104] Because it was the ninth state to ratify, New Hampshire has the distinction of being the state that took the Constitution from a mere proposal to the founding document of a new nation. New Hampshire also recommended amendments, one of which addressed religious freedom. The amendment reads: "Congress shall make no laws touching religion, or to infringe the rights of conscience."[105] Once again we see the separate treatment of church-government relations and individual conscience. We also see for the first time the phrasing "Congress shall make no laws," which later found its way into the First Amendment. At this time the Congregational Church was established in New Hampshire, and the establishment continued until 1819.[106]

Disestablishment of the Anglican Church in Virginia spanned a ten-year period from 1776 to 1786,[107] and there were clean-up issues that still simmered well into the next century.[108] The issue of monetary support for religion came to a head in 1784 and 1785, when an alliance between religious dissenters (Presbyterians and Baptists) and statesmen led by James Madison managed to defeat Patrick Henry's proposed *Bill for the Support of Christian Teachers*.[109] Thus, the issue of religious freedom was already well-trod ground in Virginia as the draft Constitution came before the state convention on the question of ratification. Virginia was the most wealthy and most populous state, so its participation seemed essential to the success of the government proposed by the new Constitution. The opposition to ratification had able leaders, such as Patrick Henry, Richard Henry Lee, and George Mason. Mason had been one of Virginia's delegates to

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[100] LEVY, *supra* note 17, at 93.
[101] 1 ELLIOT'S DEBATES, *supra* note 52, at 325.
[102] LEVY, *supra* note 17, at 88-89.
[103] Esbeck, *Dissent and Disestablishment*, *supra* note 8, at 1493-94.
[104] 1 ELLIOT'S DEBATES, *supra* note 52, at 325-26. *See* BEEMAN, *supra* note 23, at 391, 395.
[105] 1 ELLIOT'S DEBATES, *supra* note 52, at 326; *see also* COMPLETE BILL OF RIGHTS, *supra* note 68, at 12.
[106] Esbeck, *Dissent and Disestablishment*, *supra* note 8, at 1533-34.
[107] Esbeck, *Virginia Disestablishment*, *supra* note 5, at 65-89.
[108] H.J. ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA: A STUDY IN THE DEVELOPMENT OF THE REVOLUTION 130-55 (Da Capo Press reprint 1971) (1910) (describing how the Anglican Churches, formerly established, had to eventually give back their real and personal property acquired during the period of their pre-Revolution establishment).
[109] Esbeck, *Virginia Disestablishment*, *supra* note 5, at 85-87.

the Constitutional Convention in Philadelphia and had famously refused to sign when the other delegates summarily dismissed consideration of a Bill of Rights.[110] Edmund Randolph, the governor of Virginia, was also a Philadelphia delegate that had refused to sign. However, through the quiet work of George Washington and James Madison, Randolph changed his mind, and by the time the state convention began he announced his new-found support for the Constitution.[111]

The Virginia convention got under way on June 2, 1788. Like Antifederalists generally, Patrick Henry opposed ratification because the proposed Constitution took too much power away from the states.[112] The issue of religious freedom came up only occasionally, and each time in reply to rather vague claims by Henry that the Constitution put at risk civil liberties including the right of conscience, while possibly empowering Congress to establish a national religion. Randolph was first to respond to Henry's claims that the congressional powers enumerated in Article I of the Constitution endangered a litany of rights including religious freedom. Randolph said that, "I inform those who are of this opinion, that no power is given expressly to Congress over religion."[113] He went on to observe that the Religious Test Clause "puts all sects on the same footing" and that the multiplicity of religious groups in the United States was a safeguard in "that [the many sects] will prevent the establishment of any one sect, in prejudice to the rest."

James Madison likewise challenged Henry's insistence that a Bill of Rights was required to protect civil liberties, including religious freedom. Madison belittled the efficacy of a Bill of Rights to successfully protect religious liberty when a popular majority of the people was pressuring a legislature to favor one sect. Rather, like Randolph, Madison said safety was to be found where there was a multiplicity of sects, each checking the ambitious plans of the others, as was the case in the vast United States.[114] In the midst of this "rival sects" theory, Madison said that he was pleased to note that in Virginia "a majority of the people are decidedly against any exclusive establishment."[115] Then, in an oft-quoted passage Madison said, with apparent reference to the proposed federal government, "There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most

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[110] 1 ELLIOT'S DEBATES, *supra* note 52, at 494-96 (Mason's statement on objections to the Constitution).

[111] BEEMAN, *supra* note 23, at 397.

[112] *Id*. at 396.

[113] 3 ELLIOT'S DEBATES, *supra* note 52, at 204. Randolph spoke prudently here when he said that no power was "expressly" given over religion. He wisely left open the likelihood that general legislation on nonreligious subjects within congressional power might well have an effect on religious conscience. For example, a familiar quandary at the time was the matter of the military draft, clearly within congressional war powers, and whether and how the draft should accommodate religious pacifists.

[114] *Id*. at 330.

[115] *Id*. It is curious that Madison confined his remarks to only "exclusive" establishments. Just three years before in late 1785 Madison had bested Henry not in a contest over a proposal to *exclusively* establish the Anglican Church in Virginia, but had beat back an attempt led by Henry to create a *multi-establishment* of Christian churches. *See* Esbeck, *Virginia Disestablishment*, *supra* note 42, at 76-87.

flagrant usurpation."[116] The Madisonian passage is singled out because it is conforms to the broad reading of the no-establishment principle by the Court in *Everson*. No Bill of Rights was needed, argued Madison. He appealed to the delegates to trust him on this for his record in Virginia as a champion of religious freedom was well known. Zachariah Johnson, a Federalist, extolled the Religious Test Clause as a protection of religious conscience and also relied on the "rival sects" theory as a sufficient assurance against a federal religious establishment.[117]

Patrick Henry managed to partly undermine the "all that is not delegated is denied" claim of the Federalists. He first pointed out that the Constitution did expressly declare certain rights. Why were some rights necessary to declare, he asked rhetorically, if all power not delegated was denied. He further noted that Article I, Section 9 expressly denied certain powers to the federal government. Henry pointed out that such powers were not in need of being expressly denied if never delegated.[118]

On June 25, 1788, Virginia ratified the Constitution by the narrow margin of 89 to 79. However, in order to secure ratification, the Federalists in Virginia, like those in Massachusetts and South Carolina before them (Virginia was unaware of what had just transpired in New Hampshire), had to agree to a list of amendments recommended by the convention.[119] A motion by Patrick Henry had forty amendments, but the first twenty substantially paraphrase Virginia's Declaration of Rights.[120]

> The proposed amendment numbered 20th addressed religious freedom:
> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others.[121]

The phrasing here was a combination of Section 16 of Virginia's Declaration of Rights as adopted in 1776[122] with language tacked on at the end requiring that no one religion be preferred over others. This added language of nonpreferentialism, said to be the work of Patrick Henry,[123] added a puzzling no-establishment feature to the Virginia rights-based

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[116] 3 ELLIOT'S DEBATES, *supra* note 52, at 330. The absoluteness of Madison's remark contrasts with Randolph's more prudent claim, *id*. at 204, that the Constitution delegated no *express* power to touch on religion or religious freedom. When attending to other duties Madison, as a member of Congress and later as President, would find himself having to deal with both intended and incidental effects on religion.

[117] *Id*. at 645-46. The "rival sects" theory was apparently used only in Virginia's and North Carolina's conventions to argue for ratification. The argument also appears briefly in Madison's THE FEDERALIST PAPERS No. 51, *reprinted in* 1 FOUNDER'S CONSTITUTION, *supra* note 38, at 330, 331. The papers were first published in a New York City newspaper.

[118] Munoz, *Original Meaning*, *supra* note 44, at 622.

[119] Madison famously got Baptist backing for the Constitution by promising the Rev. John Leland a Bill of Rights that protected religious freedom. WALDMAN, *supra* note 26, at 136-37.

[120] 3 ELLIOT'S DEBATES, *supra* note 52, at 593 (Henry's motion). *See* BEEMAN, *supra* note 23, at 399-400.

[121] 3 ELLIOT'S DEBATES, *supra* note 52, at 659; COMPLETE BILL OF RIGHTS, *supra* note 68, at 13.

[122] Esbeck, *Virginia Disestablishment*, *supra* note 5, at 69.

[123] IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION, 1787-1800, at 269 (1950) [hereinafter "BRANT"].

declaration. Did Virginia intend to presume that the federal government—absent the Virginia amendment—had the power to affirmatively support religion so long as all religions were supported without preference? Certainly Madison strongly opposed multi-establishment of religion, for that was the object of his contest with Henry just three years before. Multi-establishments would also violate Madison's promise to the Virginia Baptists. But surely Henry as well did not intend that adoption of this nonpreferential language was an indirect way of vesting Congress with the power to support all religions just so long as it did so without preferring some religions over others. With every fiber in his being Henry stood for Congress having less power, not more.[124] Yet words are stubborn things. The text of the Virginia amendment is nonpreferentialist, and fourteen months later that would temporarily cause trouble in the U.S. Senate.

Overlapping the dates of the Virginia convention, New York had been meeting since June 17, 1788. As the ratification debate now brought all its focus on New York, the assembled delegates had full knowledge that the Confederation Congress would be dissolved and the new federal government was a *fait accompli*. Ten states had now ratified. This added to the ratification question whether New York was prepared to go it alone as a sovereign nation-state no longer in confederation with her former sister colonies. Matters of religion figured little in the convention debates. The Antifederalist Thomas Tredwell said that he favored the addition of a Bill of Rights, *inter alia*, because the Constitution did not expressly prohibit a federal establishment of religion.[125] Another Antifederalist, John Lansing, introduced several amendments as a condition of ratification, but his motion was defeated.[126] The meanings of Lansing's amendments were not debated, albeit they were eventually adopted as recommendations.[127] One of these amendments addressed religious freedom:

> That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others.[128]

This language is quite different from that used in the New York Constitution of 1777,[129] which disestablished the Church of England in the four lower counties that comprised the City of New York.[130] There never was an establishment elsewhere in the State of New York. The word "established" in Lansing's amendment is not defined. The free exercise language speaks of a free exercise of religion adjusted to each claimant's conscience. With respect to the question of establishment, the text is nonpreferentialist. New York ratified the Constitution on July 25, 1788, by a vote of 30 to 27, and the next day adopted as recommendations the proposed amendments.

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[124] LEVY, *supra* note 17, at 93.
[125] 2 ELLIOT'S DEBATES, *supra* note 52, at 399-402. "I could have wished . . . to have prevented the general government from . . . a religious establishment—a tyranny of all others most dreadful, and which will assuredly be exercised whenever it shall be thought necessary for the promotion and support of their political measures." *Id*. at 399.
[126] 2 ELLIOT'S DEBATES, *supra* note 52, at 410-12.
[127] *Id*. at 549-55. *See* BEEMAN, *supra* note 23, at 403.
[128] 1 ELLIOT'S DEBATES, *supra* note 52, at 328; COMPLETE BILL OF RIGHTS, *supra* note 68, at 12.
[129] *See* Esbeck, *Dissent and Disestablishment*, *supra* note 8, at 1480 n.324.
[130] *See id.* at 1473-80 (telling the full story of establishment and eventual disestablishment in New York).

North Carolina's ratification convention did not assemble until July 21, 1788. In early August the convention voted not to ratify.[131] Thus, North Carolina joined Rhode Island as the only holdouts. However, there was lively debate in North Carolina concerning religious freedom and the incipient Constitution. The discussion began with delegate Henry Abbot stating that the people harbor a fear for religious conscience under the new system, and that by the treaty power the central government might "make a treaty engaging with foreign powers to adopt the Roman Catholic religion in the United States." He went on to claim that "[m]any wish to know what religion shall be established. I believe a majority of the community are Presbyterians. I am, for my part, against any exclusive establishment; but if there were any, I would prefer the Episcopal."[132] Turning his attention to the Religious Test Clause, Abbot said that some worried "if there be no religious test required, pagans, deists, and Mahometans might obtain offices among us, and that the senators and representatives might all be pagans."[133]

A leading Federalist in the state, James Iredell, responded to these fears by first extolling the spirit of toleration in the American states and pointing out that the Religious Test Clause was to restrict Congress (not empower it), and thus it promoted religious liberty.[134] Addressing frontally the matter of congressional power over establishment, Iredell responded with the longest dissertation at any ratification convention on the matter of establishing religion:

> They certainly have no authority to interfere in the establishment of any religion whatsoever; and I am astonished that any gentleman should conceive they have. Is there any power given to Congress in matters of religion? Can they pass a single act to impair our religious liberties? If they could, it would be a just cause of alarm. If they could, sir, no man would have more horror against it than myself. Happily, no sect here is superior to another. As long as this is the case, we shall be free from those persecutions and distractions with which other countries have been torn. If any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass, by the Constitution, and which the people would not obey. Every one would ask, "Who authorized the government to pass such an act? It is not warranted by the Constitution, and is barefaced usurpation." The power to make treaties can never be supposed to include a right to establish a foreign religion among ourselves, though it might authorize a toleration of others.
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> . . . It would be happy for mankind if religion was permitted to take its own course, and maintain itself by the excellence of its own doctrines. The divine Author of our religion never wished for its support by worldly authority. Has he not said that the gates of hell shall not prevail against

[131] BEEMAN, *supra* note 23, at 404. *See* 1 ELLIOT'S DEBATES, *supra* note 52, at 331 (giving the date as August 1, 1788).
[132] 4 ELLIOT'S DEBATES, *supra* note 52, at 192.
[133] *Id*.
[134] *Id*. at 193. *See also id*. at 196-98 (additional comments by James Iredell on the Test Clause).

> it? It made much greater progress for itself than when supported by the greatest authority upon earth.[135]

Iredell envisions here a federal government that is barred from more than just the formal establishment of a church. Rather, the prohibition goes to any interference in matters of religion. Organized religion is to be left to the merits of its own doctrines. This is not unlike the principle of no-establishment as understood by the *Everson* Court.

David Caldwell, a Presbyterian minister, rose to express dismay that the Religious Test Clause could be understood as "an invitation for Jews and Pagans of every kind to come among us."[136] A leading Antifederalist, Samuel Spencer, took the Rev. Caldwell's remarks to be proposing an exclusive establishment by way of a religious test. Caldwell went on to argue that religious tests not only had been instruments of religious persecution, but had kept virtuous men from office while acting as no impediment to those of low principles. Spencer then extolled the Test Clause because "it leaves religion on the solid foundation of its own inherent validity, without any connection with temporal authority; and no kind of oppression can take place."[137] Delegate William Lenoir raised the lack of express limits on congressional power, fearing the absence of any restraint "against infringement on the rights of conscience. Ecclesiastical courts may be established, which will be destructive to our citizens. They may make any establishment they think proper."[138] Lenoir's long of list of possible civil liberty abuses, including those as to religion, drew a rebuke from Richard Dobbs Spaight. Spaight had been one of North Carolina's delegates to the Constitutional Convention in Philadelphia. On the matter of religion, Spaight said:

> I thought what had been said [by James Iredell] would fully satisfy that gentlemen and every other. No power is given to the general government to interfere with it at all. Any act of Congress on this subject would be a usurpation.
>
> No sect is preferred to another. Every man has a right to worship the Supreme Being in the manner he thinks proper. No test is required. . . . A test would enable the prevailing sect to persecute the rest. . . . He says that Congress may establish ecclesiastical courts. I do not know what part of the Constitution warrants that assertion. It is impossible. No such power is given them.[139]

Spaight's agreement with Iredell's understanding of the no-establishment principle is important because the two gentlemen's understanding conforms to that of the *Everson* Court. As one can see, there was more discussion about religious freedom in North Carolina than at any other state convention.

Although the vote for ratification failed, North Carolina did propose a host of amendments. Twenty amendments were to comprise a Bill of Rights, and twenty-six

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[135] *Id*. at 194. The latter reference is to the Roman Empire. *See also id*. at 198-99 (comments by Governor Samuel Johnston on how America's many sects were an assurance against a religious establishment).
[136] *Id*. at 199.
[137] *Id*. at 200.
[138] *Id*. at 203.
[139] *Id*. at 208. Richard Dobbs Spaight's argument relies on James Wilson's point that when a power is not delegated it is thereby denied.

additional amendments sought to alter the particular design of the new government.[140] North Carolina's proposed amendment with respect to religious freedom was nearly identical to that of Virginia.[141] This is puzzling. It will be recalled that the Virginia language, and now that recommended by North Carolina, prohibited only the establishment of one religion over others—leaving open the implied possibility of equal federal support for all religions. However, from the debate set out above it appears that most delegates, especially the remarks of the Federalist James Iredell and the Antifederalist Samuel Spencer, as well as Richard Dobbs Spaight, a delegate to the Philadelphia Convention, were all in agreement that religious freedom was best secured when religion was left on its own to flourish or decline on the basis of its own merit and the zeal of its adherents, whereas government involvement in religion had led only to corruption of the church and religious persecution. These sentiments in North Carolina aligned with those who had successfully brought about the Virginia disestablishment in 1784-1785. Thus, in their view government had no jurisdiction over organized religion which is left on its own to wax or wane. With this in mind, it is most unlikely that North Carolina chose its religious freedom amendment with an eye to vesting in Congress, by implication, wholly new power to directly aid religion so long as the aid is without preference.

* * *

From the foregoing, we see that the Federalists were of the firm conviction that even in the absence of the First Amendment Congress had no power to directly legislate on religious conscience or to establish a church or multiple churches. No small number of other Americans who did not regard themselves as partisan were not so sure and wanted a Bill of Rights. Antifederalists wanted even more. They sought to reduce the powers vested in the central government, thereby adding back to the powers of the states. However, the amendments on religious establishment proposed by some of the states added confusion to the matter. Specifically, the amendment language by Virginia, New York, North Carolina, and Rhode Island did not prohibit the nonpreferential support of organized religion, only the preference of one religion over others. Did these states only fear a federal government that could favor one religious establishment over others? That is highly unlikely given that by 1788 there was well-documented hostility in Virginia, North Carolina, and Rhode Island toward the establishment of both exclusive and multiple denominations. Accordingly, it is well to look for supplemental evidence with respect to the intended power of the federal government over church-government relations. That points us to the drafting and ratification of the First Amendment's two religious freedom clauses, a matter set out in Part III of this Article, and, in time, to the overarching theory of the combined 1787 Constitution and Bill of Rights discussed in Part V.

III. DRAFTING THE PHRASES ON RELIGIOUS FREEDOM IN THE FIRST FEDERAL CONGRESS, MAY TO SEPTEMBER 1789, AND ENSUING STATE RATIFICATION

[140] BEEMAN, *supra* note 23, at 405.

[141] 4 ELLIOT'S DEBATES, *supra* note 52, at 244 (there were minor changes in punctuation from the Virginia version); *see also* COMPLETE BILL OF RIGHTS, *supra* note 68, at 12.

The First Federal Congress meeting in New York City was overwhelmingly comprised of Federalists, meaning at this point simply those who had supported ratification of the Constitution, as distinct from the Antifederalists who opposed ratification. The House had 49 Federalists and 10 Antifederalists; the Senate had 20 Federalists and only two Antifederalists.[142] However, at the time there were no political parties in the formal sense, only tendencies to favor power in the central government or its opposite, namely a desire to retain more power in the several states. President George Washington opposed the formation of political parties and strongly discouraged partisan division in his administration and within Congress.[143] It was not until Washington's second term that parties calling themselves Federalists and Republicans began to coalesce.[144] It was during John Adam's four-year presidency that the partisan lines hardened. Accordingly, the congressional debates in the summer of 1789 over what in time would be called the Bill of Rights were not partisan in the modern sense of that term, and key figures such as James Madison, later a leading Republican and ally of Thomas Jefferson, was in the forefront of those Federalists working to report out a Bill of Rights for state ratification.[145]

In carefully preparing a draft of amendments to the Constitution, James Madison had available to him a pamphlet that compiled all of the 200 plus state constitutional amendments that had been recommended by seven of the eleven ratifying states in their ratifying conventions.[146] Madison did not just dispassionately sift through the recommended amendments selecting those which had merit, but he did his sorting with an eye to retaining all federal powers he deemed useful to an energetic government. He sought to fulfill his promise to safeguard rights that well-meaning Americans believed were at risk, and to thereby avoid a second constitutional convention being earnestly sought by hard-shell Antifederalists. Further, he did not hesitate to fashion amendments

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[142] ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION 144 (1997) [hereinafter "GOLDWIN"].

[143] *See* EDWARD J. LARSON, A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICAN'S FIRST PRESIDENTIAL CAMPAIGN 16-45 (2007).

[144] The informal emergence of a Republican Party to oppose the Federalists occurred between November 1791 and December 1792. It was during this period that James Madison anonymously published a series of essays in the *National Gazette* that laid out policy alternatives to those of the Federalists. JOSEPH J. ELLIS, AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC 179 (2008). However, it was not until March 1796 that the Republican Party formally caucused and made explicit its party status in opposition to the Federalist Party. *Id.* at 199.

[145] The reliability of the congressional drafting history of the First Amendment is not altogether certain. The House debate appears in 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES (Gales and Seaton, 1834) (1789), *also available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=381 [hereinafter "ANNALS"]. It is drawn from the observations of visitors, much of which is taken from the notes of newspaper reporter Thomas Lloyd. The Senate debates were closed to visitors, so all that we have to go on is the minutes of the Secretary to the Senate which recorded only committee reports, motions, and votes. As to the reliability of the congressional record, *see* James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TX. L. REV. 1 (1986); Marion Timling, *Thomas Lloyd's Reports of the First Federal Congress*, 18 WM. & MARY Q. 519 (1961).

[146] MILLER, MAY NEXT, *supra* note 22, at 252; BRANT, *supra* note 123, at 264-65.

entirely of his own creation, such as those rights limiting state powers.[147] No one else soon to join the First Federal Congress was as diligent as Madison; thus, his sifting and sorting was equally important with respect to those proposed state amendments he left out.[148]

In chronological order of their consideration for adoption, the state amendments on religious freedom that Madison would have had before him were from New Hampshire, Virginia, New York, and North Carolina. Madison may have also had copies of the failed amendments from Pennsylvania, Maryland, and Massachusetts.

A. Before the House of Representatives

May 4, 1789

James Madison first announced his intention to have the House of Representatives adopt amendments to the 1787 Constitution:

> Before the House adjourned, Mr. Madison gave notice that he intended to bring on the subject of amendments to the constitution, on the 4th Monday of this month.[149]

Madison made this announcement because he had advanced knowledge of a letter to be presented the next day by his fellow Virginian, Theodoric Bland.[150] The letter was known to be hostile to Madison's efforts.

May 5, 1789

A letter sent to the federal House of Representatives by the Virginia House of Delegates and Virginia Senate sparked a discussion in the federal House over how the amendment process should be handled. Because the letter requested a second constitutional convention, the House members argued over whether such a convention could be called by Congress or if the state-proposed amendments should be referred to a House committee of the whole. An excerpt of the discussion follows:

> After the reading of this application,

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[147] BRANT, *supra* note 123, at 265.

[148] MILLER, MAY NEXT, *supra* note 22, at 252. Half way through the amendment drafting process others in Congress wanted to go back and review the state-proposed amendments that Madison had passed over, but by then the majority in Congress was in no mood for further delay. BRANT, *supra* note 123, at 273-74.

[149] 1 ANNALS, *supra* note 145, at 257. There are two printings of the first two volumes of the ANNALS. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1426 n.84 (1990) [hereinafter "McConnell, *Origins of Free Exercise*"]. The citations here are to the version with the running head "Gales & Seaton's History of Debates in Congress." Readers with the version having the running head "History of Congress" can find parallel passages by reference to the given date.

[150] BRANT, *supra* note 123, at 264. Theodoric Bland was an Antifederalist and urged consideration of the amendments proposed by Virginia. Although he opposed ratification of the 1787 Constitution, he later supported Virginia's ratification of the Bill of Rights. GEORGE LANKEVICH, ROOTS OF THE REPUBLIC: THE FIRST HOUSE OF REPRESENTATIVES AND THE BILL OF RIGHTS 116 (1996) [hereinafter "LANKEVICH"].

> Mr. Bland: Moved to refer it to the Committee of the whole on the state of the Union.
> Mr. Boudinot:[151] According to the terms of the Constitution, the business cannot be taken up until a certain number of States have concurred in similar applications; certainly the House is disposed to pay a proper attention to the application of so respectable a State as Virginia, but if it is a business which we cannot interfere with in a constitutional manner, we had better let it remain on the files of the house until the proper number of applications come forward.
>
> . . .
>
> Mr. Madison said, he had no doubt but the House was inclined to treat the present application with respect, but he doubted the propriety of committing it, because it would seem to imply that the House had a right to deliberate upon the subject. This he believed was not the case until two-thirds of the State Legislatures concurred in such application, and then it is out of the power of Congress to decline complying, the words of the Constitution being express and positive relative to the agency Congress may have in case of applications of this nature. "The Congress, wherever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution; or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments."[152] From hence it must appear, that Congress have no deliberative power on this occasion. The most respectful and constitutional mode of performing our duty will be, to let it be entered on the minutes, and remain upon the files of the House until similar applications come to hand from two-thirds of the States.[153]

Eventually the Virginia letter was entered into the JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, and the original was placed in the files of Congress.[154]

* * *

It will be helpful at the outset of the House and latter Senate debates to identify the major cross-currents among scholars with respect to the Bill of Rights and church-government relations. One current comes under the heading of "nonpreferentialism," another under "specific federalism," and a third under the "scope" of the power that was denied to the federal government. These three disputes are taken up in this Article's Part

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[151] Elias Boudinot was a Federalist from New Jersey and an evangelical. *Id.* at 68-69.
[152] Quoting U.S. CONST. art. V.
[153] 1 ANNALS, *supra* note 145, at 260 (May 5, 1789).
[154] *Id.* at 261 (May 5, 1789). *See also* 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 28 (Gales and Seaton 1826) (May 5, 1789), *also available at* http://memory.loc.gov/cgi-bin/ampage?collId=llhj&fileName=001/llhj001.db&recNum=26&itemLink=D?hlaw:6:./temp/~ammem_uEHk::%230010027&linkText=1 (lasted visited July 2, 2010) [hereinafter "HOUSE JOURNAL"].

III. A fourth cross-current, which this Article takes up in Part IV, is whether the religion clauses of the First Amendment only protect liberty of conscience.

The scope of the text in the state-proposed amendments from Maryland and New Hampshire would have altogether disempowered Congress from establishing a "national religion" (Maryland) or enacting any law "touching religion" (New Hampshire). The scope of the Maryland disempowerment was very narrow, whereas the New Hampshire disempowerment was very broad. By way of contrast, the scope of text in the state-proposed amendments from Virginia, New York, and North Carolina would not prohibit the federal government from aiding religion so long as the aid was available to all religions without preference. For example, the federal government could aid all religions, without preferring or establishing any, by offering annual $1,000 cash payments to all clerics or other ecclesiastical leaders. The scope of the no-preference language from these three states raises the question of whether their proposed amendments were meant to imply that Congress retained the power to aid religion—delegated to Congress somewhere in the original 1787 Constitution—so long as it did so without preferring some religions over others.

This latter claim, called nonpreferentialism, is paradoxical insofar as these three state-proposed amendments were being put forward by Antifederalists. As discussed above, Antifederalists wanted to reduce the power of Congress not increase it. Yet, to embody nonpreferentialism in the Bill of Rights would seemingly increase federal power over religion. While some Antifederalists would have preferred a multi-establishment, they were aware of America's religious pluralism as one moved along the Atlantic seaboard, including religious opposition to establishmentarianism of any sort, and thus any such multi-establishment was possible only at a state level.[155] Moreover, from the perspective of the Federalists, nonpreferentialism makes little sense because Federalists were consistent in arguing James Wilson's point that nothing in the 1787 Constitution delegated to Congress—even by implication—the power to intermeddle with religion. If the power is not delegated, it is denied. And that was made explicit in the Tenth Amendment. The Wilsonian argument would necessarily include no power in the 1787 Constitution to aid all religions without preference. Finally, as we shall see below, there is little in the congressional debates indicating that there was a serious push for permitting federal support for religion so long as no particular religion was preferred. Madison's initial draft amendment ignored the no-preference texts from Virginia, New York, and North Carolina. Federalists were entirely in control of the amendment process in both chambers, and when no-preference texts were suggested in the Senate they were eventually voted down.

Nonpreferentialism is problematic for an additional reason. A more obvious solution for Antifederalists to achieve their goal of reclaiming state power was a federal amendment that expressly disempowered Congress when it came to the establishment of any or all religions, thereby leaving relations between church and government entirely in the jurisdiction of the states. Moreover, the New England Federalists would have been open to such an approach as they did not want the federal government intermeddling in the advantages enjoyed by the Congregational Church in Connecticut, Massachusetts, and New Hampshire. These three states had mandatory religious assessments (taxes) at the local level, but a taxpayer could designate his assessment to the church of his choice. In

[155] Munoz, *Original Meaning*, *supra* note 44, at 585, 617.

practice, this worked to the advantage of the far more numerous Congregationalists. Such an amendment would also serve the interests of those like James Madison who wanted to keep the federal government altogether out of the matter of establishing religion. Once again, Federalists were entirely in control of the parliamentary procedure so what they wanted would have held sway. But if Antifederalists' concerns could also be met by the Federalists inserting a specific text in the amendment on religious freedom, then all the better for the eventual success of the needed state ratification of the amendments. Thus, there were multiple reasons all around to avoid nonpreferentialism.

That the First Amendment, along with all of the other provisions of the Bill of Rights, was in 1789 meant to bind only the new federal government was not a source of contention in 1789, nor is it a matter of contention today.[156] It will be referenced here as the "general federalist" character of the Bill of Rights. What is presently contended among scholars is whether the final text of the Establishment Clause, introduced for the first time at the House-Senate Conference Committee, worked into the wording of the clause a new participial phrase ("respecting an establishment") that was specifically designed to preserve state sovereignty over religious establishment. This I call "specific federalism." Specific federalism is a unique claim. The theory attributes to the Establishment Clause alone a federalist character, not to free exercise, free speech, free press, or other provisions in the first eight amendments. The difference between the federalist character of the Bill of Rights generally and specific federalism became important only in the mid-Twentieth Century when the United States Supreme Court faced the question of whether to "incorporate" the Establishment Clause as a "liberty" through the Due Process Clause of the Fourteenth Amendment, thereby making its restraints applicable to state and local governments.[157]

Thirdly, there is the question with respect to the "scope" of the congressional disempowerment in the Establishment Clause. When Congress (and by extension, the Executive or Judicial Branches)[158] exercised one of its clearly delegated powers to make law, the more foresighted in the First Congress could envision instances when legislation sometimes would have an incidental effect on religion. For example, a congressionally adopted copyright law[159] would necessarily raise the question of whether a new translation of the Bible could be copyrighted. Or assume that in formulating the legislation to implement the constitutionally required census[160] a decision is made that one item usefully surveyed is the trades and professions of Americans. That necessarily means counting those Americans who are professional clerics or otherwise employed in fulltime religious service. So the census would touch on religion. That raises a question

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[156] When the issue came before the U.S. Supreme Court, it had little trouble holding that the Bill of Rights was not binding on state and local governments. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). In an opinion by Chief Justice John Marshall, the Court said that the question was "of great importance" but "not of much difficulty." *Id.* at 247.

[157] The Supreme Court's incorporation of the Establishment Clause, making it a restraint on state and local governments, first took place in *Everson v. Board of Ed.*, 330 U.S. 1, 14-15 (1947).

[158] Although the text says "Congress," it is widely agreed that the prohibitions in the First Amendment run against all three branches of the federal government. Congress makes the laws, to be sure, but the Executive enforces them and the Judiciary interprets them.

[159] *See* U.S. CONST. art. I, § 8, cl. 8 (Congress shall have the power "To promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

[160] *See* U.S. CONST. art. I, § 2, cl. 3.

whether the census with respect to religious vocations falls within the scope of the no-establishment disempowerment, and thus is prohibited as an object of congressional power.[161] The First Federal Congress, as we shall see, finally settles on the scope of the disempowerment being laws "respecting an establishment of religion," the meaning of which is revealed in part by the congressional debates.

* * *

With that preview of the issues of nonpreferentialism, specific federalism, and scope of disempowerment in mind, we now turn to the Bill of Rights debate in the House as it began in early June 1789.

June 8, 1789

James Madison addressed the House on the subject of amendments to the Constitution. Madison moved that the House resolve itself as a committee of the whole to consider his proposed amendments, but this was resisted. It was resisted by both New England Federalists, who thought amendments a waste of time, and Antifederalists, who wanted a second constitutional convention to consider both a Bill of Rights and structural amendments favoring state power.[162]

Madison sought to bring the ensuing controversy to an end by withdrawing his motion, and then moving to have the House appoint a select committee to consider the proposed amendments.[163] He continued by remarking on the important role the amendments would play "to limit and qualify the powers of the Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode." Accordingly, the proposed amendments were not designed to vest new substantive powers in the national government, but to clearly state what powers did not lay with Congress as a result of the 1787 Constitution. Accordingly, the amendments took power away from the new national government (in the view of the Antifederalists) or merely clarified the limited delegation of powers in the 1787 Constitution (in the view of the Federalists). That was a much easier task.[164] Madison also stressed that the amendments were to "satisfy the public mind" worried about the lack of a Bill of Rights, and to thereby gain the peoples' backing for the new government.[165] After all, six states had ratified only upon the promise that a Bill of Rights would be forthcoming.

Madison then gave the proposed amendments their initial reading, from which we get a glimpse of the provisions addressing religious freedom (and of particular interest the no-establishment phrase), in their earliest form. Madison's amendments were proposed as interlineations into the existing text of the 1787 Constitution, as opposed to a

[161] A situation similar to this actually occurred when James Madison was President. Madison saw to it that the census bureau not catalogue religious professions because of his view of the restraints on Congress imposed by the Establishment Clause. *See* BRANT, *supra* note 123, at 272.
[162] See the debate involving Messrs. Smith, Jackson, Madison, Goodhue, Burke, Sherman, White, Page, and Vining. 1 ANNALS, *supra* note 145, at 441-48 (June 8, 1789). *Cf.* BRANT, *supra* note 123, at 264, 267-68.
[163] 1 ANNALS, *supra* note 145, at 448 (June 8, 1789).
[164] *See supra* note 7 (quoting CURRY, FIRST FREEDOMS, at 193-94).
[165] 1 ANNALS, *supra* note 145, at 453-59 (June 8, 1789).

list of amendments at the end of the document.[166] By inserting what later became the First Amendment into Article I, § 9, Madison's clear intent was that the amendment is a disempowerment of federal power, not a vesting of any new congressional federal power.

> The amendments which have occurred to me, proper to be recommended by Congress to the State Legislatures, are these:
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> . . .
>
> Fourthly. 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 on any pretext, infringed.**
>
> . . .
>
> The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but **no person religiously scrupulous of bearing arms shall be compelled to render military service in person**.
>
> . . .
>
> Fifthly. That in article 1st, section 10, between clauses 1 and 2, 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.[167]

Madison's proposed Fourth Article does not resemble in the least any of the state-proposed amendments.[168] In particular, he avoids the explicit no-preference language from Virginia, New York, and North Carolina. And the no-establishment scope is narrow ("no national religion"). The amendment is overly wordy, with the first and last parts addressing the relationship between the government, religion, and the individual, whereas church-government relations occupy the middle.

As we shall see, stylistic changes—and more—are in the offing to substantially alter the text concerning relations between the individual and government. One occasionally happens upon loose thinking to the effect that because Madison was first to introduce the religious freedom amendment that he is the author (or "father") of the Establishment Clause. Closer to the mark is that Madison gave continuing and close attention to the text of the religious freedom amendment, and thus the text that emerged on September 24-25 had his fingerprints on it. Indeed, from Madison's perspective the no-establishment version that was reported out to the states in late September was much improved over what he first offered in June.

Madison's initial treatment of church-government relations is brief ("nor shall any national religion be established"), with considerable but undefined weight placed on

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[166] The interlineations were later changed at the insistence of others in the House, in particular Roger Sherman. BRANT, *supra* note 123, at 268, 275.

[167] 1 ANNALS, *supra* note 145, at 451-52 (June 8, 1789) (emphasis added when the amendments touch on religious freedom).

[168] The no-establishment text in Madison's version does resemble the amendment voted down in Maryland. *See supra* note 95 and accompanying text.

what is meant by the word "established."[169] On June 8th its meaning is not a subject of any remarks by Madison. One reading is that the text prohibits Congress from establishing one national religion, thereby implying Congress is open to establishing all religions. There are problems with that reading.[170] Those of the nonpreferentialist view, however, note that a more plausible reading is that, while Congress is prohibited from establishing any religion, there is an implied congressional power (stopping short of an establishment) to aid all religions without preference. For example, by implication the amendment does not prohibit Congress from appropriating an annual $1,000 cash supplement to all clerics and other ecclesiastical leaders. Such an appropriation would fall short of establishing religion and thus by implication be permitted by Madison's proposed text. However, the text does not require equal treatment, so the argument proves too much for nonpreferentialists because the text is also open by implication to government aiding some clerics with $1,000 payments but $500 to others or nothing at all.

In his explanation of the other amendments, Madison did remark on the proposed Fifth Article of Amendment which would bind *states* with respect to the equal rights of conscience, along with the rights of press and jury trials in criminal cases. This was the only amendment proposed by Madison that was binding on the states. It is noteworthy that with respect to the states Madison only attempts an amendment to safeguard conscience, i.e., the relationship between government, religion, and the individual. There was a broader consensus in America on the protection of conscience. Madison knew that

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[169] Professor John Witte suggests the following meaning for "establishment" as a beginning point in defining the term as it was understood in 1789:

> [T]the founders understood the *establishment* of religion to mean the actions of government to "settle," "fix," "define," "ordain," "enact," or "set up" the religion of the community – its religious doctrines and liturgies, its religious texts and traditions, its clergy and property. The most notorious example of this, to their minds, was the establishment by law of Anglicanism. English ecclesiastical law formally required use of the Authorized (King James) Version of the Bible and of the liturgies, rites, prayers, and lectionaries of the *Book of Common Prayer*. It demanded subscription to the Thirty-Nine Articles of Faith and the swearing of loyalty oaths to the Church, Crown, and Commonwealth of England. When such ecclesiastical laws were rigorously applied – as they were in England in the early Stuart period of the 1610s to 1630s, and again in the Restoration of the 1660s to 1670s, and intermittently in the American colonies – they led to all manner of state controls of the internal affairs of the established Church, and all manner of state repression and coercion of religious dissenters.

JOHN WITTE JR., GOD'S JOUST, GOD'S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION 186 (Eerdmans 2006) [hereinafter "WITTE, GOD'S JOUST"]. Professor Michael McConnell identifies six elements of the Church of England establishment in England and the colonies: governmental control over the doctrines, structure, and personnel of the state church; mandatory attendance at religious worship services in the state church; public financial support; prohibition of religious worship in other denominations; use of the state church for civil functions; and limitation of political participation to members of the state church. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131, 2144, 2146, 2159, 2169, and 2176 (2003).

[170] A more natural reading of Madison's text ("nor shall any national religion be established") is that the use of "any" means that the establishment of one or more religions is prohibited. Thus, if Congress had established the Episcopal, Methodist, and Congregational churches, that would constitute three violations of the no-establishment principle in the amendment. Likewise, to establish all religions would be a multiple violation of the amendment.

there was no way he could get an amendment disestablishing Congregationalism in New England. Such an amendment would address the relationship between state government and the churches, a matter of sharp contention that Madison knew to avoid.

> I wish also, in revising the constitution, we may throw into that section, which interdicts the abuse of certain powers in the State Legislatures,[171] some other provisions of equal, if not greater importance than those already made. The words, "No State shall pass any bill of attainder, *ex post facto* law," &c. were wise and proper restrictions in the constitution. I think there is more danger of those powers being abused by the State Governments than by the Government of the United States. The same may be said of other powers which they possess, if not controlled by the general principle, that laws are unconstitutional which infringe the rights of the community. I should therefore wish to extend this interdiction, and add, as I have stated in the 5th resolution, that **no State shall violate the equal right of conscience**, freedom of the press, or trial by jury in criminal cases; because it is proper that every Government should be disarmed of powers which trench upon those particular rights.[172]

After further explanation with respect to his proposed amendments before the House, Madison closes by again moving for the appointment of a select committee "to consider of and report such amendments as ought to be proposed by Congress to the Legislatures of the States, to become, if ratified by three-fourths thereof, part of the constitution of the United States."[173] Those seeking delay still resisted. So Madison withdrew that motion and simply moved the adoption of his entire set of proposed amendments. The threat of bringing matters to an immediate head produced quick results.[174] The House promptly voted to refer the amendments to a committee of the whole and then adjourned for the day.[175] The House did not return to the matter of amendments until mid-July,[176] testing Madison's patience.

July 21, 1789

Madison "begged" the House to take action on the subject of the amendments.[177] The House responded by referring the matter to a Select Committee of Eleven members, one from each state.[178] The Select Committee consisted of Messrs. Vining, Madison, Baldwin, Sherman, Burke, Gilman, Clymer, Benson, Goodhue, Boudinot, and Gale.[179]

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[171] This is a reference to U.S. CONST. art. I, § 10.
[172] 1 ANNALS, *supra* note 145, at 450-58 (June 8, 1789) (emphasis added).
[173] 1 ANNALS, *supra* note 145, at 459 (June 8, 1789).
[174] BRANT, *supra* note 123, at 264.
[175] 1 ANNALS, *supra* note 145, at 467–68 (June 8, 1789).
[176] *Id.* at 685-86 (July 21, 1789).
[177] *Id.* at 685 (July 21, 1789). *See*, *e.g.*, BRANT, *supra* note 123, at 267 (quoting a private letter by Fisher Ames of Massachusetts, a Federalist, to the effect that Madison was seeking popularity while largely wasting Congress' time).
[178] 1 ANNALS, *supra* note 123, at 685–86 (July 21, 1789). At this time in their careers all members of the committee were Federalists except for Aedanus Burke of South Carolina, and even Burke supported the Bill of Rights. *See* LANKEVICH, *supra* note 150, at 27, 36, 38, 45, 54, 63, 68, 74, 92, 106, 123. Concerning the composition of this select committee, see Ronald J. Krotoszynski, Jr., *If*

July 28, 1789

The Select Committee of Eleven acted with dispatch by reporting back in just one week. It issued its report on this day to the entire House, where the report is tabled without discussion.[180] The phrases on religious freedom, as emerging from the Select Committee, are not just simplified but are materially altered with respect to religion and matters of conscience. The report read:

> **Fourth. No religion shall be established by law, nor shall the equal rights of conscience be infringed.**[181]
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> . . .
>
> A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; **but no person religiously scrupulous shall be compelled to bear arms.**[182]
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> . . .
>
> **Fifth. No State shall infringe the equal rights of conscience,** nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases.[183]

The text produced by the Select Committee returned to a clear pattern of two relationships: first that of government and organized religion and then that of government and individual conscience. As to church-government relations, the word "national" was omitted, probably because it was redundant. The provision was, after all, to be inserted into Article I, Section 9, of the Constitution, and that section spoke to limits only on the national government. The real scope of the restraint still lay with the meaning of

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Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith, 102 NW. U. L. REV. 1189 (2008):

> Given that the Framers established the House of Representatives on a basis of proportional representation, it was, at least superficially, odd to assign such an important task to a committee that did not itself reflect proportional representation of the states. On reflection, however, because ratification of amendments would require the consent of three-fourths of the state legislatures (or conventions in the states called for the purpose of considering the amendments), it undoubtedly made sense to create a committee constituted in a fashion that would lead to the drafting of amendments that might enjoy the broadest support among the states. A committee dominated by members from more populous states, such as Virginia, New York, and Massachusetts, might not be as effective at crafting amendments likely to secure the necessary support to ensure ratification.

Id. at 1254.

[179] 1 ANNALS, *supra* note 145, at 690–91 (July 21, 1789). John Vining, a Federalist from Delaware, was designated chair and Madison vice-chair. BRANT, *supra* note 123, at 268. Although chair of the Select Committee, Vining is known to have thought the House could better spend its time on legislative matters. *See* LANKEVICH, *supra* note 150, at 36.

[180] 1 ANNALS, *supra* note 145, at 699 (July 28, 1789).

[181] *Id.* at 757 (August 15, 1789) (emphasis added).

[182] *Id.* at 778 (August 17, 1789) (emphasis added).

[183] *Id.* at 783 (August 17, 1789) (emphasis added).

"established." Thus, the no-establishment alterations by the Select Committee were stylistic.[184] Not so with respect to the relationship between the federal government and individual conscience. No longer were the "full and equal rights of conscience" protected, but only the "equal rights" thereof. Further, the reference to "religious belief and worship" not being abridged was omitted. The latter change appears to be for reasons other than just brevity. "Religious belief and worship" are easily said to be subsumed into the "full rights of conscience," but it is less convincing to say they are subsumed into the mere "equal rights" of conscience.

August 13-14, 1789

Richard Bland Lee[185] moved for the House to resolve itself into a Committee of the Whole to consider the amendments. Working as a Committee of the Whole permitted agreement on the text of each amendment by a mere majority vote. Once the draft amendments were reported by the Committee to the entire House, adoption of each amendment would require passage by a two-thirds vote.[186] Having so resolved, the Committee of the Whole began by discussing the preamble to the Articles of Amendment.[187] The next day, August 14th, the Committee of the Whole resumed consideration of the amendments, debating matters unrelated to the proposals concerning religious freedom.[188]

August 15, 1789

The debate by the House, still sitting as a Committee of the Whole, turned for the first time to the no-establishment provision. It was the longest discussion of the no-establishment principle in the House, with the House ultimately adopting an amended version proposed by Mr. Samuel Livermore. The debate unfolded as follows:

> The House again went into a Committee of the whole on the proposed amendments to the constitution, Mr. Boudinot in the chair.
>
> The fourth proposition being under consideration, as follows:
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> Article 1. Section 9. Between paragraphs two and three insert **"no religion shall be established by law, nor shall the equal rights of conscience be infringed."**

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[184] Those of the "no preference" view can still claim that the restraint ("no religion shall be established by law") prohibits only religious establishments, thereby leaving open by implication that the federal government could aid religion (while stopping short of establishment) so long as none is preferred. Once again, however, the text does not require equal treatment. Thus, the argument proves too much because the government is also open by implication to aid some religions but not others.

[185] Richard Bland Lee was a Federalist from Virginia. *See* LANKEVICH, *supra* note 150, at 121.

[186] *See* U.S. CONST. art. V.

[187] 1 ANNALS, *supra* note 145, at 730-44 (August 13, 1789). *"Resolved by the Senate and the House of Representatives of the United States in Congress assembled*, That the following articles be proposed as amendments to the constitution, and when ratified by three-fourths of the State Legislatures shall become valid to all intents and purposes, as part of the same." *Id.* at 735.

[188] 1 ANNALS, *supra* note 145, at 745-57 (August 14, 1789).

> Mr. Silvester[189] had some doubts of the propriety of the mode of expression used in this paragraph. He apprehended that it was liable to a construction different from what had been made by the committee. He feared it might be thought to have a tendency to abolish religion altogether.[190]

Peter Silvester's remark is doubly puzzling. The Select Committee's draft amendment is rightly said to "abolish establishment," but it surely did not "abolish religion." Moreover, the Select Committee's amendment unquestionably applied only against the federal government given its placement in Section 9 of Article I, whereas all then existing juridical interactions with religious establishments in America were at the state level. Silvester was a Federalist from New York. New York had completed its disestablishment in 1777, albeit as was the case most everywhere at this time Christianity continued to be favored in lesser ways.[191] Silvester could not have been out to protect a state established church in his home state. Accordingly, Silvester's "apprehensions" and "fears" make sense only if his concern is that the amendment's text ("no religion shall be established by law") is understood as "abolishing religion" even at the state level by either doing away with favoritism toward Christianity or affirmatively driving religion entirely out of the public square where it otherwise would wax or wane based on its own merit and appeal. The latter reading is highly extreme, essentially a federal establishment of secularism. Such hostility toward religion was evident in the then ongoing French Revolution but not in the American Revolutionary settlement. The debate continued as follows:

> Mr. Vining[192] suggested the propriety of transposing the two members of the sentence.
>
> Mr. Gerry[193] said it would read better if it was, that **no religious doctrine shall be established by law.**[194]

Elbridge Gerry's suggestion is an attempt by an Antifederalist to define "establishment" narrowly, confining it to the legal codification of a religious creed. His proposal goes to the scope of the disempowerment of Congress. Gerry was ignored by the Federalists. The debate continues:

> Mr. Sherman[195] thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by

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[189] Peter Silvester was a Federalist from New York. *See* LANKEVICH, *supra* note 150, at 81.
[190] 1 ANNALS, *supra* note 145, at 757 (August 15, 1789) (emphasis added).
[191] Esbeck, *Dissent and Disestablishment*, *supra* note 8, at 1480.
[192] John Vining was a Federalist from Delaware and an Episcopalian. *See* JOHN A. MUNROE, HISTORY OF DELAWARE 85 (2006).
[193] Elbridge Gerry was an Antifederalist from Massachusetts and an Episcopalian. *See* LANKEVICH, *supra* note 150, at 52-53; M.E. BRADFORD, A WORTHY COMPANY 6 (1982) (listing Gerry as an Episcopalian) [hereinafter "BRADFORD"].
[194] 1 ANNALS, *supra* note 145, at 757 (August 15, 1789) (emphasis added).

> the constitution to make religious establishments; he would, therefore, move to have it struck out.
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> Mr. Carroll.[196] – As the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand; and as many sects have concurred in opinion that they are not well secured under the present constitution, he said he was much in favor of adopting the words. He thought it would tend more towards conciliating the minds of the people to the Government than almost any other amendment that he had heard proposed. He would not contend with gentlemen about phraseology, his object was to secure the substance in such a manner as to satisfy the wishes of the honest part of the community.[197]

Roger Sherman was a Federalist from Connecticut who thinks the amendment process a waste of time because the 1787 Constitution delegated no congressional authority to establish religion. Again, this is the Wilsonian argument. Daniel Carroll was a Federalist as well. However, he was also a Roman Catholic from Maryland. At the time, Catholics were a small minority in America. They were widely discriminated against, albeit much less so in Maryland, which at its founding was a refuge for Catholics leaving Great Britain.[198]

Here, Carroll rises to answer Sherman and reassure the House that many well-meaning Americans, not just a few dissenters in New England, are sincerely fearful because the 1787 Constitution lacks a Bill of Rights, and such is of particular concern to religious minorities throughout the states.

Madison responded to the puzzling remarks earlier by Peter Silvester of New York, as well as those of Roger Sherman of Connecticut, as follows:

> Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion; to

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[195] Roger Sherman was a Federalist from Connecticut and a Congregationalist. *See* LANKEVICH, *supra* note 150, at 22-23; BRADFORD, *supra* note 193, at 22 (listing Sherman as a Congregationalist).

[196] Daniel Carroll was a Federalist from Maryland and a Roman Catholic. *See* LANKEVICH, *supra* note 150, at 42-43.

[197] 1 ANNALS, *supra* note 145, at 757-58 (August 15, 1789).

[198] Esbeck, *Dissent and Disestablishment*, *supra* note 8, at 1484.

> prevent these effects he presumed the amendment was intended, and he thought it well expressed as the nature of the language would admit.[199]

Madison makes three points in this reply. The first is that the no-establishment text limits only Congress. Thus state establishments or other forms of religious favoritism with respect to religion are left undisturbed by the amendment. This is general federalism that is uncontested today but was apparently a point of confusion for Silvester. Again, while not entirely clear, Silvester seemed to think the amendment would apply to restrict the states. As a Federalist, Madison is still unwilling to say that the no-establishment text is necessary; in this he agreed with Roger Sherman's earlier remark.[200] But Madison notes that several state-proposed amendments suggested that an amendment was prudent, thus many Americans needed reassuring.[201]

Second, Madison notes that some of the fears expressed in the state constitutional conventions were not about the abuse of power expressly delegated to the federal government but in the incidental "effects" on both conscience and no-establishment that the use of Congress' delegated powers might have. The Necessary and Proper Clause[202] had been singled out by opponents, notes Madison, as one source of such detrimental "effects." Thus, it can be said that one of the issues expressly thought about by the First Congress is how congressional action pursuant to its delegated powers may have incidental—and indeed detrimental—effects on religious freedom. Whatever the detrimental effects of Congress' powers on conscience or no-establishment, real or imagined, Madison argued that the proposed amendment was a corrective.

Madison's third point, this also in reply to Silvester, is that the amendment not only restrains a congressional establishment of religion but, in his opinion, also restrains the federal government from enforcing the "legal observation of [religion] by law." This helps to define "establish[ment]" in Madison's thinking. The remark has Madison saying that the scope of the proposed text is not just a bar to a full-fledged establishment but the amendment also disempowers Congress to legislate particular elements ("legal observation … by law") of a fully developed establishment. As we have seen, the Church of England, the religious establishment most familiar to the founders, had multiple elements where particular observances of the Church of England were compelled by law.[203]

In the course of this colloquy, Madison says that he apprehended the meaning of the no-establishment text as "Congress should not establish a religion," and to not "establish a national religion." These remarks are taken by some as narrowing the

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[199] 1 ANNALS, *supra* note 145, at 758 (August 15, 1789).

[200] At this point in his public life Madison worked with Federalists to not diminish the powers delegated to the central government. In the struggle for ratification of the 1787 Constitution, the most effective argument by the Antifederalists was that it lacked a Bill of Rights. Federalists, such as Madison, responded that a declaration of rights was unnecessary because of the limited powers delegated to the new central government. In the debates recorded here in 1789, Madison is careful to not take a position contrary to the one he had maintained during 1787-1788.

[201] As discussed earlier, New Hampshire, Virginia, New York, and North Carolina had all proposed language for a religious freedom amendment.

[202] *See* U.S. CONST. art. I, § 8, cl. 18.

[203] Professors Witte and McConnell indicate that a fully developed establishment had multiple elements. *See supra* note 169.

understanding of the amendment's text. By implication, they say, Congress is left free to establish multiple religions or all religions. Not only is such a narrow reading inconsistent with Madison's well-known views on church-state relations both before and after this debate, but those of the nonpreferentialist view can claim no solace in this narrow understanding because it attributes to the amendment a meaning more narrow than nonpreferentialism.[204] That is, it proves too much to buttress their theory.

The debate continues as follows:

> Mr. Huntington[205] said that he feared, with the gentleman first up on this subject [Mr. Silvester], that the words ["no religion shall be established by law"] might be taken in such latitude as to be extremely hurtful to the cause of religion. He understood the amendment to mean what had been expressed by the gentleman from Virginia [Mr. Madison]; but others might find it convenient to put another construction upon it. The ministers of their congregations to the Eastward [i.e., Huntington's Connecticut] were maintained by the contributions of those who belonged to their society; the expense of building meeting-houses was contributed in the same manner. These things were regulated by bylaws. If an action was brought before a Federal Court on any of these cases, the person who had neglected to perform his engagements could not be compelled to do it; for a support of ministers, or building of places of worship might be construed into a religious establishment.
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> By the charter of Rhode Island, no religion could be established by law; he could give a history of the effects of such a regulation; indeed the people were now enjoying the blessed fruits of it.[206] He hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all.
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> Mr. Madison thought, if the word **national** was inserted before **religion**, it would satisfy the minds of honorable gentlemen. He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to

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[204] *See* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 891-93 (1985/1986) [hereinafter "Laycock, *Nonpreferential Aid*"].

[205] Benjamin Huntington was a Federalist from Connecticut and a Congregationalist. *See* LANKEVICH at 26; *Religious Affiliation of the Senators and Representatives in the First United States Congress, available at* http://www.adherents.com/gov/congress_001.html (last visited June 12, 2010) (listing Huntington as a Congregationalist, the established church in the parishes of Connecticut).

[206] This is an unflattering remark directed at Rhode Island about the effects on the state of never having had an establishment. *See* McConnell, *Origins of Free Exercise*, *supra* note 149, at 1426 n.84, 1427 ("In fact, far from being a positive example, Rhode Island was the pariah among the colonies, with a reputation for disorder and instability: 'During and after the colonial period, Rhode Island, "the licentious Republic" and "sinke hole of New England," was an example to be shunned.'").

> conform. He thought if the word **national** was introduced, it would point the amendment directly to the object it was intended to prevent.[207]

Benjamin Huntington, a Federalist from Connecticut, here shared Peter Silvester's confusion that the no-establishment text could be construed to be "hurtful to the cause of religion" in the states.[208] Huntington wanted to shield the Connecticut church-state arrangement favoring the Congregational Church, but this arrangement was left untouched because the proposed amendment was binding only on the federal government. This is the general federalism on which there is no present-day disagreement. As with Peter Silvester, Huntington's fear makes sense only if he was being overly cautious that the amendment's text not be misconstrued as being binding on the states.[209] Huntington goes on to supply an illustration of such a misconstruction. He thinks the amendment could be read to essentially overturn Connecticut's religious assessment law. The law, like that in Massachusetts and New Hampshire, operated at the local level to provide tax support for churches. The assessment was mandatory, but each taxpayer could direct the amount assessed to the church of his choice. Because each taxpayer could direct the amount of the assessment to the church of his choice, Congregationalists like Huntington did not believe that the tax was a violation of conscience. Nor did Congregationalists think such assessments constituted an establishment of religion.[210] Huntington makes that clear in his remarks saying he supports "the rights of conscience," and fears only that the religious assessment "might be construed into a religious establishment" by others.

Baptists in New England disagreed with Huntington, as he was likely aware. First, Baptists believed that church contributions must be voluntary, and thus the mandatory assessment was an affront to religious conscience even when the money was ultimately paid over by the state to the Baptist Church. Second, in practice the assessment law worked to the advantage of the Congregational Church. The Congregationalists overwhelmingly dominated in the number of its followers, and they received assessments from those who were marginally religious but not wanting to be

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[207] 1 ANNALS, *supra* note 145, at 758-59 (August 15, 1789) (emphasis added).

[208] Historian Thomas Curry interprets Huntington's remarks as being fearful that the proposed amendment gave Congress the power to interfere with state establishments. CURRY, FIRST FREEDOMS, *supra* note 7, at 202-03. If correct, Curry's view would help bolster the "specific federalism" argument. But neither Silvester nor Huntington mention any concern about congressional power being impliedly vested by the amendment to overturn establishments at the state level. Rather, their concern is focused on the wording of the amendment itself and how that wording might be misconstrued to restrain the states. The Silvester/Huntington fear was that the self-operative text of the amendment limited the states, not what Congress might do with the amendment.

[209] Huntington's fear of misconstruction of the amendment's text as directly operative against states is also evident by his sarcastic remark concerning Rhode Island and how disestablishment there had only led to degradation of the morals of Rhode Island citizens. Huntington again has his facts wrong. The Rhode Island charter did not by its terms prohibit an establishment. That does not take away from Huntington's point, however, for Rhode Island never had an establishment. Nor was there any sentiment in the state for starting one. Much of New England had distain for the moral character of Rhode Island's people and attributed it to the state's lack of support for religion.

[210] Congregationalists contrasted their religious assessment laws with "true establishments" such as the Church of England in Great Britain. *See* CURRY, FIRST FREEDOMS, *supra* note 7, at 131-32.

viewed as such. Understandably, Baptists argued that this arrangement was not only a violation of conscience but also an establishment of the Congregational Church.

To illustrate his concern over the amendment being misconstrued, Huntington hypothesizes a lawsuit in Connecticut filed in federal court where the claim involved the nonpayment by a citizen of his tax assessment.[211] Huntington assumes that a federal judge assigned the case would have to follow the Bill of Rights. However, the proposed amendment did not bind the states. This general federalism, however, was a point on which Huntington (like Silvester) was confused.

Of greater interest is Madison's passing contemplation during the foregoing exchange with respect to the scope of the amendment. He said that the proposed amendment would bar not just the establishment of a single sect, but also an establishment of multiple sects that combined together to achieve such an objective. Thus, Madison's focus went beyond a single national church establishment. For example, he also sought to prohibit several Protestant churches combining to form a national establishment. Nonpreferentialists claim Madison's remarks as helping their cause by implying that Congress could aid all religions without favor to any, while stopping short of a full establishment. However, once again there are two problems with this claim: their reading would also imply congressional power to aid two or three churches while stopping short of a no-preference rule, and the reading does not take into account Madison's broader and well-known view of church-state separation.

Rather than quarrel with Huntington and Silvester about their confusion over the amendment applying to the states, Madison suggests an amendment that made it even clearer the amendment ran against only the federal government. Madison's fix backfires because, as the debate is about to show, it draws the scorn of Elbridge Gerry.

> Mr. Gerry did not like the term **national**, proposed by the gentleman from Virginia [Mr. Madison], and he hoped it would not be adopted by the House. It brought to his mind some observations that had taken place in the [state] conventions at the time they were considering the present constitution. It had been insisted upon by those who were called antifederalists, that this form of Government consolidated the Union; the honorable gentleman's motion shows that he considers it in the same light. Those who were called antifederalists at that time complained that they had injustice done to them by the title, because they were in favor of a Federal Government, and the others were in favor of a national one; the federalists were for ratifying the constitution as it stood, and the others not until amendments were made. Their names then ought not to have been distinguished by federalists and antifederalists, but rats and antirats.
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> Mr. Madison withdrew his motion, but observed that the words "**no national religion shall be established by law**," did not imply that the Government was a national one . . . .[212]

[211] If the State of Connecticut was the proper party to file the claim to collect the assessment tax, it might be that the U.S. Supreme Court would have original subject matter jurisdiction. *See* U.S. CONST. art. III, § 2, cl. 2.

[212] 1 ANNALS, *supra* note 145, at 759 (August 15, 1789) (emphasis added).

To placate Silvester and Huntington, Madison suggests inserting the word "national" to point the object of the amendment to the only government it restrained. He very shortly gets called out by the Antifederalist, Elbridge Gerry. In the contest to ratify the Constitution, Madison and other Federalists had insisted that the document creates not a "national" but a "federal" government. This was done to assuage the concern of those who complained that the Constitution took too much power from the states. Angering Gerry and other Antifederalists is one of the few recorded occasions where Madison slipped-up during debate. He repairs the error by quickly withdrawing the motion.

The debate continues as follows:

> Mr. Livermore was not satisfied with [Madison's] amendment; but he did not wish them to dwell long on the subject. He thought it would be better if it was altered, and made to read in this manner, that **Congress shall make no laws touching religion, or infringing the rights of conscience.**[213]

Like Madison, Samuel Livermore is a Federalist and he had a religious background that lent itself to his being ecumenical, and thus perhaps favorable to religious freedom.[214] He also hailed from New Hampshire, and moved for the substitution of a text nearly identical to that recommended by the New Hampshire constitutional convention. Livermore may have even been the author of the amendment at the state constitutional convention, but we do not know as no transcript of the convention was kept. The opening phrase ("Congress shall make no laws") unmistakably pointed the object of the amendment to the federal government and not the states, thus meeting the fears of Silvester and Huntington. It achieved what Madison had tried to do with insertion of the word "national," but without angering Antifederalists.

Livermore's text also had the effect of preventing Congress from enacting legislation to overturn state laws on religion, which had not been part of the discussion so far and was not a consequence discussed upon introduction of Livermore's amendment. Still, the text's literal effect is to raise the "specific federalism" position: Congress is uniquely disempowered by the no-establishment provision from "mak[ing] . . . laws touching religion." Livermore's text would render *ultra vires* any congressional law the subject matter which is a state's manner of dealing with religion. That such an intent was not claimed or disclaimed, or even remarked upon, is perhaps suggestive of no intent along the lines of specific federalism, and thus a mild undermining by silence of the position.

An even more remarkable unknown with Livermore's text came with his use of the word "touching." This word choice substantially broadened the scope of the restraint from negating federal lawmaking that established a religion to one of negating federal

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[213] *Id.* at 759 (August 15, 1789) (emphasis added).

[214] Samuel Livermore, the son of a clergyman, was a Federalist from New Hampshire with ties to both the Congregational and Episcopalian churches. *See* LANKEVICH, *supra* note 150, at 64-65; ANSON PHELPS STOKES, 1 CHURCH AND STATE IN THE UNITED STATES 315 (1950) ("His association with both Congregational and Episcopal churches, and his study at a Presbyterian college [Princeton], may have been factors in his developing interest in religious toleration.").

lawmaking that merely touched religion. All sorts of federal legislation could incidentally "touch" religion, such as whether the creation of federal bankruptcy courts meant that financially distressed churches could be discharged of their debts.[215] This broad scope surely would have caused someone in the House to think about congressional legislation's incidental effects on religion, not just about *ultra vires* actions clearly outside of Congress' delegated powers. It would have caused at least attentive Representatives to ask themselves whether there were unintended consequences brought on by the breadth of Livermore's amendment. We learned the result five days later.

Finally, in the day's debate Livermore dropped the word "equal" before "rights," thus broadening the protection of individual conscience. Remarkably, neither of the latter two changes in the text drew any discussion on this day.

The effect of both of these changes likely took a little time to be fully realized. For now, there was relief that the Silvester/Huntington problem was solved. Matters concluded on that positive note:

> [T]he question was then taken on Mr. Livermore's motion, and passed in the affirmative, thirty-one for, and twenty against it.[216]

Accordingly, at the end of the day the proposed Article of Amendment read: "Article I, Section 9, between paragraphs 2 and 3 insert '**The Congress shall make no laws touching religion, or infringing the rights of conscience.'**"

August 16, 1789

The House did not convene this day, it being a Sunday.

August 17, 1789

The House, still sitting as a Committee of the Whole, took up the two proposed amendments respecting conscientious objectors to war and restricting the states from infringing on the rights of conscience.[217] The debate with respect to the amendment directed against states infringing the rights of conscience is reproduced below. It yields an important insight concerning what is meant by the word "conscience." In complete control of proceedings in the House, Madison and other Federalists were willing to restrain states from infringing equal rights of conscience but knew they had no chance of restraining states from establishing religion. To attempt the latter would have been futile, of course, because New England states still had establishments and were not about to have the federal Constitution order them abolished. Indeed, the New England representatives were hyper-Federalists with votes essential to Madison's efforts at shepherding amendments through the House and reluctant to support a Bill of Rights because they thought the effort a waste of time.

The Committee of the Whole then proceeded to the fifth proposition:

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[215] Congress is delegated the power to pass uniform laws on the subject of bankruptcy. U.S. CONST. art. I, § 8, cl. 4.
[216] 1 ANNALS, *supra* note 145, at 759 (August 15, 1789).
[217] *Id.* at 778-80 (August 17, 1789).

> Article 1. section 10. [B]etween the first and second paragraph, insert "**no State shall infringe the equal rights of conscience,** nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases."
>
> Mr. Tucker.[218] – This is offered, I presume, as an amendment to the constitution of the United States, but it goes only to the alteration of the constitutions of particular States. It would be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do; and that is thought by many to be rather too much. I therefore move, sir, to strike out these words.
>
> Mr. Madison conceived this to be the most valuable amendment in the whole list. If there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments. He thought that if they provided against the one, it was as necessary to provide against the other, and was satisfied that it would be equally grateful to the people.
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> Mr. Livermore had no great objection to the sentiment, but he thought it not well expressed. He wished to make it an affirmative proposition; **"the equal rights of conscience,** the freedom of speech or of the press, and the right of trial by jury in criminal cases, **shall not be infringed by any State."**
>
> This transposition being agreed to, and Mr. Tucker's motion being rejected, the clause was adopted.[219]

Clearly, the House majority thought they had the votes to pass an amendment restraining states from infringing the rights of conscience[220] but members knew it was foolhardy to attempt to get past representatives from New England a restraint on state establishments. That means that Madison and the Federalists in the House regarded the liberty of conscience and disestablishment as two different restraints, and that they did not regard a

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[218] Thomas Tudor Tucker was an Antifederalist from South Carolina. GOLDWIN, *supra* note 142, at 130; LANKEVICH, *supra* note 150, at 113. Tucker's remark on this amendment binding the states was the only recorded objection in the House. The provision was eventually dropped in the Senate, likely for the reason stated here by Tucker.

[219] 1 ANNALS, *supra* note 145, at 783-84 (August 17, 1789) (emphasis added).

[220] Mr. Tucker, an Antifederalist from South Carolina, was not so sure. He said that even a restraint on the states with respect to conscience would alter some state constitutions. He might well have been correct. For example, some states where there were no longer establishments still had constitutional provisions with religious tests for public office and other coercive laws directed at individuals of minority faiths or no religion. Accordingly, it will come as no surprise that the amendment restraining the states is eventually dropped in the Senate, and the House made no attempt to restore it.

state establishment as a violation of conscience.[221] This is hardly surprising. In England today there is liberty of conscience but at the same time the Church of England is established. Likewise, Madison and others were aware that in Virginia liberty of conscience was achieved in 1776, but it was not until 1786 that the Anglican Church was disestablished.[222] Accordingly, "coercion" of conscience must truly confront an individual with a cruel choice between obedience to the civil law or obedience to one's deepest beliefs.

At the end of the day the proposed Fifth Article read: "Article I, Section 10, between paragraphs 1 and 2 insert **'Fifthly. The equal rights of conscience**, the freedom of speech or of the press, and the right of trial by jury in criminal cases, **shall not be infringed by any State.'**" Madison sought to achieve a modest advance. He did not try to protect from state interference the "full rights of conscience," only the "equal" rights of conscience.

That the amendment passed the House of Representatives was an act of high solicitude for religious freedom in those days. More telling, Madison did not even try for a no-establishment amendment to bind the states. The latter would have created a firestorm in New England where mandatory religious assessments at the parish level were still popular and worked strongly in favor of the Congregational Church. Each taxpayer could designate which church was to receive his payment. For this reason the dominant Congregationalists refused to call these assessments an "establishment," but the dissenting Baptists did not hesitate to do so.

August 18, 1789

The House, still sitting as a Committee of the Whole, passed the amendments proposed by the Select Committee of Eleven, as now amended, and reported them to the entire House.[223] Thomas Tudor Tucker, an Antifederalist from South Carolina, also proposed sixteen new amendments to the Constitution.[224] They were largely structural changes with the exception of the desire to insert the word "other" between the words "no" and "religious" in the Religious Test Clause, Article VI, clause 3, of the 1787 Constitution.[225] The clause would then have read, "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but **no other religious test shall ever be required as a qualification to any office or public trust under the United States.**"[226] Tucker's aim was to characterize the oath to support the Constitution as

[221] Historian Thomas Curry gets this wrong when he just assumes, without basis, that an establishment of religion is necessarily coercive of "conscience" as that term is used in this proposed amendment. *See* CURRY, FIRST FREEDOMS, *supra* note 7, at 204-06. Where there were state establishments, certainly Baptists and other dissenters used the rhetoric of coercion-of-conscience to argue for disestablishment. But those in the Congregational Church were just as firm in their belief that their system of religious assessments did not violate conscience. Curry admits as much. *See id*. at 205.
[222] Esbeck, *Virginia Disestablishment*, *supra* note 5, at 65-69, 85-89.
[223] HOUSE JOURNAL, *supra* note 154, at 81-82 (August 18, 1789).
[224] 1 ANNALS, *supra* note 145, at 790-92 (August 18, 1789).
[225] 1 ANNALS, *supra* note 145, at 792 (August 18, 1789).
[226] U.S. CONST. art. VI, cl. 3 (emphasis added).

religious in nature. By deduction, that would mean that atheists could not take such an oath because they held to no religion, effectively barring atheists from federal public office. All of Tucker's proposals, including this amendment to the Religious Test Clause, were defeated.[227] Once again, for its day it was highly tolerant of the House to reject Tucker's amendment.

August 19, 1789

The full House began consideration of the amendments as reported by the Committee of the Whole. The House decided to place the amendments in a "supplement" (or Bill of Rights) at the end of the Constitution.[228] From June 8th forward, Madison had proposed to interlineate the amendments into the existing text of the 1787 Constitution. Those who opposed him sought to keep the 1787 Constitution intact because they were Federalists that revered the Constitution as a monument to republican government and thought the amendments were unnecessary. These Federalists, led by Roger Sherman of Connecticut, sought to emphasize their lesser importance by placing the amendments at the end.[229] History has shown that the separate listing has had just the opposite effect by giving the Bill of Rights its own revered place as a stand-alone founding document.

August 20, 1789

Debate continued on other proposed amendments, along with the phrases on religious freedom again being amended. The House also debated the conscientious objector language of the Sixth Article that concerned bearing arms. The debate with respect to the no-establishment provision is as follows:

> The House resumed the consideration of the report of the Committee of the whole on the subject of amendment to the constitution.
>
> Mr. Ames'[230] proposition was taken up. Five or six other members introduced propositions on the same point, and the whole were, by mutual consent, laid on the table. After which, the House proceeded to the third amendment,[231] and agreed to the same.

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[227] 1 ANNALS, *supra* note 145, at 792 (August 18, 1789).

[228] 1 ANNALS, *supra* note 145, at 796 (August 19, 1789). *See* BRANT, *supra* note 123, at 275 (Madison finally yields to Sherman's persistence).

[229] GOLDWIN, *supra* note 142, at 141-42, 145.

[230] Fisher Ames is a Federalist from Massachusetts. *See* WINFRED E. A. BERNHARD, FISHER AMES, FEDERALIST AND STATESMAN, 1758-1808, at 1 (1965). *See also* VERNON LEWIS PARRINGTON, THE ROMANTIC REVOLUTION IN AMERICA, 1800-1860, at 280 (1987); LANKEVICH, *supra* note 150, at 50-51.

[231] The "third amendment" referenced here could be either the amendments the Committee of the Whole House made to the report of the Select Committee of Eleven (*see* HOUSE JOURNAL, *supra* note 154, at 82 (August 18, 1789)), or it may be a reference to Madison's original Third Amendment, as proposed to the House on June 8, 1789, that read: "Thirdly. That in article 1st, section 6, clause 1, there be added to the end of the first sentence, these words, to wit: 'But no law varying the compensation last ascertained shall operate before the next ensuing election of Representatives.'" *See* 1 ANNALS, *supra* note 145, at 451 (June 8, 1789). Either way, the record in the HOUSE JOURNAL on the next day, August 21st, lists the Third Amendment as the phrases on

> On motion of Mr. Ames, the fourth amendment[232] was altered so as to read **"Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."** This being adopted,
>
> The first proposition was agreed to.[233]

Apparently Madison, working behind the scenes, had enlisted Fisher Ames of Massachusetts to put forth this version on church-government relations and religious liberty.[234] The first thing to note is that the text restores the scope of the disempowerment of Congress' authority to "establish[] religion" and thereby abandons Livingston's impossibly broad "laws touching" religion. No one can say for certain, but this is quite possibly because over the last five days the House had come to realize that the scope of the amendment's restraint needed to be narrowed lest countless and unavoidable incidental effects of legislation on religion were to be within the negation of congressional power. The second matter to note is that the term "free exercise" is introduced for the first time into the text of the amendment, and "free exercise" of religion is stated separate from "conscience." The relationship between "free exercise" and "conscience" is not explained.[235] The term "free exercise" appeared in 1776 as part of Section 16 of Virginia's Declaration of Rights and would have come to the attention of the House by way of the proposed amendments from Virginia and North Carolina.[236] Madison used the term back in 1776. He successfully substituted the right of "free exercise" of religion in place of toleration in the Virginia Declaration.

August 21, 1789

Debate continued on the proposed amendments. The free exercise language appearing in the HOUSE JOURNAL was slightly altered in style from that of the prior

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religious freedom, reflecting a change in the numbering of the Articles of Amendment. *See* HOUSE JOURNAL, *supra* note 154, at 85 (August 21, 1789) ("3. Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.").

[232] The "fourth amendment" referenced here could be either the amendments the Committee of the Whole House made to the report of the Select Committee of Eleven (*see* HOUSE JOURNAL, *supra* note 154, at 82 (August 18, 1789)) or to Madison's original Fourth Amendment, as proposed to the House on June 8, 1789, that read, in relevant part: "Fourthly. 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 on any pretext, infringed.'" *See* 1 ANNALS, *supra* note 145, at 451-52 (June 8, 1789).

[233] 1 ANNALS, *supra* note 145, at 795-96 (August 20, 1789). The "first proposition" referenced here is Fisher Ames' motion to alter Madison's original Fourth Amendment introduced on June 8, 1789.

[234] BRANT, *supra* note 123, at 271.

[235] Munoz, *Original Meaning*, *supra* note 44, at 617.

[236] Esbeck, *Virginia Disestablishment*, *supra* note 5, at 66-69. Madison did not coin the phrase "free exercise" of religion. Rather, the phrase made its first appearance in America in the *Maryland Act Concerning Religion* adopted in 1649. COMPLETE BILL OF RIGHTS, *supra* note 68, at 17.

day.[237] No mention is made in the ANNALS of any additional debate over the religious freedom provisions. The HOUSE JOURNAL reads as follows:

> The House proceeded to consider the original report of the [Select] committee of eleven, consisting of seventeen articles, as now amended; whereupon the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth articles being again read and debated, were, upon the question severally put thereupon, agreed to by the House, as follows, two-thirds of the members present concurring, to wit:
>
> . . .
>
> **3. Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.**
>
> . . .
>
> **5.** A well regulated militia, composed of the body of the People, being the best security of a free State, the right of the People to keep and bear arms shall not be infringed; **but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.**
>
> . . .
>
> **11. No State shall infringe** the right of trial by jury in criminal cases; nor **the rights of conscience;** nor the freedom of speech or of the press.[238]

August 22, 1789

The House concluded its deliberations on the other amendments and referred the task of arranging the amendments to a Style Committee for presentation to the Senate.[239] Thomas Tudor Tucker again proposed an amendment inserting the word "other" into the Religious Test Clause of the 1787 Constitution, and the motion was again defeated.[240]

August 24, 1789

The Style Committee issued its report to the House. There was only one minor change to the amendments of interest. The amendment barring the states from infringing the rights of conscience was moved from the eleventh to the fourteenth position. Accordingly, at the end of the day, religious freedom was addressed in House-proposed amendments three, five, and fourteen.

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[237] HOUSE JOURNAL, *supra* note 154, at 85 (August 21, 1789). *See* Laycock, *Nonpreferential Aid*, *supra* note 204, at 875, 879 n.27.
[238] HOUSE JOURNAL, *supra* note 154, at 85 (August 21, 1789).
[239] 1 ANNALS, *supra* note 145, at 808. The Style Committee was composed of Messrs. Egbert Benson, Roger Sherman, and Theodore Sedgwick. All were Federalists. *See* LANKEVICH, *supra* note 150, at 27, 58, 74.
[240] 1 ANNALS, *supra* note 145, at 807. *See supra* notes 224-27 and accompanying text.

The House ordered the Clerk to deliver an engrossed copy of the Resolve of the House to the Senate for its consideration.[241] There were a total of 17 articles of amendment proposed by the House.[242]

* * *

Before turning to the record in the Senate, where we have only the resolutions, motions, and amendments from the SENATE JOURNAL, but not the senatorial debates because the Senate met in secret, an interim summary is useful about what was debated by Representatives in the House. Once again, because of their overwhelming numbers the real give and take was among the Federalists. There was no House debate reflecting the Representatives struggling over a choice between nonpreferential support for religion, on the one hand, and prohibiting the establishment of religion, whether single or multiple, on the other hand. Professor Douglas Laycock explores the claims of nonpreferentialist scholars during the drafting stages in the House up to this point, and he convincingly dispels them.[243] The House of Representatives was equally silent with respect to a desire to work specific federalism into the text of the amendment to uniquely ensure the exclusive sovereign power of the states over relations between government and organized religion. Indeed, that at the end of the long debate of August 15th Silvester and Huntington are satisfied that the text ("Congress shall make no laws") was sufficient to make it clear that the amendment was not binding on the states. That undermines the theory of specific federalism which claims that additional wording is needed and, hence, the later addition of "respecting" in the Conference Committee.

By way of contrast, the scope of the restraint of Congress' disempowerment with respect to "establishment" did receive considerable attention in the House. Most important was on August 20th when the House trimmed back Samuel Livermore's version of "laws touching religion" to the one Fisher Ames introduced at Madison's urging, "no law establishing religion." A second occasion was on August 15th when the Federalists ignored the Antifederalist Elbridge Gerry's attempt to narrow the scope of the restraint on congressional power to "no religious doctrine."

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[241] HOUSE JOURNAL, *supra* note 154, at 89 (August 24, 1789); 1 ANNALS, *supra* note 145, at 808–09 (August 24, 1789). Professor Witte states that the religious provisions of the amendments were revised in the Style Committee. *See* JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 87 (2d ed. 2005) [hereinafter "WITTE, AMERICAN CONSTITUTIONAL EXPERIMENT"]. His citation is to LINDA GRANT DE PAUW ET AL., EDS., 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 159, 166 (1972). WITTE, AMERICAN CONSTITUTIONAL EXPERIMENT, *supra* note 241, at 104. However, the language cited by Professor Witte as having been changed in the Style Committee matches the language in the HOUSE JOURNAL for August 21st, the day before the House sent the amendments to the Style Committee. *See* HOUSE JOURNAL, *supra* note 154, at 85. The Style Committee apparently altered only the order of the amendments on religious freedom. *Compare* HOUSE JOURNAL, *supra* note 154, at 85 (August 21, 1789) *with* SENATE JOURNAL, *supra* note 11, at 103-06 (August 24, 1789).

[242] SENATE JOURNAL, *supra* note 11, at 103-06 (August 24, 1789).

[243] Laycock, *Nonpreferential Aid*, *supra* note 204, at 885-94; *see* CURRY, FIRST FREEDOMS, *supra* note 7, at 207-15 (dispelling nonpreferentialism, but by a somewhat different path than taken by Professor Laycock).

This pattern of two religion clauses—one addressing conscience and the other no-establishment—during the House debate through August 24th, will be replicated in the Senate. We turn there now.

B. Before the United States Senate

August 24, 1789

The engrossed Resolve of the House is read into the SENATE JOURNAL.[244] This includes the Third, Fifth, and Fourteenth Articles of Amendment, as adopted in the House on August 21st and again on August 24th. After the Resolve of the House was read, the Senate rejects a motion to put off the subject of amendments to the next congressional session.[245]

September 3, 1789

The Senate extensively debates the provisions on religious freedom in the Third Article as adopted by the House. The record of the SENATE JOURNAL appears as follows:

> The Senate resumed the consideration of the Resolve of the House of Representatives on the Amendments to the Constitution of the United States.
>
> . . .
>
> On motion, To amend the Article third, and to strike out these words, **"Religion or prohibiting the free Exercise thereof,"** and insert, **"One Religious Sect or Society in preference to others,"**[246] It passed in the Negative.
>
> On motion, For reconsideration, it passed in the Affirmative.[247]

So the Third Article now reads: "**Congress shall make no law establishing one Religious Sect or Society in preference to others, nor shall the rights of conscience be infringed."** The nonpreferential terminology likely came from the amendments proposed by Virginia, New York, and North Carolina. Clearly this version of the amendment adopted the no-preference position. Assuming that this text also implies that Congress has among its delegated powers in the 1787 Constitution the authority to legislate about religious establishments, then the only power denied by the scope of this version is when Congress prefers one religion over others.

> On motion, That Article the third be stricken out, it passed in the Negative.

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[244] SENATE JOURNAL, *supra* note 11, at 103-05 (August 24, 1789).
[245] *Id*. at 106 (August 24, 1789).
[246] This proposal has an establishment clause similar to the amendment proposed by New York. *See supra* note 128-30 and accompanying text.
[247] SENATE JOURNAL, *supra* note 11, at 116 (September 3, 1789) (emphasis added).

> On motion, To adopt the following, in lieu of the third Article**. "Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society,"** it passed in the Negative.[248]

This rejected version of the amendment would have dropped explicit use of the no-preference language. Nonetheless, it could be said to still align with nonpreferentialism theory because Congress is denied only the power to not establish a "religious sect or society," leaving the no-preference option. Once again, however, there is the problem that the rejected text could also be read to imply Congress had the power to create multiple establishments—countermanding a no-preference reading. Of course, the nonpreferentialist's reply would be that this is why the proposal was voted down.

> On motion, To amend the third Article, to read thus – **"Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed"** – it passed in the Negative.[249]

This rejected version of the amendment makes explicit use of the no-preference text. We cannot know for sure, but it likely was rejected for reasons of style.

> On the question upon the third Article as it came from the House of Representatives – it passed in the Negative.
>
> On motion, to adopt the third Article proposed in the Resolve of the House of Representatives, amended by striking out these words – **"Nor shall the rights of conscience be infringed"** – it passed in the Affirmative.[250]

This is a sudden turnabout. The Third Article now reads: "**Congress shall make no law establishing religion, or prohibiting the free exercise thereof."** A no-preference amendment is rejected by the Senate in favor of the House's no-establishment language. This is not to change, thus making for an uphill battle for the proponents of nonpreferentialism. This new text also drops "conscience," leaving "the free exercise" of religion. This narrows the protection of individual religious rights. No doubt conscience can be violated by a law whether the individual subjected to coercion subscribes to a religion or not. But the "free exercise" of religion text can only be violated if one first has a religion to exercise.[251]

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[248] *Id*. at 116 (September 3, 1789) (emphasis added).
[249] *Id*. at 117 (September 3, 1789) (emphasis added).
[250] *Id*. at 119 (September 3, 1789) (emphasis added).
[251] The modern Court has adjusted to this narrowness of the free exercise text by protecting under the Establishment Clause those who have suffered injuries due to the government exceeding church-state boundaries that do not result in religious harms. *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (finding department store suffered economic harm as a result of labor law requiring unyielding accommodation of Sabbath for religious employees; Establishment

September 4, 1789

The Senate adopts an amended version of the Fifth Article on bearing arms that eliminated its religious conscience clause.[252] This change likely reflects a compromise whereby it was agreed that the matter of the military draft and religious pacifism are best handled by Congress and the flexibility of legislation.[253]

September 7, 1789

The Senate refuses to adopt the proposed Fourteenth Article which would bind the states with respect to the rights of trial by jury, conscience, speech, and press.[254] The sparse entry in the SENATE JOURNAL appears below:

> The Senate resumed the consideration of the Resolve of the House of Representatives of the 24th of August, on "Articles to be proposed to the Legislatures of the several States as Amendments to the Constitution of the United States."
>
> . . .
>
> On motion, To adopt the fourteenth Article of the Amendments proposed by the House of Representatives – it passed in the Negative.[255]

A likely rationale is that the Senate did not want the Fourteenth Article to disturb the varied state arrangements with respect to even the matter of conscience, a question on which there was some agreement throughout the states.

In a larger sense, the First Congress (reflecting the concern that animated many Americans at the time) envisioned the Bill of Rights as restraining only the federal government. The federal government alone presented a new threat and thus the federal government alone was in need of restraining by a new Bill of Rights. This thinking underlies what I earlier called general federalism.

The claim of specific federalism might be claimed to be mildly bolstered by the rejection of Madison's amendment. The rejection could be said to be evidence that the First Congress thought the matter of religious freedom in the states as exclusively one for each state to resolve. The counter to that argument is that Madison's rejected amendment had to do with conscience—the relationship between government, religion, and the individual. The claim of specific federalism, by way of contrast, focuses on the

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Clause violated); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (finding tavern owner suffering economic harm when obtaining liquor license was subject to veto by nearby church; Establishment Clause violated); Epperson v. Arkansas, 393 U.S. 97 (1968) (finding public school teacher was denied academic freedom to expand the science curriculum to include Darwinian theory; Establishment Clause violated); *cf.* Torcaso v. Watkins, 367 U.S. 488 (1961) (atheist unable to assume public office with taking oath professing a belief in God; required oath held to violate the First Amendment without the Court specifying either religion clause).

[252] SENATE JOURNAL, *supra* note 11, at 119 (September 4, 1789).

[253] WITTE, GOD'S JOUST, *supra* note 169, at 203-04.

[254] The Senate also rejected an amendment to characterize the oath to support the Constitution as religious in character by inserting the word "other" into the Religious Test Clause of the Constitution. The House had twice rejected the same proposal. *See supra* notes 224-27, 240 and accompanying text.

[255] SENATE JOURNAL, *supra* note 11, at 121 (September 7, 1789).

uniqueness of the Establishment Clause. That clause has to do with the relationship between government and organized religion. Accordingly, the better view is that the rejection of Madison's amendment binding on states tends not to bolster specific federalism.

September 9, 1789

For reasons not stated, the Senate reconsiders its work of September 3rd and passes yet a new version of the Third Article. For reasons of style, it also combines the Third with the Fourth Article (addressing the rights of speech, press, assembly, and petition). The record of the SENATE JOURNAL appears as follows:

> Proceeded in the consideration of the Resolve of the House of Representatives of the 24th of August, "On Articles to be proposed to the Legislatures of the several States as Amendments to the Constitution of the United States" – And,
>
> On motion, To amend Article the third, to read as follows:
>
> **Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion,** or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition the Government for the redress of grievances – it passed in the Affirmative.[256]

This change goes to narrowing the scope of the congressional disempowerment. Two familiar elements of the Church of England establishment were that the government controlled the church's creed and its liturgy. The scope of the foregoing amendment denying congressional power with respect to "articles of faith" and "mode of worship" focuses only on creeds and liturgy, leaving the implication that Congress arguably retained power over the many other aspects of a full establishment. This was the narrowest scope of the no-establishment principle considered in either the Senate or the House, with the exception of that offered by Elbridge Gerry (and ignored by the House Federalists) on August 15th.

The Senate then passed all of its amendments to the Resolve of the House on Articles of Amendment, which the Senate had reduced from seventeen to twelve in number. It then sent them to the House.

C. Back to the House of Representatives

September 10, 1789

The House receives the message that the Senate had passed amendments to its Resolve of the House on Articles of Amendment.[257]

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[256] SENATE JOURNAL, *supra* note 11, at 129 (September 9, 1789) (emphasis added).
[257] 1 ANNALS, *supra* note 145, at 924 (September 10, 1789); HOUSE JOURNAL, *supra* note 154, at 106 (September 10, 1789).

September 19, 1789

The House considers the Senate's amendments to the Resolve of the House on Articles of Amendment. The House debate at this stage is not recorded.[258]

September 21, 1789

The House resumes consideration of the amendments proposed by the Senate to the Resolve of the House and requested a Committee of Conference with the Senate concerning their disagreements.[259] The HOUSE JOURNAL recorded which amendments proposed by the Senate that the House disagrees with, including those to the Third Article, as follows:

> The House resumed the consideration of the amendments proposed by the Senate to the several articles of the amendment to the Constitution of the United States, as agreed to by this House, and sent to the Senate for concurrence: Whereupon,
>
> *Resolved*, That this House doth agree to [various] amendments proposed by the Senate to the said articles; two-thirds of the members present concurring on each vote.
>
> *Resolved*, That a conference be desired with the Senate on the subject matter of the amendments disagreed to, and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers at the same on the part of this House.[260]
>
> *Ordered*, That the Clerk of this House do acquaint the Senate therewith, and desire their concurrence.[261]

D. Back to the United States Senate

September 21, 1789

The message from the House informing the Senate of some disagreement to the proposed amendments of the Senate of September 9th to the House Resolve of August 24th, as well as requesting a conference is received. The Senate "receded" on its third amendment, but insists on all others. It thus agrees to the conference.

> A message from the House of Representatives –
>
> Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to [various Senate] Amendments [] and to disagree to [various

[258] 1 ANNALS, *supra* note 145, at 937 (September 19, 1789); HOUSE JOURNAL, *supra* note 154, at 115 (September 19, 1789).
[259] 1 ANNALS, *supra* note 145, at 940 (September 21, 1789); HOUSE JOURNAL, *supra* note 154, at 115 (September 21, 1789).
[260] The House members of the Conference Committee had earlier been on the House Select Committee of Eleven. *See supra* note 178 and accompanying text.
[261] HOUSE JOURNAL, *supra* note 154, at 115-16 (September 21, 1789).

> Senate] amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives –
>
> And he withdrew.
>
> . . .
>
> The Senate proceeded to consider the Message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;" and,
>
> *Resolved*, That the Senate do recede from their third Amendment,[262] and do insist on all the others.
>
> *Resolved*, That the Senate do concur with the House of Representatives in conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll, and Mr. Paterson be managers of the conference on the part of the Senate.[263]

E. The Committee of Conference

Going into the Committee of Conference the Senate's version of the Third Article reads, "**Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion,** or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition the Government for the redress of grievances." Whereas the House version of the Third Article reads, "**Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.**"

The Conference Committee did not face a choice between a nonpreferentialist Senate version and a no-establishment House version. So nonpreferentialism is not in play. Nor is specific federalism a feature of either of the two choices going into the Conference. Rather, the difference between the Senate and House versions is over the *scope* of the disempowerment of Congress. Specifically, the Conference Committee faced a choice between a narrow Senate version ("no law establishing articles of faith or a mode of worship") and a broader House version ("no law establishing religion"), albeit not as broad in scope as the earlier Samuel Livermore proposal in the House.

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[262] This reference to a "third amendment" was the Senate's third of twenty-six amendments dated September 9th to the House Resolve of August 24th, and did not pertain to the Third Article about religious freedom and free expression.

[263] SENATE JOURNAL, *supra* note 11, at 141-42 (September 21, 1789). Mr. Oliver Ellsworth was an Antifederalist from Connecticut. Mr. Charles Carroll was a Federalist from Maryland and the only Roman Catholic in the Senate. Mr. William Paterson was a Federalist from New Jersey and an evangelical Presbyterian. *See* LANKEVICH, *supra* note 150, at 32-33, 78-79; WITTE, AMERICAN CONSTITUTIONAL EXPERIMENT, *supra* note 241, at 88.

September 22-24, 1789

There is no record of the negotiations among members of the Committee of Conference. The absence of Madison, Sherman, and Vining from the House roll as reflected in the records of the HOUSE JOURNAL and ANNALS suggests that the Committee of Conference met over two days, September 22nd and 23rd. The House members of the Conference Committee agreed to all of the Senate's proposed amendments to the Resolve of the House of August 24th, except for those to the Third and Eighth Articles. These two articles are altered by the Conference,[264] and then the joint agreement is reported back to the House and Senate.

Senator Oliver Ellsworth's handwritten notes are the most contemporaneous record emerging from the Committee of Conference and they reflect his report to the Senate on the results of the negotiations.[265] His entry on the Third Article is reproduced below:

> [T]hat it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: **Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof;** or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of grievances.[266]

With respect to the no-establishment principle, the Conference Committee's text ("no law respecting an establishment of religion") favored the House version over that of the Senate. So something close to the broader-in-scope House version prevailed.[267] There also may have been a trade-off in Conference. The Conference Committee favored the Senate version when it came to adopting the narrower "free exercise" text rather than the broader protection for "rights of conscience." So perhaps a broader no-establishment restraint was traded for a narrower free exercise right. We know the result, but we cannot know if it was part of a conscious trade-off.

Additionally we know that the final text does not read "respecting *the* establishment," so a plain reading speaks of a restraint on Congress' power broader than just a bar on the full establishment of a single national church.[268] The text prohibits

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[264] Irving Brant, one of James Madison's biographers, claims Vining and Sherman had displayed little interest in the amendment with respect to religious freedom. That causes Brant to speculate that the Conference Committee language was most likely that of Madison. BRANT, *supra* note 123, at 271. There is some evidence to support this claim. As previously noted, John Vining, a Federalist, thought the House was wasting valuable time drafting a Bill of Rights. *See supra* note 179. Roger Sherman, also a strong Federalist, sought to downplay the importance of the amendments by listing them separately at the back of the Constitution. *See supra* notes 195, 229 and accompanying text.

[265] COMPLETE BILL OF RIGHTS, *supra* note 68, at 8; *see also* SENATE JOURNAL, *supra* note 11, at 145 (September 24, 1789).

[266] COMPLETE BILL OF RIGHTS, *supra* note 68, at 8 (emphasis added).

[267] BRANT, *supra* note 123, at 271 (Brant claims a "House victory" with respect to no-establishment.).

[268] It is unlikely that the use of the indefinite article "an" before "establishment" was intended to mean that the restraint on federal power is limited to the establishment of a single national

multiple establishments as well. We also know that the Conference Committee's chosen text moves even farther away from the no-preference theory.

What at first seems strangely new to the text is the introduction of the participle "respecting." Then, as now, respecting means "considering," "with regard or relation to, regarding, [or] concerning."[269] A first reading is that in comparison to even the House version, the introduction of the word "respecting" seemingly broadens the disempowerment of Congress from "establishing religion" to "respecting an establishment of religion." The Conference version appears broader because now Congress cannot establish *or disestablish* religion. And, of course, the only existing establishments were in New England that Congress could conceivably need to be prohibited from disestablishing. Such a reading is federalist.

To one focused only on the text as it emerges from Conference Committee, the introduction of "respecting" appears to fit with the theory of specific federalism. However, recall that a premise underlying the entire debate in both the House and Senate is that all of the Articles of Amendment vested no new power in the federal government. This in turn aligns with the Wilsonian argument, made again during House debate by Roger Sherman on August 15th, and the attitude of Federalists generally, that the 1787 Constitution delegated no federal power over the matter of religion, including religious establishment by the states. And the Silvester/Huntington confusion during the House debate of August 15th led to a rewriting of the text so that they were satisfied a federal court could not enforce the Establishment Clause against the state religious assessment laws which favored the Congregational establishments in New England. These combined factors suggest that in the Conference Committee the manner by which states dealt with establishmentarianism was never in play. By way of contrast, specific federalism requires there to have been an active concern in the First Congress that the no-establishment text could be construed to imply substantive power in the federal government to interfere with state establishments—substantive power that was squelched by the introduction into the text of the participle "respecting." As matters went to Conference there is no record of any such concern.

Before jumping to the conclusion that a last-minute alteration in the no-establishment text by the Conference Committee was substantive (indeed, federalist), there is a stylistic explanation that far more simply accounts for the textual modification in Conference. A straightforward explanation is that the Conference made grammatical improvements to sharpen the focus of the no-establishment text that started with the House version. Going into Conference, the House version read: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." If we first make the Conference's textual change dropping "rights of conscience," the House version would then read: "*Congress shall make no law establishing religion, or prohibiting the free exercise thereof.*" The desired focus of the

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church—thereby allowing the federal establishment of two or more churches. If the drafters had intended to prohibit the establishment of only a single church, it is likely they would have substituted the definite article "the" for present rendering of "an." *See* Laycock, *Nonpreferentialism*, *supra* note 204, at 884-85.

[269] WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 2123 (2d ed. 1952). The word "respecting" also appears in the Property Clause vesting power over federal property in Congress. U.S. CONST. art. IV, § 3, cl. 2. Once again respecting means in "relation to" or "regarding."

amendment is to emphasize establishment and free exercise. However, there are two participles ("establishing" and "prohibiting") that bring the focus down on the two objects of the participial phrases, namely "religion" and "free exercise." The drafters did not want the focus on "religion" but on "establishment." That meant taking the participle "establishing" and changing it to "establishment," thereby making it the object in a participle phrase. The Conference Committee would have needed a new participle ("respecting" was selected), leading to a new participial phrase ("respecting an establishment") that brings about the desired focus on the new object ("establishment"). Stylistically this is desirable because the Third Article now begins with two parallel participial phrases ("respecting an establishment" and "prohibiting the free exercise") that focus on "establishment" and "free exercise," respectively. Finally, the parallel participial phrases are modified by the same prepositional phrase ("of religion"). The grammatical change had no substantive impact.

The foregoing explanation is straightforward and makes sense as a mere grammatical improvement to the House version. It is also in line with how committees work when tasked with reconciling competing drafts and being faithful to the duty of making as little change in meaning as possible. Although we cannot know if this is why the Conference Committee introduced "respecting" into the text, the more obvious and simple explanation is also the more likely.

Those holding to the theory of specific federalism seize on "respecting" as central to their argument that the Establishment Clause had embedded in it by the Conference Committee a federalist principle, unique to the no-establishment clause, specifically designed to preserve state sovereignty over how each state handles its church-state affairs.[270] Five observations about this claim need to be made, each of which undermines specific federalism.[271]

First, if the theory of specific federalism is to be embraced, there was intended a double denial of federal power to interfere with state laws on establishmentarian matters—both general federalism and specific federalism. So those holding to specific federalism need to explain why a double shield against federal interference was thought to be necessary in September 1789. While redundancy is occasionally intended in legislation, it is extraordinary in a constitution.

Second, it was unremarkable that both the prior versions and the new Conference text had some federalist impact. The earlier House and Senate versions also had participles that worked to restrain congressional power over how each state handled certain church-state affairs. For example, the final House version said that Congress lacked power to "make . . . law establishing religion." The final Senate version said that Congress lacked power to "make . . . law establishing articles of faith or a mode of worship." In both versions "establishing" is a participle, and the participle limited federal power over the described religious subject matter. If the federal government had no power over establishmentarianism and a particular state had an establishment, it would

[270] Munoz, *Original Meaning*, *supra* note 44, at 630.

[271] Professor John Witte called the evidence "very thin" for reading into the Establishment Clause what I have termed specific federalism. WITTE, GOD'S JOUST, *supra* note 169, at 229. He makes an additional argument against specific federalism: if the drafters had intended the no-establishment principle to do the work of both general and specific federalism it would have been easy for Congress to have drafted the phrase to read "Congress shall make no laws 'respecting' a *state* establishment of religion." *Id.* at 197 (emphasis added).

follow that the version had a federalist impact in that state. The Conference Committee's substitution of the participle "respecting" for the participle "establishing" did not make the Conference version uniquely federalist in that all of the versions in play restrained some congressional power concerning how each state handled certain establishmentarian matters. What more obviously was changing over the various House and Senate versions was the *scope* of the congressional disempowerment, not that the Conference Committee was suddenly overtaken by a new and irresistible "state's rights" urge and caused to subtlety insert into the no-establishment text a wholly unique preservation of state sovereignty.

Third, the Establishment Clause restraint on congressional power works to limit Congress with respect to a given subject matter: establishmentarianism. This is a jurisdictional restraint. Accordingly, it has the effect of limiting Congress with respect to *both* the state and federal governments. True, the participle "respecting" means that Congress is prohibited from interfering with laws "respecting an establishment" of religion in each of the then eleven states. However, the participle "respecting" also means that Congress is prohibited from interfering at the federal level "respecting an establishment" of religion.[272] So the restraint is not just federalist (restraining Congress vis-à-vis the sovereignty of the several states) but rather jurisdictional (restraining Congress vis-à-vis church-government relations, be the government federal or state). Moreover, the scope of this disempowerment is the *same* with respect to both levels of government, state and federal. Accordingly, overblown claims that "respecting" means that the federal government can have nothing to do with church-state relations at the state level but that "respecting" means only that Congress cannot establish a national religion[273] rely on an asymmetry that defies the plain text. The same words ("no law respecting an establishment of religion") grammatically define an identical scope of congressional disempowerment, whether that disempowerment has the consequence of favoring residual state sovereignty or limits the federal government when acting within its enumerated powers such as governing the territories or regulating the Army and Navy.

Fourth, the rights with respect to free speech and free press in what became the First Amendment also have a participle, i.e., "abridging." As with the participle "respecting," it can equally be said that the participle "abridging" disempowered Congress with respect to certain subject matters within the scope of a participial phrase (i.e., "abridging the freedom of speech, or … press; or the right … to assemble, and to petition."). All of which is to say that the Conference Committee's substitution of the participle "respecting" for the participle "establishing" appears unremarkable with

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[272] Congress would have to be mindful of the Establishment Clause whenever it exercised exclusive federal powers. For example, when establishing Post Offices pursuant to U.S. CONST. art. I, § 8, cl. 7, Congress would have to take into account the Establishment Clause when deciding to suspend operations for postal delivery on Sundays because it is the Christian Sabbath. Likewise, when regulating the territories pursuant to U.S. CONST. art. IV, § 3, cl. 2, Congress could touch on religion but it could not "make … law respecting an establishment." Indeed, the Northwest Ordinance of 1787, which the First Congress reenacted, did touch on the matter of religion in Articles 1 and 3 but did so in a manner that was not "an establishment" of religion. *See An Act to Provide for the Government of the Territory Northwest of the River Ohio*, 1st Cong., 1st Sess., ch. 8, 1 Stat. 50, 52 (Aug. 7, 1789).

[273] *See, e.g.*, Munoz, *Original Meaning*, *supra* note 44, at 630; STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 23 (1995) [hereinafter "SMITH, FOREORDAINED FAILURE"].

respect to federalism—in contrast to an exotic claim that the Conference uniquely and redundantly reached out and embedded a federalist provision in the Establishment Clause.[274] What is noteworthy in the Conference Committee's substitution of participles from "establishing" to "respecting" is that the shift more clearly causes the first participial phrase in the First Amendment to now focus on the meaning of "establishment" as opposed to the meaning of "religion." That grammatical improvement does not help the theory of specific federalism.

Fifth, the record in the House and journal in the Senate are without any complaint that the states believed that their sovereignty over church-state arrangements was in need of special protection from federal interference. The concern voiced by Silvester and Huntington during the House debate of August 15th was resolved to their satisfaction by Livermore's phrase ("Congress shall make no law") that pointed the object of the disempowerment solely at Congress.

Professor Vincent Munoz subscribes to the specific federalism theory. He finds in the early Senate versions of the Third Article a need to protect how the states deal with establishmentarian matters. His argument is that early Senate versions of the no-establishment principle appear to borrow the no-preference language from the amendment proposed by Virginia,[275] which Munoz rightly traces back to Patrick Henry.[276] For example, the Senate text from September 3rd read in nonpreferential terms as follows: "Congress shall make no law establishing one Religious Sect or Society in preference to others." Henry was a staunch Antifederalist, hence he sought to reduce federal powers and thereby increase retained state powers.[277] The final Senate version that went to the Conference Committee denied Congress the power to make "law establishing articles of faith or a mode of worship." Munoz argues that the Conference "faced the choice between adopting [a] text that would recognize [Congress'] lack of power (the House proposal), or language that would regulate [Congress'] power and thereby, arguably, augment it (the Senate proposal)."[278] Munoz claims that the final Senate version augmented congressional power as follows: by denying Congress the power to establish "articles of faith or a mode of worship" the text suggests Congress had the implied power to establish religion except with respect to "articles of faith or a mode of worship." Munoz reads the choice between the House and Senate versions, and the Conference Committee's decision to favor the House version, as "unmistakably

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[274] This is not to say that there is no difference between the participle "respecting," on the one hand, and the other participles "prohibiting" and "abridging" in the First Amendment. Prohibiting and abridging are negatives on a government's power with respect to a person's free-exercise or expression. These participles create rights. On the other hand, "respecting" is a reference not to a person's free-exercise or expression but to a certain subject matter that is being placed off limits to the government. Hence, "respecting" sets a jurisdictional limit that runs against the government as opposed to creating a right that runs in favor of the rights-holder. *See infra* text accompanying notes 343-44.

[275] *See infra* notes 120-24 and accompanying text (Virginia's proposed amendment).

[276] Munoz, *Original Meaning*, *supra* note 44, at 628-29.

[277] It is thus counterintuitive for Munoz to link Patrick Henry and Virginia's proposed amendment, on the one hand, to a conjectural desire in the Senate to expand congressional power.

[278] Munoz, *Original Meaning*, *supra* note 44, at 629. Earlier Senate versions arguably augmented congressional power, according to Munoz, because to expressly deny to Congress the power to prefer one religion over others implied that Congress had the power to support all religions. Again, this is implausible for the reason stated in note 277, *supra*.

federal."[279] It is "unmistakably federal" and hence a choice in favor of retained state powers, reasons Munoz, because a rejection of the Senate version was a rejection of the notion that Congress had implied power to establish religion.

Contextually this makes little sense. Federalists were in complete control of the amendment process in the Senate, and they were committed to the Wilsonian argument that the Constitution was one of enumerated powers. Federalists had repeatedly offered reassurance that nothing in the 1787 Constitution delegated power to the federal government over the matter of religion. Additionally, the proposed amendments, including the Third Article, did not vest new powers in the federal government. Indeed, the amendments did just the opposite: the amendments, including the Third Article, were offered to expressly put into words powers that Congress did *not* have, thereby reassuring the American people that they had little to fear from the new government. Therefore, any suggestion that the Senate version of no-establishment implied new power in Congress over religion would have been immediately recognized as a false implication by the six members of the Conference, all of whom were Federalists. All this being so, it is pure fancy to suppose that the Conference, in order to avoid a power-vesting Senate version, chose the House version. Indeed, as Munoz would have it, the Conference chose the House version but then beefed-up the version with redundant protection for federalism. The Conference Committee, of course, did face a choice between the House version and the Senate version. And, as related above, the Conference did not choose either version, but fashioned a version of its own that clearly favored the House version with respect to religious establishment. In these few respects, Munoz is correct. However, the theory of specific federalism ultimately depends on a claim that the shift in participle from "establishing" to "respecting" was a clever last-minute maneuver by the Conference Committee of modern substantive importance. As stated above, that is unlikely given more obvious grammatical explanations. Additionally, a far less strained reading of the choice before the Conference Committee is that the House and Senate options differed over the *scope* of the restraint to impose on congressional power. The House choice with respect to scope was "no law establishing religion," and the Senate choice with respect to scope was "no law establishing articles of faith or a mode of worship." The Conference's decision to favor the House version was a decision to choose the broader of the two restraints on congressional power. That decision was not "unmistakably federal," as Munoz claims. Rather, it has all the traits of a straightforward decision about the desirable *scope* of the disempowerment of Congress' authority with respect to church-government affairs. This is particularly so given that even Munoz admits that the Antifederalists had no say in the matter, the First Congress being dominated by Federalists. This straightforward interpretation of events is preferable to Munoz's exotic explanation, an explanation that had no legal consequence until *Everson* incorporated the Establishment Clause in 1947—158 year later! If anything, rather than "unmistakably federal," the decision by the Conference to choose the House version, with grammatical improvements, was unmistakably pro religious freedom. It was pro religious freedom because when the federal government has no jurisdiction with respect to the affairs of organized religion, then organized religion is free to govern its own affairs.

In order to interject Antifederalist influence into the drafting process, Munoz has to go back to the origin of the Senate-rejected nonpreferential language from Virginia,

[279] *Id.*

with Patrick Henry's fingerprints thereon. That is nylon thin support indeed, given that the Federalists in control of Congress saw Henry as their most able opponent. Once again, at this point in the process no member of Congress, neither Federalist nor Antifederalist, was complaining that their own state's sovereignty over church-state affairs was insecure and thus was in need of double protection (general and specific federalism) from the federal government. And, once again, the *scope* of the restraint on power works to limit Congress' jurisdiction over establishmentarian subject matters both in the several states and in the federal government's wielding of its enumerated powers such as overseeing the territories or regulating the Army and Navy. This line of argumentation is not new. It is at least as old as James Madison and his *Report on the Virginia Resolution of 1800*.[280]

The better reading is that the no-establishment text as it emerged from Conference does not specifically protect state sovereignty from congressional power, as Munoz's "unmistakably federal" construction would have us believe. Everyone agreed on general federalism, namely that the Bill of Rights was binding only on the federal government. A rejection of the theory of specific federalism, however, is a rejection of the argument that the text of the Establishment Clause, unlike other clauses in the Bill of Rights, uniquely and redundantly shielded how each state chose to deal with the establishmentarian question. That case has not been made.[281]

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[280] FOUNDERS' CONSTITUTION, *supra* note 38, at 141. The context of Madison's celebrated *Report of 1800* is the constitutionality of the Alien and Sedition Acts enacted during the Presidency of John Adams. *See* Kurt T. Lash, *James Madison's Celebrated Report of 1800: The Transformation of the Tenth Amendment*, 74 GEO. WASH. L. REV. 165, 180-82 (2006). The acts were being enforced against critics of the Adam Administration, and the Republican opposition argued, *inter alia*, that enforcement was in violation of the Free Speech and Free Press Clauses of the First Amendment. The matter came on for debate before the Virginia House of Delegates, then controlled by Republicans, which had earlier issued *The Virginia Resolutions* critical of Adams and of the actions of Federalists generally. In their defense, Federalists filed a *Report of the Minority on the Virginia Resolutions*. FOUNDERS' CONSTITUTION, *supra* note 38, at 136. Believed to be the work of John Marshall (*See* Kurt T. Lash, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, 68 OHIO ST. L.J. 435 (2007)), the *Minority Report* focused on the text, "Congress shall make no law … abridging" freedom of speech or press. Pointing out that pursuant to the text Congress is only restrained from abridging speech and press, the *Minority Report* argued that Congress is thereby free to regulate speech and press in ways that fall short of a complete abridgement. FOUNDERS' CONSTITUTION, *supra* note 38, at 138. In Madison's rebuttal, which he set out in the aforementioned *Report of 1800*, the line of argumentation parallels the one in the text with respect to Munoz: the Federal government is one of enumerated powers, thus all powers not given are reserved; the enumerated powers do not reach over free press or are incidental to it; that the Constitution's ratification was secured upon assurances that amendments would be adopted; the amendments rendered rights more safe under the Constitution because they made explicit the reservation of the power from Congress; any doubt that the amendments were not a grant of power is erased by the Senate's resolution accompanying the amendments' adoption to the effect that the amendments were to prevent any misconstruction or abuse of congressional power; and that the amendments placed an additional restriction on Congress, all so that American's might have more confidence in the new government. *Id.* at 143. *See also id.* at 146-47.

[281] Arguments based on the larger historical context have also been assembled against the theory of specific federalism. *See*, *e.g.*, Steven K. Green, *"Bad History":The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717, 1752-53 (2006), arguing against the theory of specific federalism because: (1) while there were establishments in the New

F. Final Action in the House of Representatives

September 24, 1789

The House considers the Report of the Committee of Conference. As the Conference Report recommended, the House agrees to recede from its disagreements with the Senate's amendments on all but the Third and Eighth Article.[282]

> The House proceeded to consider the report of a Committee of Conference, on the subject matter of the amendments depending between the two Houses to the several articles of amendment to the Constitution of the United States, as proposed by this House: whereupon, it was resolved, that they recede from their disagreement to all the amendments; provided that the two articles, which, by the amendments of the Senate,

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England states as defined by our present understanding of the term, in 1789-1791 most of the New England states denied they had an "establishment" when faced with criticism by Baptists that they did establish the Congregational Church; (2) the clear trend in 1789-1791 was toward disestablishment, thus there was little reason for members of Congress from New England to waste political capital on preserving establishments from federal interference; and (3) the majority of calls for the protection of religious freedom in a Bill of Rights centered on rights of conscience and equality among religions, not disestablishment.

I share Professor Green's rejection of specific federalism, but do so for reasons stated in the text. That said, Green's assertion that others have got "bad history" is open to debate. For example, consider the New England establishments he says were soon on the outs. Vermont disestablished in 1807, Connecticut in 1818, New Hampshire in 1819, and Massachusetts in 1832-33. Maine was carved out of territory held by Massachusetts; Maine disestablished in 1820. *See* Esbeck, *Dissent and Disestablishment*, *supra* note 8, at 1524-40. These establishments had far more staying power than Green allows, and we can be certain members of the 1789 Congress from New England would have fought to keep their establishments. The House debate on August 15th by Representatives Silvester and Huntington tells us that much.

New Englanders, other than those from Connecticut, did deny they had an "establishment." However, they did so as a matter of rhetoric. Their religious assessment laws permitted each taxpayer to designate which church was to receive his tax payment. The dominate Congregationalists thought this arrangement was so enlightened that they refused to admit to Baptist charges of "establishment," which carried with it opprobrium. So Green is right about Baptist charges of "establishment" and denials of the same by Congregationalists, but it was just the rhetoric of a political spate internal to each New England state. That does not mean that Congregationalists in Congress were not fully aware that the church-state arrangement in New England greatly favored the Congregational Church. And it follows that they were not about to permit any wording in the Bill of Rights that would bring about a loss of that advantage.
Finally, Green may be right that a tally of the calls would show more for protection of conscience than for the no-establishment principle. But both were called for, and Baptists in Virginia and New England were especially vocal. If calls for disestablishment were down, it was because by 1789 only New England still had establishments. And the Baptists in Virginia had the promise of the singularly important James Madison that the recently won Virginia disestablishment would not be endangered by the new federal government. The Baptists and Madison agreed that the means for achieving that promise was a Bill of Rights that denied federal power over matters of establishment. Although I reject specific federalism, unlike Green, those devoted to specific federalism understandably find reinforcement for their theory in Madison's promise to the Virginia Baptists.

[282] The Eighth Article was the proposed amendment securing a right to a jury in a criminal trial.

> are now proposed to be inserted as the third and eighth articles, shall be amended to read as follows:
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> Art. 3. **Congress shall make no law respecting an establishment of religion, or prohibiting [a** or **the]**[283] **free exercise thereof [,** or **;]**[284] or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Report of the Committee of Conference as recited in the HOUSE JOURNAL and in the ANNALS was passed by a vote of 37 to 14,[285] thus adopting the Conference's version of Article Three. The House also resolved that the President of the United States be requested to forward copies of the twelve Articles of Amendment to the eleven states, along with copies to Rhode Island and North Carolina.[286]

> On motion, it was resolved, that the President of the United States be requested to transmit to the Executives of the several States which have ratified the Constitution, copies of the amendments proposed by Congress, to be added thereto, and like copies to the Executives of the States of Rhode Island and North Carolina.[287]

G. Final Action in the United States Senate

September 24, 1789

The Senate considered the Report of the Committee of Conference and ordered that the Report "lie for consideration."[288] Later that day, the Clerk of the House reported to the Senate that the House had agreed to all of the changes in the Conference Committee Report.[289]

September 25, 1789

The Senate concurred in the Report of the Conference Committee, as agreed to by the House of Representatives the prior day:

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[283] The ANNALS read "…or prohibiting *a* free exercise thereof…", whereas the HOUSE JOURNAL reads "…or prohibiting *the* free exercise thereof." *Compare* 1 ANNALS, *supra* note 145, at 948 (September 24, 1789) *with* HOUSE JOURNAL, *supra* note 154, at 121 (September 24, 1789). The record in the SENATE JOURNAL agrees with the HOUSE JOURNAL. *See* SENATE JOURNAL, *supra* note 11, at 145 (September 24, 1789).

[284] The ANNALS use a comma, whereas the HOUSE JOURNAL uses a semicolon. Once again the record in the SENATE JOURNAL agrees with the HOUSE JOURNAL. *See* SENATE JOURNAL, *supra* note 11, at 145 (September 24, 1789).

[285] 1 ANNALS, *supra* note 145, at 948 (September 24, 1789); HOUSE JOURNAL, *supra* note 154, at 121 (September 24, 1789). The HOUSE JOURNAL and the ANNALS list a roll call vote on the "alteration of the eighth article" but not on the Third Article.

[286] These two states had not yet ratified the 1787 Constitution and thus were not part of the Union.

[287] 1 ANNALS, *supra* note 145, at 948 (September 24, 1789); HOUSE JOURNAL, *supra* note 154, at 121 (September 24, 1789).

[288] SENATE JOURNAL, *supra* note 11, at 145 (September 24, 1789).

[289] *Id.* at 148-49 (September 24, 1789).

> The Senate proceeded to consider the Message of the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" – And
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> Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.[290]

Two-thirds of both the House and Senate thus agreed on the text of the Third Article.

September 29, 1789

A Preamble explaining the impetus behind their passage, followed by a list (or "Bill") of the twelve proposed Articles of Amendment, is inserted in the record of the SENATE JOURNAL as follows:

> The Conventions of a Number of States having, at the Time of their adopting the Constitution, expressed a Desire, in order to prevent misconstruction or abuse of its Powers, that further declaratory and restrictive Clauses should be added: And as extending the Ground of public Confidence in the Government, will best insure the beneficent Ends of its Institution –
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> . . .
>
> Article the Third. **Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,** or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances. [291]

The congressional Preamble makes it clear that the amendments did not vest any new powers in the federal government. On the contrary, the amendments were to reassure Americans that the federal powers delegated in the 1787 Constitution are not be misconstrued or abused so as to impute powers to the federal government that it did not have. This is important in rightly interpreting the relationship between the Establishment and Free Exercise Clauses.[292] By reassuring the American people, the Federalists hoped to take away much of the support for a second constitutional convention. In this they succeeded.

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[290] *Id.* at 150 (September 25, 1789).

[291] This final record of the proposed Third Article of Amendments uses a comma instead of a semicolon to set apart the phrases on religious freedom from those phrases on speech, press, assembly, and petition. *Compare id.* at 145 (September 24, 1789) *with id.* at 163 (September 29, 1789) (emphasis added).

[292] *See supra* notes 164-65 and accompanying text (when introducing proposed bill of rights, Madison stated that the amendments would not expand federal powers, but would limit and qualify them), and *see infra* Part V.B. (discussing the impossibility of tension between the religion clauses).

H. Ratification in the States, October 1789 to March 1792

After receiving the proposed amendments from the First Congress, on October 2, 1789, President Washington forwarded them to each of the states for consideration pursuant to U.S. Constitution Article V.[293] About two and one-half years later, on March 1, 1792, Secretary of State Thomas Jefferson formally announced that 10 of the 12 proposed amendments (Articles Third through Twelfth) had been ratified by the requisite three-fourths of states, thereby ending the formal period of ratification.[294]

The following table lists the states that ratified the proposed amendments by the date of each state's ratification. Almost none of the state-by-state debate over the proposed amendments has survived, or indeed was ever recorded. Much of the remaining record is in various letters and newspaper accounts.

Ratification of the Amendments by the States
November 20, 1789 – March 1, 1792

	Date of Ratification by State	**Date Ratification Reported to the Federal Congress**	**State**	**Amendments Ratified**	**Record of Debate?**
1	November 20, 1789	August 6, 1790	New Jersey[295]	1, 3-12	No
2	December 19, 1789	January 25, 1790	Maryland[296]	1-12	No
3	December 22, 1789	June 11, 1790	North Carolina[297]	1-12	No
4	January 28, 1790	March 8, 1790	Delaware[298]	2-12	No
5	January 18, 1790	April 1, 1790	South Carolina[299]	1-12	No
6	January 25, 1790	February 15, 1790	New Hampshire[300]	1, 3-12	No
--	February 2, 1790	--	Massachusetts	3-11	Minimal
7	February 27, 1790	April 5, 1790	New York[301]	1, 3-12	No
8	March 10, 1790	March16, 1790	Pennsylvania[302]	3-12	No
9	June 7, 1790	June 30, 1790	Rhode Island[303]	1, 3-12	No

[293] BERNARD SCHWARTZ, 5 THE ROOTS OF THE BILL OF RIGHTS 1171-72 (5 vols., Chelsea House Pub., N.Y. 1980) [hereinafter "SCHWARTZ"].
[294] *Id.* at 1171.
[295] RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 245 (2006) [hereinafter "LABUNSKI"]; SCHWARTZ, *supra* note 293, at 1181, 1200-01.
[296] SCHWARTZ, *supra* note 293, at 1172, 1176, 1193-94.
[297] LABUNSKI, *supra* note 295, at 245; SCHWARTZ, *supra* note 293, at 1184, 1199.
[298] *Amendments to the Constitution of the United States of America*, *available at* http://caselaw.lp.findlaw.com/data/constitution/amendments.html at n.2 (last visited June 12, 2010); SCHWARTZ, *supra* note 293, at 1180; *see id.* at 1196-97 (letter to President Washington from the Governor of Delaware which omits the exact date of ratification by the Delaware Legislature).
[299] *Id.* at 1195-96.
[300] *Id.* at 1179, 1182-83, 1194-95.
[301] *Id.* at 1180, 1181-82, 1197-98 (according to the notification sent to President Washington, the House resolved on February 22, 1790, the Senate resolved on February 24, 1790, and the "Council of Revision" resolved on February 27, 1790).
[302] *Id.* at 1176 (citing the December 10, 1789, unofficial reports in the *New York Journal* and *Weekly Register*), 1180, 1197.

10	December 15, 1791	December 30, 1791	Virginia	1-12	Yes
11	November 3, 1791	January 18, 1792	Vermont[304]	1-12	No

Scholars disagree over whether the amendments needed to be ratified by ten or eleven states, the confusion arising because Vermont joined the Union after the proposed amendments had been sent to the states for ratification but before ten states had properly ratified.[305] The point becomes moot because by the time Jefferson formally announced ratification, at least eleven states had ratified the Third through the Twelfth Articles.

Jefferson's tally at the time of his announcement of ratification did not include Massachusetts. The legislature of that state had never sent any notification of ratification to anyone in the federal government.[306] As Secretary of State, Jefferson asked Christopher Gore, the U.S. Attorney for Massachusetts, about the status of Massachusetts' ratification in early August 1791 and was informed on August 18th of the legislature's mistake.[307]

The Massachusetts ratification process was problematic.[308] The Massachusetts House and Senate provisionally approved the third to eleventh proposed amendments, omitting the first, second, and twelfth.[309] Ratification failed because a special committee dominated by Antifederalists declined to give final approval to the earlier passage of Articles Third through the Eleventh by both the House and Senate.[310] The special committee's only reason to not report approval of the earlier House and Senate actions was that the amendments to the Constitution proposed by Massachusetts back in 1788 should again be recommended to Congress.[311]

Massachusetts is the first state where some official record of the debate over the amendments is recorded.[312] The House was particularly troubled over the proposed twelfth amendment, which reserved powers not granted by the Constitution to the states or to the people.[313] While it is clear from the House and Senate journals that the House

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[303] *Amendments to the Constitution of the United States of America, available at* http://caselaw.lp.findlaw.com/data/constitution/amendments.html at n.2 (last visited June 12, 2010); SCHWARTZ, *supra* note 293, at 1199-1200.

[304] SCHWARTZ, *supra* note 293, at 1202-03; *Amendments to the Constitution of the United States of America, available at* http://caselaw.lp.findlaw.com/data/constitution/amendments.html at n.2 (President Washington's correspondence to Congress does not include the date of Vermont's ratification).

[305] *See* LEVY, *supra* note 17, at 106 ("The admission of Vermont to the Union made necessary the ratification by eleven states."); *but see* SCHWARTZ, *supra* note 293, at 1172 ("The state ratifications . . . ended when Virginia became the tenth state to ratify at the end of 1791.").

[306] Both houses of the Massachusetts Legislature had passed amendments 3-11 by February 2, 1790, but the legislature failed to finalize the ratification by formally declaring its passage of the proposed amendments. This anomaly is explained in SCHWARTZ, *supra* note 293, at 1172.

[307] *See* LABUNSKI, *supra* note 295, at 245 n.16; *see also* SCHWARTZ, *supra* note 293, at 1175-76 (including the letter from Christopher Gore, explaining the failure of notice by the Massachusetts Legislature).

[308] LABUNSKI, *supra* note 295, at 245; *see also* SCHWARTZ, *supra* note 293, at 1172, 1174-75.

[309] SCHWARTZ, *supra* note 293, at 1179, 1182-83, 1184.

[310] *Id.* at 1175, 1182, 1183, 1184; LEVY, *supra* note 17, at 107.

[311] LEVY, *supra* note 17, at 107.

[312] LABUNSKI, *supra* note 295, at 245; *see also* SCHWARTZ, *supra* note 293, at 1173-76, 1178-79, 1183, 1184.

[313] LABUNSKI, *supra* note 295, at 246.

struggled over this amendment, no official record of the House's objections exists.[314] However, in other records concerning Massachusetts' ratification debate are instances where the Governor of Massachusetts, John Hancock, exhorted the legislature to consider the proposed amendments. In one such instance, a speech before the legislature, he begins by suggesting that the House objection was to the reservation in the Twelfth Article reserving powers not delegated to either the federal or state government remained in the authority of the people:

> In all free governments, a share in the administration of the laws aught to be vested in, or reserved to the people; this prevents a government from verging towards despotism, secures the freedom of debate, and supports that independence of sentiment, which dignified the citizen, and renders the government permanently respectable. The intuitions of grand and petit juries are admirably calculated to produce these happy effects, and to afford security to the best rights of men in civil society: These articles, therefore, I believe will meet your ready approbation: Some of the others appear to me as very important to that personal security which is so truly characteristic of a free government. After speaking of the state of the union, he observes: —"Notwithstanding a general government is well established by the free consent of the people, we are to continue to support our own government, with unabating anxiety for its welfare and prosperity: indeed, the general government of the United States is founded in an assemblage of republican governments; and it depends essentially on these, not only for its dignity and energy, but for its very existence in the form it now possesses; therefore, whatever is done to support the commonwealth, has a tendency to advance the interest and honor of all the states, hence we are called upon in an especial manner, to maintain an equal and regular system of revenue and taxation, *to support the faith*, and perform the engagements of our republic; to arm and cause our militia to be disciplined according to the mode which shall be provided by Congress and to see that they are officered with men, who are capable of making the greatest progress in the art of military, and who delight in the freedom and happiness of their country. A well regulated and disciplined militia, is at all times a good objection to the introduction of that bane of all free government—a standing army."[315]

Hancock's reference to the state's duty "to support the faith" is an apparent nod to Massachusetts' authority to levy religious assessments (taxes) at the parish level. This generally favored the local Congregational Church. While Hancock makes no mention of the religion clauses in the proposed Third Article of Amendments, he was perhaps reassuring the dominant Congregationalists that ratification of the Third and Twelfth Articles did not negate the state's power to impose religious assessments by law.

Virginia ratified the first of the proposed amendments (concerning the size of the U.S. House) on November 3, 1791, and President Washington reported that partial

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[314] SCHWARTZ, *supra* note 293, at 1174-75.

[315] SCHWARTZ, *supra* note 293, at 1178-79 (speech by Governor John Hancock to the Massachusetts Legislature, January 28, 1790) (emphasis added).

ratification to Congress on November 14, 1791.[316] When Virginia ratified the balance of the amendments on December 15, 1791, President Washington forwarded the full ratification message to the House and Senate on December 30, 1791.[317]

Virginia is the only state where some official record exists of a debate concerning the religion clauses, albeit the record is complex and must be situated in its larger context of the Antifederalist struggle to call a second constitutional convention or to secure amendments to the 1787 Constitution that would trim back the powers of the national government with respect to direct taxation and the regulation of commerce.[318] In late September 1789, Virginia's two U.S. Senators, Richard Henry Lee and William Grayson, wrote the Virginia Governor and Legislature stating their disappointment with the twelve submitted Articles of Amendment.[319] The letters complained that Virginia's proposed amendments had not been adopted by Congress, that the power of the central government remained unchecked, and that civil liberties were endangered by the central power. However, neither the Third Article nor religious freedom generally was explicitly mentioned. The Virginia House, a majority of which were Federalists, approved all the amendments on December 24, 1789.[320]

Dividing by a vote of 8 to 7, the state Senate held up ratification for almost two years, ostensibly because of objections to Articles Third, Eighth, Eleventh, and Twelfth.[321] One of the claims by the eight Antifederalist senators was that the proposed Third Article did not protect the right of conscience or prohibit certain aspects associated with an established church. The eight senators explained their opposition to the amendment as follows:

> The 3d amendment, recommended by Congress, does not prohibit the rights of conscience from being violated or infringed: and although it goes to restrain Congress from passing laws establishing any national religion, they might, notwithstanding, levy taxes to any amount, for the support of religion or its preachers; and any particular denomination of christians might be so favored and supported by the General Government, as to give it a decided advantage over others, and in process of time render it as powerful and dangerous as if it was established as the national religion of the country.
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> . . .
>
> This amendment then, when considered as it relates to any of the rights it is pretended to secure, will be found totally inadequate, and betrays an unreasonable, unjustifiable, but a studied departure from the amendment proposed by Virginia and other States, for the protection of these rights. We conceive that this amendment is dangerous and fallacious, as it tends to lull the apprehensions of the people on these important points, without affording them security; and mischievous, because by setting bounds to Congress, it will be considered as the only restriction on their power over

[316] *Id.* at 1201.
[317] *Id.* at 1201-02.
[318] *Id.* at 1185, 1188.
[319] *Id.* at 1186-88, 1189.
[320] *Id.* at 1176-77, 1184, 1188-89, 1190-91.
[321] *Id.* at 1192-93; Levy, *supra* note 17, at 109.

> these rights; and thus certain powers in the government, which it has been denied to possess, will be recognized without being properly guarded against abuse.[322]

Read narrowly, the Establishment Clause could be said to prohibit only the establishment of a national religion—albeit one familiar with the drafting history would not do so. So construed, however, these eight senators went on to suppose the Third Article thereby leaves Congress free to impose some elements of what were commonly associated with an "establishment," while stopping short of a full establishment or national church.[323] Indeed, the examples given by the senators as consequences to be avoided track those made by James Madison, as well as Presbyterian and Baptist dissenters, when successfully opposing Patrick Henry's General Assessment Bill in 1784-1785.[324] While the Third Article protects the free exercise of religion, as we have seen above, earlier versions of the amendment protected both "free exercise" and "conscience."

What casts suspicion on these objections by the eight state senators is not just that they were known to be Antifederalists, but also that that they had a voting record of supporting the earlier-established Anglican Church in Virginia and had argued in favor of Henry's General Assessment Bill when it was debated in 1784-1785. Likewise, U.S. Senators Richard Henry Lee and William Grayson had opposed Virginia's ratification of the 1787 Constitution[325] and still sought more state-friendly amendments taking power away from the federal government. If these twelve Articles of Amendments were not ratified, an opportunity would open up for another round of amendments more to their liking.

In a letter dated November 20, 1789 updating President Washington on Virginia's progress on the amendments, James Madison questioned these state senators' sincerity and confidently stated his belief that the Antifederalists would be unsuccessful in blocking the amendments.[326] Specifically, Madison wrote:

> If it be construed by the public into a latent hope of some contingent opportunity for prosecuting the war agst. the Genl. Government, I am of opinion the experiment will recoil on the authors of it. . . . One of the principal leaders of the Baptists lately sent me word that the amendments had entirely satisfied the disaffected of his Sect, and that it would appear in their subsequent conduct.[327]

The referenced letter from Virginia Baptists to Madison[328] is important because it was the Baptists who had, along with the Presbyterians, allied with Madison and other statesmen

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[322] *Journal of the Senate of the Commonwealth of Virginia; Begun and held in the City of Richmond, on Monday, the 19th Day of October, in the Year of Our Lord 1789 and in the Fourteenth Year of the Commonwealth* 62-63 (Richmond, Va., 1828). *See also* LEVY, *supra* note 17, at 107-08. For the amendment on religious freedom originally proposed by Virginia, *see supra* note 120-24 and accompanying text.

[323] Professors John Witte and Michael McConnell each give a multipart definition of a full establishment. *See supra* note 169.

[324] *See* Esbeck, *Virginia Disestablishment*, *supra* note 5, at 82-85.

[325] BEEMAN, *supra* note 23, at 370, 372-73.

[326] LEVY, *supra* note 17, at 109-10.

[327] WILLIAM HUTCHINSON, ET AL., EDS., 12 THE PAPERS OF JAMES MADISON 453 (1962-1991) (letter from Madison to President Washington dated November 20, 1789).

[328] SCHWARTZ, *supra* note 293, at 1185. The Baptist letter is found in DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870 (DERIVED FROM RECORDS,

in Virginia to defeat Henry's General Assessment Bill. And it was the Baptists who are thought to have thrown their votes behind Madison to elect him to the U.S. House of Representatives, said by some to have been in return for Madison's promise to deliver on a Bill of Rights that protected full religious freedom at the federal level.[329]

On January 5, 1790, Madison wrote to President Washington to again express confidence that the tactics of the Antifederalists would ultimately backfire against them:

> You will probably have seen by the papers that the contest in the Assembly on the subject of the amendments ended in the loss of them. The House of Delegates got over the objections to the 11 & 12, but the Senate revived them with an addition of the 3 & 8 articles, and by a vote of adherence prevented a ratification. On some accounts this event is no doubt to be regretted. But it will do no injury to the Genl. Government. On the contrary it will have the effect with many of turning their distrust towards their own Legislature. The miscarriage of the 3d. art. particularly, will have this effect.[330]

Almost two years later, Madison's confidence was rewarded by the Virginia Senate's ratification on December 15, 1791.[331] Considered in the context of the Antifederalist's goal to reduce the power of the new federal government, the lapse of time between eventual ratification and the published interpretation of the religion clauses in the Third Article by the slim majority of Antifederalist senators, and their earlier non-support for Virginia disestablishment, there is every reason to fully discount the understanding of the religion clauses that had been published back in October 1789 by the eight senators.[332]

On March 1, 1792, Secretary of State Jefferson officially notified the several states that Articles of Amendment Third through Twelfth had been successfully ratified, thus implying the First and Second Articles had failed. A stylist thus renumbered the successful Articles First through Tenth, and in time they took on the popular appellation "Bill of Rights." With uncharacteristic understatement, Jefferson wrote:

> I have the honor to send you herein enclosed, two copies duly authenticated, of an Act concerning certain fisheries of the United States, and for the regulation and government of the fishermen employed therein; also of an Act to establish the post office and post roads within the United States; also the ratification by three fourths of the Legislatures of the Several States, of certain articles in addition and amendment of the Constitution of the United States, proposed by Congress to the said Legislatures . . . .[333]

MANUSCRIPTS AND ROLLS DEPOSITED IN THE BUREAU OF ROLLS AND LIBRARY OF THE DEPARTMENT OF STATE, 5 VOLS. (Washington, D.C., 1894-1905)) vol. 5, at 215 [hereinafter "DOCUMENTARY HISTORY"].

[329] MILLER, MAY NEXT, *supra* note 22, at 194, 240, 248-49.

[330] SCHWARTZ, *supra* note 293, at 1193 (reproducing letter from Madison to President Washington). *See also* DOCUMENTARY HISTORY, *supra* note 328, at 230.

[331] LEVY, *supra* note 17, at 111.

[332] *Id.* 111 ("there is every reason to believe that Virginia [ratified] the Religion Clauses of the First Amendment [in December 1791] with the understanding that [they] had been misrepresented [back in October 1789] by the eight senators").

[333] SCHWARTZ, *supra* note 293, at 1203.

In Georgia and Connecticut the legislatures failed to ratify the proposed amendments.[334] The religious freedom provisions in the Third Article were not a cause of opposition, or even discussion, in these two states. Georgia took the position that it had not yet been proven that the proposed amendments were necessary.[335] In Connecticut, the House ratified all of the amendments except the Second in 1789[336] and again in 1790. However, the Federalists, who held a majority in the Senate, declined to take up the amendments because they thought to do so would only strengthen the Antifederalist's criticism that the original Constitution was flawed.[337] In 1939, these two states, along with Massachusetts, ratified the amendments in a ceremonial recognition of the 150th year anniversary of the amendments' initial submission to the states.[338]

In summary, so far as indicated from the state convention records that were kept, ratification of the Third Article, which covered religious freedom and freedom of expression, generated no opposition, indeed no debate, except in Massachusetts and Virginia. In Massachusetts, the Antifederalists in the state Senate were able to forestall ratification for reason other than opposition to the Third Article. In Virginia, the opposition was by Antifederalists who held a slim majority in the state Senate. Although it took almost two years, popular support for the Third Article eventually broke through the blocking tactics of the Antifederalists, and Virginia became the tenth state to ratify the Bill of Rights. Given that the likely reason behind the delay in Virginia's ratification was Antifederalist maneuverings, it is best said that the surviving records of state ratifications yields little additional insight into the original meaning of the Establishment Clause. What little we do know is from Virginia where there was popular support for the Third Article.

IV. PLAIN MEANING OF THE TEXT OF THE ESTABLISHMENT CLAUSE

We take up in this Part the matter of the plain meaning of the text of the Establishment Clause as the words were finally agreed to by both houses of Congress on September 24-25, 1789. Some of these issues necessarily arose in Part III, but it would have unduly disrupted the presentation of the unfolding congressional debates recorded there to have pursued them more deeply. That will be the task here.

A. The Establishment Clause Does Not Codify a Preexisting Right

The nature of many of the first eight amendments in the Bill of Rights is *not* that rights were being newly created. Rather, the text reads as if many of these rights were already held by Americans. Thus, the rights are merely being made explicit, as a matter of reassurance, and accordingly the rights were not superseded by the powers delegated to the new federal government.[339]

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[334] *Id.* at 1172, 1201, 1203.
[335] LEVY, *supra* note 17, at 106.
[336] SCHWARTZ, *supra* note 293, at 1181.
[337] LEVY, *supra* note 17, at 106.
[338] SCHWARTZ, *supra* note 293, at 1172.
[339] *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2797 (2008) ("[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendment, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of

This understanding is suggested by the various participles and verbs chosen by the members of the First Federal Congress who drafted the text. It is perhaps most obvious when reading the phrasing of the Fourth Amendment,[340] which begins by stating an existing right and then negating Congress' power to "violate[]" that right. If one first reads the Fourth and then the First Amendment, that pattern is evident in most of the First Amendment as well. Participles like "prohibiting" and "abridging" in the First Amendment,[341] the noun "right" characterizing both "assemble" and "petition," as well as the verb "infringed" in the Second Amendment,[342] are all indicative of preexisting rights that the new government is acknowledging it has no authority to transgress. The Ninth Amendment even speaks in terms of other rights "retained by the people,"[343] suggesting many of the foregoing explicitly listed rights in the first eight amendment are already possessed by Americans.[344]

The participle "respecting" in the phrase "Congress shall make no law respecting an establishment of religion" stands out as quite different. It is not that no-establishment is a direct command to Congress restraining its use of powers delegated elsewhere. The

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the right and declares only that it 'shall not be infringed.'"). The *Report on the Virginia Resolutions of 1800*, authored by James Madison, stated with respect to two of the rights in the First Amendment as follows: "Both of these rights, the liberty of conscience and [freedom] of the press, rest equally on the original ground of not being delegated by the Constitution, and, consequently, withheld from the Government." FOUNDERS' CONSTITUTION, *supra* note 38, at 146. Madison wrote this passage in the course of arguing that the use of the word "abridging" in the text ("Congress shall make no law … abridging the freedom … of the press.") should not be read as reserving to Congress a limited power to regulate the press so long as Congress did not totally abridge it. Such a reading, argued Madison, would be contrary to the fact that First Amendment did not in the first instance grant these two rights, but only acknowledged the rights which "rest[ed] ... on ... original ground."

[340] NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 100 n.77 (1937) (noting that the text that eventually became the Fourth Amendment "did not purport to *create* the right to be secure from unreasonable searches and seizures but merely stated it as a right which already existed"). In relevant part, the Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

[341] In relevant part the U.S. CONST. amend. I provides: "Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[342] U.S. CONST. amend. II provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

[343] U.S. CONST. amend. IX provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Antifederalists (as well as others) thought adoption of a Bill of Rights prudent because they still harbored concerns that the new central government might abuse its powers, and most Federalists thought the amendments unnecessary but generally harmless. However, a possible unintended harm of adopting amendments was omitting to mention a right among those explicitly listed in the Bill of Rights. Such an omission might leave a supplicant open to the argument by the government's attorney that the asserted right did not exist because it was not among those explicitly listed. That concern was alleviated by the Ninth Amendment.

[344] The seeming absoluteness of the word "prohibiting," as contrasted with the matter-of-degree nature of words like "abridging" or "infringed," should not be taken literally such that the right of "free exercise" is only violated by the government's total blockage of an adherent's religious practice. *See* WITTE, GOD'S JOUST, *supra* note 169, at 202.

same is true of free exercise, free speech, free press, as well as the rights to assemble and petition. The difference is that the participial phrase "respecting an establishment" is not describing a right (preexisting or otherwise) but is describing a discrete subject matter or topic (i.e., "an establishment of religion") that is not within Congress' powers to "make . . . law." In that sense, the Establishment Clause does not read as if it is describing a right (e.g., free exercise of religion, free speech, or free press) held by the people. Rather, it is as if the Establishment Clause is describing a limit on Congress' jurisdiction to legislate on a discrete subject matter or topic. The limit is that there may be no legislation on the subject matter described as "an establishment of religion."

Of course, the congressional drafters did not mean to be understood as claiming Congress, in the absence of the Establishment Clause, had legislative power to "establish . . . [a] religion" under the 1787 Constitution. Federalists were in complete control of the drafting process. And, as we have seen, from James Wilson's speech forward the Federalists, including Madison, repeatedly denied that the 1787 Constitution vested such power in Congress.[345] Rather, to the drafters no-establishment meant only that readers of the 1787 Constitution should be reassured that Congress had no legislative power concerning the subject matter "respecting an establishment." In short, the plain text of the first participial phrase in the First Amendment is different than the balance of the rights-based clauses in the Amendment, as well as those in the Second and Fourth Amendments.

The text of the Establishment Clause reads like part of the structural frame of the federal government (i.e., delegations and denials of power), not as an acknowledgment of a rights-based principle. As such, the Establishment Clause is a precautionary negation of federal power over a narrow, but nonetheless highly important, subject matter described as "respecting an establishment," thereby leaving power over that subject matter to the states or to the people and their houses of worship.[346] It is thus easy to see how some federal courts later came to characterize the Establishment Clause as a limit on their federal subject matter jurisdiction as defined in Article III, Section 2 of the U.S. Constitution.[347]

Even beyond the text, it is common sense for religious conscience, free speech, free press, freedom to assemble, and freedom to petition to be regarded by Americans as preexisting rights. However, in the period 1789-1791 the question of establishment or disestablishment was not everywhere settled. Indeed, in the New England states it was highly disputed terrain with the establishmentarians in the dominate role.

On September 29, 1789, as Congress reported out the proposed articles of amendment to the states for ratification, some states (all in New England) still had a tax-supported church, whereas other states had recently gone through a disestablishment struggle and placed authority over organized religion in the hands of voluntarily supported houses of worship.

At the federal level, however, the new government never had to make a choice between keeping an existing establishment or to disestablish—there never having been a

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[345] *See supra* notes 80-81, and accompanying text.
[346] *See* U.S. CONST. amend. X.
[347] Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 42-51 (1998) (collecting cases) [hereinafter "Esbeck, *Establishment Clause as Structural*"].

national church. Rather, the Establishment Clause denied federal power to establish a national church and likely much more. Such a limitation on the power of the federal government left a jurisdictional restraint on its authority, thereby leaving matters "respecting an establishment" in the hands of institutional religion. Given the plain text of the no-establishment principle, one can hardly fault the modern Supreme Court when, after its *Everson* decision in 1947, it began to read the Establishment Clause as allocating power between two centers of authority. That is, the Court envisioned the Establishment Clause as about the "separation of church and state" and its judicial task was to keep the river of governmental power from overflowing the levy between church and state and flooding forbidden fields defined as "respecting an establishment of religion."

We can also say that since *Everson* the Court has made that line-drawing task harder than it was thought to be in 1789-1791. In part, this is because the post-*Everson* line drawing has to take place at a myriad of state and local governmental arenas, not just with respect to the federal government. This line-drawing task has also become more difficult because of the increase in the size and regulatory activity of government.

B. The Religion Clauses Reduced to Protecting Only Conscience

In relevant part the First Amendment reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." While there is but one clause here addressing religious freedom, there are two participial phrases ("respecting an establishment" and "prohibiting the free exercise") modifying the object ("no law") of the verb ("shall make"). Grammatically, each participial phrase is equal to and has a meaning independent of the other phrase.[348]

Yet another innovation has surfaced which would severely narrow the scope of religious freedom as understood by the Supreme Court since its decision in *Everson*. Professor Noah Feldman argues that the Establishment Clause protects only liberty of conscience.[349] His idea is based on the historical claim that in 1789 the only American consensus on religious freedom was that liberty of conscience ought to be protected.[350] Feldman thus believes that the protection of conscience is all that could have been agreed to by the First Congress. It follows, Feldman postulates, that protection of conscience is the full scope of the original meaning of the Establishment Clause of the First Amendment.[351]

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[348] Their independent and equal status is evident because either participial phrase can be omitted and the remaining phrase still makes sense. That is, the opening clause to the first semicolon would make sense if it read, "Congress shall make no law respecting an establishment of religion." It would also make sense if the opening clause to the first semicolon read, "Congress shall make no law prohibiting the free exercise of religion."

[349] *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 351-52 (2002) [hereinafter "Feldman, *Origins*"]. Professor Feldman later wrote a book for a popular audience that is based on his conscience-only reading of the scope of the First Amendment. *See* NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 26-27 (2005). But the book assumes the correctness of the thesis in his earlier law review article. *Id.* at 27 n.19. So our attention is best focused on the merits of the original article.

[350] Feldman, *Origins*, *supra* note 349, at 372-84, 397-98.

[351] *Id.* at 398-412.

Feldman's innovation is problematic at a multiplicity of levels. First, we examined in Part II of this Article the amendments proposed by the states of New Hampshire, Virginia, and New York during the ratification of the Constitution,[352] and North Carolina and Rhode Island later copied Virginia's proposed amendment.[353] We also saw a constitutional amendment debated in Maryland, although it did not pass.[354] Each of these amendments addressed conscience and no-establishment separately. Accordingly, these amendments assumed an understanding of religious freedom that went beyond just liberty of conscience. Indeed, one could begin a few years earlier in time by taking note of how Virginia had worked through its struggle for religious freedom. In Virginia, conscience was protected in the state constitution as of 1776 but disestablishment of the Anglican Church was not achieved until January 1786.[355]

Second, the adoption of a Bill of Rights (including the First Amendment) was possible because the purpose of the amendments was confined to agreeing on those powers that were *not* delegated to the federal government. As historian Thomas Curry explained: while Americans did disagree over governmental power with respect to issues such as the establishment of religion, they could agree on Congress not being vested with any power over such establishments.[356] Feldman is thus asking the wrong question. The question is not what substantive rule could the Congress of 1789 have agreed to with respect to religious freedom, but what could the Congress have agreed were the powers not held by the new federal government.

Third, Feldman's argument is at odds with the separate treatment of the Free Exercise and Establishment Clauses as they independently evolved during the 1779 drafting process beginning in the House, then in the Senate, and finally in the Conference Committee. For example, Feldman's claim is contrary to the amendments initially proposed by James Madison. On June 8, 1779, Madison proposed a separate amendment binding on states that involved only the protection of conscience. That amendment was unlike Madison's amendment binding on the federal government which involved both the concepts of conscience and no-establishment.[357] This not only shows a clear distinction in the mind of Congress between conscience and no-establishment, but it shows that Madison intended from the very start a no-establishment principle binding on the federal government but not the states.[358] The distinction was maintained a week after Madison's

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[352] *See supra* notes 105, 121, 128 and accompanying text (proposed amendments from these three states).

[353] *See supra* notes 100, 141 and accompanying text (proposed amendments from these two states).

[354] *See supra* note 95 and accompanying text (proposed amendment in Maryland).

[355] Esbeck, *Virginia Disestablishment*, *supra* note 5, at 65-70 (adoption of the Virginia Declaration of Rights in 1776), 75-89 (defeat of Patrick Henry's Assessment Bill in 1784-1785 and passage of Jefferson's Religious Freedom Bill in early 1786).

[356] *See supra* note 7 (quoting CURRY, FIRST FREEDOMS, at 193-94).

[357] *See supra* notes 167 and accompanying text. Compare Madison's amendment directed at the federal government numbered "Fourthly," with his amendment directed at the states numbered "Fifthly."

[358] This is borne out in the modern Supreme Court's differentiation of the two religion clauses in that a violation of free exercise requires a showing of coercion of conscience whereas a violation of no-establishment does not. School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 221, 223 (1963); Engel v. Vitale, 370 U.S. 421, 430-31 (1962) (distinguishing between direct and indirect coercion).

introduction of amendment in the report to the House by the Select Committee of Eleven.[359] And the distinction remained right on through the several August drafts in the House.[360] The distinction continued through the several September drafts in the Senate, albeit conscience was reduced along the way to the more narrow "free exercise of religion."[361] Finally, the distinction was maintained by the Conference Committee which reported out two independent participial phrases ("respecting an establishment" and "prohibiting the free exercise") clearly maintaining two independent legal concepts. Thus, the distinction between conscience and no-establishment was not just that of Madison, but it is faithfully maintained by the House and Senate members active in the debate over what later came to be the Free Exercise and Establishment Clauses of the First Amendment.

Fourth, Feldman's thesis causes him to distort the normative meaning of coercion, for conscience is violated only when coerced. For example, quite understandably he wants the Establishment Clause to prevent many types of government programs where there is direct funding going to religious organizations. Since he limits the Establishment Clause to matters of conscience, he has to claim that such funding constitutes coercion of conscience.[362] But this is rather fanciful when the source of the funding is from taxes paid into the general treasury, which would mean every taxpayer suffers coercion even when many taxpayers are supporters of the government's aid program.[363]

Fifth, as noted in the prior paragraph, for Feldman it is coercive of conscience for a taxpayer to pay taxes into the general treasury from which some money is later appropriated to religious organizations.[364] It becomes coercive not when the taxes are extracted, but when (and if) the money is appropriated to organizations some of whom are religious. If that is not illogical enough, one can go on and ask why then is it not

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[359] *See supra* notes 181-83 and accompanying text.

[360] *See supra* notes 190-238 and accompanying text.

[361] *See supra* notes 246-56 and accompanying text. The Free Exercise Clause is narrower than "rights of conscience," because a claimant must first adhere to a religion before he can claim that its free exercise is being unconstitutionally hindered. A claim that one's conscience is unconstitutionally coerced by the government does not necessarily entail that the claimant adhere to a religion.

[362] Feldman, *Origins*, *supra* note 349, at 417-21.

[363] The lack of logic to this notion is laid bare in Steven D. Smith, *Taxes, Conscience, and the Constitution*, 23 CONST. COMMENT. 365 (2006). Coercion with respect to taxpayers is present only when there is a special or earmarked tax for a religious use and no other. *See* Esbeck, *Virginia Disestablishment*, *supra* note 5, at 89-90 (noting that the religious assessment proposed by Patrick Henry which was defeated by Madison and Protestant Dissenters in Virginia in 1785 was a special tax earmarked for religious purposes, and thus its defeat is not evidence for the proposition that the use of tax monies collected for general purposes are violative of conscience when appropriated to religious organizations for public purposes).

[364] Dictum in *Flast v. Cohen*, 392 U.S. 83 (1968), does say that the one of the abuses with which the Establishment Clause was concerned is the spending of tax funds on religion. *Id.* at 103-05. However, the actual importance of *Flast* is not so expansive. *Flast* only grants standing to sue. The actual rules on when an appropriation from tax funds does or does not violate the Establishment Clause are far narrower. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (setting the modern Court's parameters for when "indirect" funding of religious organizations is not permitted under the Establishment Clause); Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion) (setting the modern Court's parameters for when "direct" funding of religious organizations is not permitted under the Establishment Clause).

coercion of conscience when a taxpayer is forced to pay taxes into the general treasury from which some money will certainly be appropriated for causes which directly contradict the taxpayer's sincere religious beliefs? For example, why is it not actionable coercion to force a religious pacifist to pay federal income taxes a significant percent of which will go to military weaponry and fighting wars? If the abstraction of tax-derived money going, *inter alia*, to pay for education in science and mathematics at a religious school is actionable coercion, then why is the pacifist's more palpable coercion of religiously informed conscience not recognized as coercion actionable under the First Amendment? Feldman's privileging of a taxpayer's claim only when challenging governmental appropriations where some monies make their way to a religious organization makes no sense. What does make sense is to say, as the modern Supreme Court has said, that a violation of the Establishment Clause does not require a showing of coercion of conscience.[365] That means, of course, abandoning Feldman's claim that the religion clauses protect only conscience. And, indeed, the Supreme Court has protected interests other than liberty of conscience under the Establishment Clause. Since *Everson*, the Court's application of the Establishment Clause has been to police the boundary between church and government. Sometimes that policing role has rightly taken the Court beyond just protecting the liberty of conscience. For example, the Court has found that the government has exceeded its powers as limited by the Establishment Clause when composing voluntary prayers,[366] conducting voluntary devotional Bible reading,[367] resolving creedal disputes,[368] or involving the judiciary in explicitly religious events, beliefs, and practices.[369]

Sixth, if only coercion of conscience is prohibited by the First Amendment then government may favor one or some religions over others. Indeed, as in England today, government may have a full-fledged church establishment while not coercing the faiths of others who choose not to be a member of the Church of England. In order to prevent this result, Feldman once again ends up distorting the meaning of coercion to discover

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[365] *Schempp*, 374 U.S. at 221, 223; *Engel*, 370 U.S. at 430.

[366] *See Engel*, 370 U.S. at 425 (stating that it is not for the government to compose prayers for voluntary daily recitation by public school students).

[367] *See Schempp*, 374 U.S. at 205-07, 223-24 (stating that it is not for the government to select biblical passages for voluntary daily devotions to begin the public school day).

[368] *See* Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981) (stating that it is not for the government to determine whether plaintiff had a correct or incorrect view of Jehovah's Witnesses beliefs and practices); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (holding that civil courts may not probe into church polity or the process of removal of clerics in hierarchical church).

[369] *See* Widmar v. Vincent, 454 U.S. 263, 269-70 n.6, 271 n.9, 272 n.11 (1981) (stating it is not for the government to determine whether a university student organization's speech is worship or non-worship religious speech).

violations of conscience where they do not presently appear,[370] such as equating adolescent peer pressure to a crisis of conscience.[371]

Finally, this shrinking of the First Amendment to the protection of individual conscience is objectionable because altogether inconsistent the Western legal tradition. The two participial phrases up to the first semicolon of the First Amendment treat the matter of religious freedom as requiring attention to two distinct tasks. One task has to do with the relationship between government and the religious individual (i.e., free exercise). The second task has to do with the relationship between government and organized religion (i.e., no-establishment or separation of church and state).[372] This second task aligns with over a millennium of Western civilization which envisions the task of religious freedom to be about not just the liberty of the individual but also the separation of government and church.[373] It is no happenstance that Feldman's version of intellectual history bends the historical record toward his preference for liberalism's claim that ultimately only the nation-state and individuals have ontological status, omitting any possibility for autonomy of the organized religious body not reducible to the aggregate rights of the body's individual members. From the perspective of the West, however, Feldman's argument is malformed. His position fails to account for the dual-authority relationship of church and nation-state that has deeply marked civilization in the West and led to its highest form of religious freedom in the American states rejecting any power in the state to instrumentally use organized religion so as to unify and stabilize the state. The latter step is the rightly celebrated American notion of full religious freedom—not just liberty of conscience—through the separation of church and state.

C. Scope of the Establishment Clause's Negation of Power and the Constitutionality

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[370] *See* Tilton v. Richardson, 403 U.S. 672, 689 (1971) (where complaint was by taxpayers challenging program funding institutions of higher education, including religious colleges, Court dismissed Free Exercise Clause claim because taxpayers were unable to show religious coercion); Board of Ed. v. Allen, 392 U.S. 236, 248-49 (1968) (where challenge was to program of lending secular textbooks to K-12 schools, including religious schools, Court dismissed Free Exercise Clause claim because plaintiffs were unable to show religious coercion).

[371] *Compare Schempp*, 374 U.S. at 205, 211-12, 221, 223 (where peer pressure with respect to prayer and devotional Bible reading were said not to be direct coercion because the exercises were optional, but were nevertheless in violation of the Establishment Clause) *with* Lee v. Weisman, 505 U.S. 577, 586-95 (1992) (where mere exposure to unwanted prayer during graduation ceremony is said to be indirectly coercive even though attendance was not required).

[372] Coercion of conscience is about preventing personal harm. It is for that reason that we often associate coercion of religious-based conscience with the Free Exercise Clause. Albeit, one must first subscribe to a religion to freely exercise that religion. So free exercise is not as broad as protecting all of conscience, the latter not being dependent on first subscribing to a religion. In contrast, the no-establishment principle is about policing the outer limits of the government's jurisdiction when it comes to treading on matters within the purview of organized religion. The Establishment Clause is thus primarily about the structural harm that can result when church-government relations is disordered. *See* Esbeck, *Establishment Clause as Structural*, *supra* note 347, at 40-42. That is why the popular term for what the Establishment Clause is about is the separation of church and government.

[373] *See* JOHN F. WILSON & DONALD L. DRAKEMAN, EDS., CHURCH AND STATE IN AMERICAN HISTORY: KEY DOCUMENTS, DECISIONS, AND COMMENTARY FROM THE PAST THREE CENTURIES 1-7 (3d ed. 2003); BRIAN TIERNEY, THE CRISIS OF CHURCH AND STATE, 1050–1300, at 1-5 (1964); HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 88-119 (1983).

of Regulatory Exemptions

Consider again just the text, "Congress shall make no law respecting an establishment of religion." By virtue of this text, the power of Congress to enact a law that touches generally on religion is not what is denied. Rather, the scope of what is denied is, more narrowly, enacting a law about "an establishment of religion."

So, for example, assume Congress soon after 1791 passed a comprehensive law regulating conscription into the Army and Navy. In exercising the express constitutional power to oversee the armed forces,[374] nothing prevented Congress from providing an exemption from the draft for religious pacifists. While the source of the congressional power to provide for such an exemption came from a delegated power in the original 1789 Constitution (not from the Establishment Clause because, as discussed above, the clause was not a grant of new federal power[375]), nothing in the Establishment Clause prohibits such an exemption. That is, adopting an exemption for religious pacifists is certainly to "make [a] law respecting" religion but the exemption is not more narrowly to make a law about "an establishment" of religion. The legislative exemption is designed to merely allow individuals to follow certain practices born of their religious conscience, not for the government to affirmatively support religion.

As a second example, it would be fully consistent with the scope of the Establishment Clause for Congress to enact comprehensive legislation under the Interstate Commerce and Taxing Clauses[376] so as to require large employers to provide unemployment compensation to their employees, but then to exempt religious organizations from the act. To enact such a religion-specific exemption is certainly to "make [a] law respecting" religion. But the exemption is not more narrowly a law "respecting an establishment" of religion. Once again, the exemption is designed to merely allow individuals to follow certain religious practices if there are already so inclined.[377]

The foregoing raises the larger issue of the constitutionality of statutory religious exemptions from regulatory and tax burdens. It is a categorical mistake to presume that a religious exemption in legislation is a form of religious "favoritism," and thereby

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[374] U.S. CONST. art. I, § 8, cl. 14 delegates to Congress the authority "To make Rules for the Government and Regulation of the land and naval Forces."

[375] *See supra* note 164 and accompanying text.

[376] The Interstate Commerce Clause grants to Congress the power, "To regulate Commerce . . . among the several States . . . ." U.S. CONST. art. I, § 8, cl. 3. The Taxing Clause reads, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8, cl. 1.

[377] *See, e.g.*, Rojas v. Fitch, 127 F.3d 184 (1st Cir. 1997) (holding that statutory exemption for faith-based organizations from unemployment compensation tax did not violate the Establishment Clause). In a similar vein, although the text of the Free Exercise Clause by its terms does not allow for a law "prohibiting" religious exercise, the government retains authority to allow for ("allow" being the opposite of "prohibit") those wishing to independently pursue their religious interests. For example, a public school is free to have a policy allowing a teacher to observe a religious holy day as one of the teacher's allotted "personal days." Although the public school's power accommodates the teacher's religious liberty, it does not come from the Free Exercise Clause (because, as discussed above, the clauses in the Bill of Rights were not a grant of new federal power). Nor does the Free Exercise Clause negate a use of federal power delegated elsewhere in the Constitution to expand religious liberty.

prohibited by the Establishment Clause. Look again at the text. Although the government cannot "make [a] law" in support of "an establishment" of religion, it may "make [a] law" in support of religious freedom. Indeed, that would have to be so because the Free Exercise Clause is itself a law in support of religious freedom. Moreover, there are two provisions in the 1787 Constitution that expressly safeguard independent acts of religious observance: the Religious Test Clause and the provisions permitting an affirmation in lieu of an oath to accommodate Quakers, Anabaptists, and German Brethren, who cannot swear an oath. The First Amendment would not make any sense if the no-establishment text contradicted the free exercise text or if the Establishment Clause overrode or nullified these two other explicit accommodations of religious exercise.

The rationale for this plain reading of the text is straightforward. All agree that the First Amendment is pro freedom of speech and pro freedom of the press. By the same token, the First Amendment is pro religious freedom. And this is as true of the Establishment Clause as it is true of the Free Exercise Clause. Sponsoring or supporting religions, on the one hand, and sponsoring or supporting acts of religious freedom, on the other hand, are two very different things. While the post-*Everson* Establishment Clause prohibits the government from supporting religion, it does not prohibit the government from supporting religious freedom.[378] While religious exemptions from general regulatory and tax burdens are compatible with the text of the Establishment Clause, exemptions that discriminate among religions or that cause government officials to be drawn into the task of resolving a question of religious doctrine in order to administer a law do violate the Establishment Clause.[379]

Another way of stating the matter is as follows: government does not establish religion by leaving its private exercise alone—which is exactly what a legislative religious exemption does. Religious exemptions not only allow private acts of religious freedom but they reinforce the desired separation of church and state. Hence, it is entirely proper that the Supreme Court has held in every congressional religious-exemption case to come before it that the act of Congress in question did not violate the Establishment Clause.[380] The Court's specific rationale in these cases has not always been entirely clear or even logical, but the justices have consistently reached the correct result—a result fully in harmony with the text of the religion clauses.[381]

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[378] *See* Carl H. Esbeck, *When Accommodations for Religion Violate the Establishment Clause: Regularizing the Supreme Court's Analysis*, 110 W. VA. L. REV. 359, 360, 367-68, 372-74 (2007).

[379] *Id*. at 387-95 (setting forth five rules concerning errors to avoid in drafting a religious exemption in legislation).

[380] *See* The Selective Serv. Draft Law Cases, 245 U.S. 366 (1918) (holding that clergy, theology students, and religious pacifists could be exempt from military draft consistent with Establishment Clause); Gillette v. U.S., 401 U.S. 437 (1971) (holding that religious pacifist opposed to all war could be exempt from military draft consistent with Establishment Clause); Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (holding that nondiscrimination statute could exempt religious organizations from prohibition on religious discrimination in employment consistent with Establishment Clause); Cutter v. Wilkinson, 544 U.S. 709 (2005) (holding that federal civil rights legislation requiring states to accommodate many religious practices of prison inmates was consistent with the Establishment Clause).

[381] The foregoing demonstrates why law professor Philip Kurland's theory that what is required by the First Amendment is a "religion blind government" is deeply flawed. *See* PHILIP B. KURLAND, RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT 18, 112 (1962)

V. THE CONSTITUTION'S OVERALL STRUCTURE AND UNDERLYING POLITICAL THEORY AS BEARING ON THE MEANING OF THE ESTABLISHMENT CLAUSE

A. Incorporating the Establishment Clause: Confusing a Rights-Based Clause with a Jurisdictional Clause.

The incorporation of the Establishment Clause through the Due Process Clause of the Fourteenth Amendment presents an intriguing legal problem, but one of interest only to academics until Justice Clarence Thomas took note in his concurring opinion in *Zelman v. Simmons-Harris*.[382] The essence of the puzzle is that if the Establishment Clause is structural rather than rights based, then it makes no sense conceptually to incorporate the clause as a Fourteenth Amendment "liberty" applicable to the states. Of course, there is no chance that *Everson*'s incorporation of the clause will be reversed.[383] Aware of that reality, Justice Thomas has taken the less ambitious tack that the Establishment Clause be applied to the states with reduced rigor.[384] For example, one approach is that only when the clause protects conscience from religious coercion would the Establishment Clause bind state and local governments.

The first thing to be sorted when the topic of incorporation of the Establishment Clause arises is the confusion between two very different concepts. There is a sharp difference between a federalist Establishment Clause and an Establishment Clause that is jurisdictional. The former—which this Article calls "specific federalism"—is not supported by the record in the First Federal Congress.[385] The latter—an Establishment Clause that in certain respects separates church and government and thereby structures relations between these two centers of authority—is suggested by the text.[386] A jurisdictional Establishment Clause has not only separated organized religion and the federal government since 1789-91, but beginning with its incorporation by *Everson* the clause has separated organized religion from government in general (federal, state, and local). In summary, a federalist Establishment Clause is about federal/state structure

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(proposing that First Amendment means religion can never be used as a basis for legislative classification by the government). Kurland's theory is contrary to the very text of the two religion clauses which are pro religious freedom.

[382] Zelman v. Simmons-Harris, 536 U.S. 639, 678-80 (2002) (Thomas, J., concurring). *See also* McDonald v. City of Chicago, 130 S. Ct. 3020, 3084 n.20 (2010) (Thomas, J., concurring in part and concurring in the judgment) (reaffirming his view that the Establishment Clause is federalist and thus not capable of incorporation as a right); Cutter v. Wilkinson, 544 U.S. 709, 727-29 (2005) (Thomas, J., concurring); Elk Grove United Sch. Dist. v. Newdow, 542 U.S. 1, 50-51 (2004) (Thomas, J., concurring in the judgment).

[383] Reversing incorporation was expressly rejected by the Court in *Wallace v. Jaffree*, 472 U.S. 38, 48-55 (1985) (striking down a state law requiring a moment of silence for prayer or meditation in public schools as a violation of the Establishment Clause).

[384] Justice Thomas suggests that when applied to the states the Establishment Clause should be focused only on prohibiting religious coercion and stopping discrimination among religions. *See Cutter*, 544 U.S. at 728-29 (Thomas, J., concurring); *Newdow*, 542 U.S. at 50-51 (Thomas, J., concurring in the judgment); *Zelman*, 536 U.S. at 678-80 (Thomas, J., concurring).

[385] *See supra* notes 269-81 and accompanying text.

[386] *See supra* notes 272-73, 339-47 and accompanying text.

whereas a jurisdictional Establishment Clause is about church/government structure. The former is not supported by original meaning whereas the latter is suggested by it.

Professor Kurt Lash subscribes to specific federalism.[387] Accordingly, he believes that the original Establishment Clause (being federalist in structure) could not be incorporated as a "liberty" through the Fourteenth Amendment. However, Lash maintains that between 1789-91 and 1868 (the year the Fourteenth Amendment was ratified) both the states and Congress came to regard the clause not as federalist but as an individual right.[388] Therefore, he argues, since by 1868 the Establishment Clause was understood as a right its later incorporation was one of the rights in the first eight amendments of the Bill of Rights intended to be binding on the states by the Thirty-ninth Congress.[389]

Lash's argument that the Thirty-ninth Congress regarded the Establishment Clause as rights based has its detractors.[390] Indeed, for those who reject the theory of specific federalism then his thesis is a solution in search of a problem. Nonetheless, if one assumes, *arguendo*, that Lash is correct insofar as the Establishment Clause was federalist at the outset but lost its federalist character by 1868, it does *not* follow that the Establishment Clause thereby took on the nature of an individual right. Rather, it is probable that the Establishment Clause retained its character as separating church and government. That is, the jurisdictional character of the clause was never lost in the perception of either the states or Congress. Indeed, many of the sources that Lash cites as evidence that the federalist character of the Establishment Clause was forgotten are also evidence that the clause actually increased in the public's mind as guaranteeing the separation of church and government.[391] Then came 1947 and *Everson*'s incorporation of

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[387] *See* Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1090-92 (1995) [hereinafter "Lash, *Second Adoption*"].

[388] *Id.* at 1089, 1105-17.

[389] *Id.* at 1088, 1099, 1141-45. This would lead to two meanings to the Establishment Clause: one meaning binding on the federal government and a different meaning binding on state and local governments. That would be messy but manageable.

[390] The evidence that the meaning of the Establishment Clause changed during this period is thin and not altogether convincing, as is the paltry evidence that the Reconstruction Congress gave thought to the meaning of the Establishment Clause when the Fourteenth Amendment was debated in 1866-67. *See* HAMBURGER, *supra* note 6, at 436 n.112 (discussing why it is unlikely that the Fourteenth Amendment was meant to alter the meaning of the Establishment Clause); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 253, 385 n.91 (1998) (noting that the historical evidence is sparse and that members of the Reconstruction Congress did not list non-establishment among their catalogue of individual rights); Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause*, 24 OHIO N.U. L. REV. 1, 17-29 (1998) (reviewing the congressional history of the post-Civil War debate over the drafting of the Fourteenth Amendment with respect to religious freedom and concluding that in 1866-67 the Establishment Clause continued to be viewed as a power-limiting clause rather than as a rights-based clause).

[391] Lash quotes from various state supreme court cases holding that Sunday closing laws violated the principle of church-state separation. It was common for the court to say that all civil power has been denied as to spiritual matters. Lash, *Second Adoption*, *supra* note 387, at 1105-10. Additionally, with respect to church doctrinal disputes which in turn caused the two factions to both claim ownership of the real estate of the church, Lash quotes several state rulings based on common law that once again church-state separation disempowers the civil courts to resolve

the Establishment Clause. In Lash's view incorporation is not a problem because the clause had become right, and rights (if fundamental) are properly incorporated as "liberty" interests secured by the Fourteenth Amendment. However, to the extent that the post-1868 Establishment Clause separates church and government—that is, sets a jurisdictional limit on government involvement with organized religion—incorporation is still awkward because it is treating church/government structure as a "liberty" interest.

Lash is not the only one to fail to keep separate and distinct the federal/state divide from the church/government divide. In an article cataloging individual rights under state constitutions as of 1868, Professor Steven Calabresi and one of his students collects those state constitutions which had adopted a clause similar to the federal Establishment Clause.[392] Calabresi then reasons that if a state adopted such a clause in its own constitution, the state must not have believed that the Establishment Clause was federalist.[393] I agree. But Calabresi goes on to assume—as does Lash—that therefore the state must have perceived the Establishment Clause as an individual right.[394] That does *not* follow. Rather, such a state likely presumed that the Establishment Clause separated church and government, the latter being a jurisdictional limit separating these two centers of authority.

The question of whether the Establishment Clause—properly understood as jurisdictional—is capable of incorporation as a Fourteenth Amendment "liberty," this Article leaves for the reader to resolve to her own satisfaction.[395] That said, even if the

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disputes over doctrine. *Id*. at 1111-17. These cases are about lacking civil jurisdiction over religious matters more than they are about individual rights.

[392] Steven G. Calabresi and Sarah E. Agudo, *Individual Rights under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 31-33 (2008).

[393] *Id*. at 32.

[394] *Id*.

[395] Using the process of "selective incorporation," the *Everson* Court applied the Establishment Clause through the "liberty" provision in the Due Process Clause of the Fourteenth Amendment making the restraints of the clause binding on state and local governments. *Everson*, 330 U.S. at 13-15. Selective incorporation uses fundamental rights analysis to determine which rights in the first eight amendments of the Bill of Rights should bind state and local governments. However, the Establishment Clause is not a right but has been applied by the Court as structural in character in the sense of separating organized religion and government. *See supra* notes 339-47, 365-69, 372-73 and accompanying text. Therefore, the argument that incorporation of the Establishment Clause was a mistake is that the clause is incapable of incorporation as a fundamental right because no-establishment is not a right but structural. *Cf. McDonald v. City of Chicago*, 130 S. Ct. 3020, 3084 n.20 (2010) (Thomas, J., concurring in part and concurring in the judgment) (reaffirming his view that the Establishment Clause is federalist and thus not capable of incorporating as a right); *id.* at 3111 n.40 (Stevens, J., dissenting) (agreeing with the logic that if a clause is structural, such as a federalist clause, then such a clause cannot be incorporated). In defense of incorporation, on the other hand, is that enforcement of the Establishment Clause has the consequence of protecting, *inter alia*, the right of conscience to be free of government-imposed religion even for those who subscribe to no religion. The rejoinder to that argument is that constitutional structure often yields liberty as a consequence, but that still does not make structure capable of incorporation because it is not a right. The surrejoinder is that the doctrine of selective incorporation is not to be limited to rights *qua* rights but also reaches liberties that are a consequence of structure. *See id.* at 3123 (Breyer, J., dissenting) (stating that structure might be selectively incorporated "the extent to which incorporation will advance or hinder the Constitution's structural aims."). For more discussion and a collection of authorities, see Esbeck, *Establishment Clause as Structural*, *supra* note 347, at 25-32.

Supreme Court had never incorporated the Establishment Clause in *Everson* the clause would still separate organized religion and government. No incorporation would only mean that the federal government alone would be bound. The clause's denial of national power with respect to establishmentarianism necessarily had substantive consequences in the nature of restraining the federal government's jurisdiction. From 1791 forward, this meant that at the national level Congress had no power to "make . . . law respecting an establishment" of religion. However, Congress remained free to draw on one of its powers enumerated in the 1787 Constitution with respect to enacting a law that touched on religion. For example, using its enumerated power to regulate the armed forces,[396] Congress could provide for military conscription but then could also regulate (that is, touch on) religion by exempting religious pacifists from the draft. Such a statute is within Congress' original enumerated powers, whereas the pacifist exemption, albeit touching on religion, is not a statute "respecting an establishment" of religion. As discussed above, the First Amendment text necessarily makes this distinction as to the scope of the Establishment Clause.[397] So the military conscription statute with its religious exemption does not run afoul of the limited denial of national power imposed by the Establishment Clause. It advances religious freedom rather than advances religion. That was true in 1791, and it is true today.

We thus see that the early Congress, with an eye to the Establishment Clause, necessarily had to work out a definable line between when the federal government has "jurisdiction" to pass general legislation on a matter that merely touches on religion and those instances when the legislation was more narrowly "respecting an establishment" of religion. The former legislation is permitted but the latter is not because violative of the Establishment Clause. Call it jurisdictional, a substantive rule, or a structural restraint, this case-by-case line drawing would require Congress to systematically work out relations between the federal government and organized religion. This is another way of saying that the Establishment Clause polices the boundary between organized religion and government.

It is almost certainly true that no fully developed rule of church-government relations was understood by the Federalists in control of the House and Senate in 1789. But such a substantive rule would have had to develop case-by-case as Congress (and the other federal branches) faithfully sought to make general laws that might touch on religion but did not, more narrowly, result in the sort of evils associated with an establishment of religion. Lastly, because the federal government was at first small and not focused on day-to-day domestic matters, the occasion for federal laws about religion were few. And the pervasive Protestant ethic was often mistaken for merely culture or morals as opposed to religion. It would not be until well after the Civil War that the Establishment Clause would be called on to do some work in the federal courts.

B. The Impossibility of Tension Between the Religion Clauses

As we have seen, the Constitution was ratified in eleven states by the end of July 1788. As directed by the Confederation Congress,[398] national elections of Presidential

[396] U.S. CONST. art. I, § 8, cls. 12-14.
[397] *See supra* Part IV.C.
[398] 1 ELLIOT'S DEBATES, *supra* note 52, at 332-33.

Electors and Representatives in the House followed in the fall and winter of 1788. The implementation of the new government was set to begin in March and April of 1789 as Congress and President Washington's Administration constituted themselves at a temporary capital in New York City.[399] A proposed Bill of Rights was introduced by James Madison in the House of Representatives on June 8, 1789, debated in Congress from July to September 1789, and over two years later ratified by three-quarters of states come December 1791.

Focusing on the early Constitution's overall structure and theory, we begin with the fact that the Establishment Clause has its origin as a part of the Bill of Rights. The Bill of Rights did not vest any new power in the federal government. It did just the opposite.[400] Most provisions in the first eight amendments comprising the Bill of Rights[401] were designed to negate an assumption of power by the federal government being wrongly implied from some power-delegating clause in the 1787 Constitution. That is why the provisions in the Bill of Rights are often referred to as "negative rights."[402] They tell the federal government what it has no power to do, as opposed to telling the government what it may (or must) affirmatively do.

During the debate over ratification of the 1787 Constitution, numerous Americans called for safeguards against an overly expansive interpretation of the power-granting clauses of the proposed federal government. This was a line of attack favored by Antifederalists. However, for many Americans—not just Antifederalists—the argument by James Wilson that the new government was one of limited, enumerated powers[403] was reassuring but not sufficient. They wanted it in writing. For example, these Americans worried that the wording of the Necessary and Proper Clause[404] was so open-ended as to be a vehicle for implying all manner of powers in the federal government that would be widely opposed if put to a popular vote.[405] Similarly, Baptists

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[399] LABUNSKI, *supra* note 295, at 184.

[400] WALDMAN, *supra* note 26, at 153; LEVY, *supra* note 17, at 141.

[401] The Ninth Amendment is a rule on how to construe the 1787 Constitution and its first eight amendments. U.S. CONST. amend. IX reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Tenth Amendment is a rule on how to construe the 1787 Constitution. U.S. CONST. amend. X reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Tenth Amendment thereby makes explicit what James Wilson and other Federalists argued repeatedly during the ratification period, namely that the federal government was one of enumerated powers.

[402] *See*, *e.g.*, Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring) ("[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.").

[403] *See supra* notes 80-81 and accompanying text.

[404] U.S. CONST. art. I, § 8, cl. 18 ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[405] James Madison's remarks defending the need for a Bill of Rights to protect religious freedom in the face of Federalists' complaints that the amendments were unnecessary, specially mentioned the Necessary and Proper Clause:

> Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution,

in Virginia worried that the Religious Test Clause, while prohibiting the imposition of religious qualifications on those holding federal office, was so narrow in its protection of religious liberty that the Test Clause could be read as giving license to Congress to violate religious freedom more generally—for example, by imposing a federal tax to support a national church.[406] As a general matter such concerns about fundamental rights were not thought fanciful. They were shared by noted statesmen such as George Mason who opposed the ratification of the 1787 Constitution because it did not have a Bill of Rights.[407] Mason's model for such a comprehensive list was Virginia's Declaration of Rights adopted in late 1776, Section 16 of which addressed the free exercise of religion. Mason is credited with the initial draft of Virginia's declaration, albeit the free exercise language came from Madison.[408]

James Madison, as discussed previously, worked assiduously to ratify the 1787 Constitution by joining with other Federalists in arguing that the Constitution did not need a Bill of Rights. Principal among the reasons was that the powers delegated to the new federal government were sufficiently defined and limited such that they did not permit transgressing on fundamental rights. Madison also worried that acquiescing in the need for a Bill of Rights would alarm Americans. By denying powers never granted the proposed amendments might suggest to the people that the new government had such implied powers in the original document.[409] Further, he was concerned that compiling a list of fundamental rights risked omitting others that would later be claimed to be not protected because not among those explicitly listed.[410] Madison was also concerned that in compiling a list of rights, progressives would have to share the task with those having illiberal views on the scope of certain rights such as religious freedom, and thus the end product would be a description of rights too crabbed for his liking.[411] Finally, Madison thought a Bill of Rights an ineffective or "parchment barrier" to legislative excesses, whereas the surer way to safeguard liberties was to widely diffuse governmental power and enable factions to check power with power.[412]

Over the course of 1788-1789 Madison became of a different mind.[413] Several state ratifying conventions expressed dismay at the absence of a Bill of Rights, and five of the eleven states to ratify did so only after adopting a nonbinding resolution that

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> and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion . . . .

1 ANNALS, *supra* note 145, at 758 (August 15, 1789).

[406] WILLIAM R. ESTEP, REVOLUTION WITHIN THE REVOLUTION: THE FIRST AMENDMENT IN HISTORICAL CONTEXT, 1612-1789, at 166 (1990) (quoting letter by Joseph Spencer to James Madison) [hereinafter "ESTEP"]. Some Antifederalists had the same concern. STORING, *supra* note 67, at 64.

[407] LABUNSKI, *supra* note 295, at 62; 1 ELLIOT'S DEBATES, *supra* note 52, at 494-96

[408] *See* Esbeck, *Virginia Disestablishment*, *supra* note 5, at 66-70.

[409] Alexander Hamilton warned of such a danger in THE FEDERALIST PAPERS No. 84, *reprinted in* 1 FOUNDER'S CONSTITUTION, *supra* note 38, at 467-68.

[410] LABUNSKI, *supra* note 295, at 62. This concern was ultimately resolved by the Ninth Amendment, which provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

[411] WALDMAN, *supra* note 26, at 139.

[412] *Id.* at 135-36, 138-39.

[413] ESTEP, *supra* note 406, at 164-65; LABUNSKI, *supra* note 295, at 62-63.

certain amendments be added to the Constitution.[414] As a candidate to join the Virginia delegation to the U.S. House of Representatives, Madison is thought to have promised voters, in particular the Rev. George Eve, a leader of the Baptists in Madison's congressional district, that if Madison was elected he would introduce a Bill of Rights.[415] Baptists had fought hard for religious freedom in Virginia, and they were keen on securing similar safeguards for religious freedom from potential federal abuses. Finally, there was a serious effort underway by Patrick Henry and other hard-shell Antifederalists to call for a second constitutional convention.[416] At a second convention, the likely result would be to increase the power of the states vis-à-vis the central government. However, the most popular feature to Henry's call for a second convention was to add a Bill of Rights. That popular appeal would be neutralized if Congress were to promptly follow through and report out a Bill of Rights for ratification by the states. Madison aimed to do just that.

On May 4, 1789, James Madison, now a newly seated member of the U.S. House of Representatives, announced on the House floor that he would be proposing a set of amendments.[417] On June 8th, Madison submitted a list of nineteen amendments to the 1787 Constitution[418] (plus changes to the Preamble suggestive of social contract theory as the basis for the nation's founding).[419] In general remarks on his proposed list, Madison stated on the House floor that the overall purpose of the amendments was:

> . . . to limit and qualify the powers of the Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode.[420]

The Congress stayed true to this limited purpose to the very end. The final draft of the Bill of Rights, as the Senate concurred in the House Resolution on September 25, 1789, contained a Preamble that read:

> The Convention of a Number of the States having, at the Time of their adopting the Constitution, expressed a Desire, in order to prevent misconstruction or abuse of its Powers, that further declaratory and restrictive Clauses should be added: And as extending the Ground of public Confidence in the Government, will best insure the beneficent ends of its Institution . . . .[421]

Stated differently, the purpose of the proposed amendments was *not* to declare a comprehensive list of positive fundamental rights, but to deny to the new federal government the ability to later claim certain abusive powers implied from the original

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[414] LABUNSKI, *supra* note 295, at 58-59, 114. The five states were Massachusetts, South Carolina, New Hampshire, Virginia, and New York. North Carolina voted down ratification, but did recommend a set of amendments. James Madison would have had before him all six sets of proposed amendments as he formulated his own list of amendments for introduction at the First Federal Congress. MILLER, MAY NEXT, *supra* note 22, at 252-53.

[415] ESTEP, *supra* note 406, at 165-71; MILLER, MAY NEXT, *supra* note 22, at 248-49; WALDMAN, *supra* note 26, at 142-44.

[416] LABUNSKI, *supra* note 295, at 187-95; WALDMAN, *supra* note 26, at 142-44.

[417] *See supra* note 149 and accompanying text.

[418] *See supra* notes 166-67 and accompanying text.

[419] LABUNSKI, *supra* note 295, at 198-99; MILLER, MAY NEXT, *supra* note 22, at 251-53.

[420] 1 ANNALS, *supra* note 145, at 454 (June 8, 1789).

[421] SENATE JOURNAL, *supra* note 11, at 163 (September 25, 1789).

1787 Constitution.[422] The first eight amendments did not vest any new powers, but instead denied powers. Any rights stated were "negative rights." Thereby the amendments sought to calm the fears of concerned Americans, blunt the force of Henry's call for a second constitutional convention, and instill confidence in the new central government.

On the other hand, the Federalists throughout the ratification debate over the 1787 Constitution had insisted that a Bill of Rights was unnecessary. This was, in their view, because the Antifederalist fears were overblown. As James Wilson argued early on, the central government simply was not delegated the power in the first instance to disturb fundamental rights. That was still the view of many Federalists assembled in Congress, and Federalists now held substantial majorities in both the House and Senate.[423]

Madison's position had shifted ever so subtlety. He still did not argue that a Bill of Rights was needed to thwart potential abuses by the federal government. On the other hand, he now urged the adoption of a Bill of Rights to assuage the fears of common Americans,[424] sought to thwart the Antifederalist's call for a second convention, worked to fulfill the demands of those five states that ratified the Constitution only because a follow on Bill of Rights was promised, wanted to entice North Carolina and Rhode Island to ratify and thus join the Union, and strove to fulfill his campaign promise to Baptists in his congressional district.

It follows that the Establishment Clause (as well as the Free Exercise Clause, Free Speech Clause, Free Press Clause, etc.) cannot be a source of new power delegated to the national government, but must be regarded as a further restriction of federal power. Or, as the Federalists saw the matter, the Bill of Rights served as a harmless denial of powers that were never conferred in the first place by the 1787 Constitution.

This new tack by Madison is further borne out by his seeking to interlineate the amendments into Article I, Section 9 of the Constitution, which is where express restraints on federal power are catalogued. Therefore, although still difficult, the task of getting a Bill of Rights was made easier. The task was not to agree on a comprehensive list of positive fundamental human rights, but to agree on what powers were not vested (the Federalists said "were never") by the 1787 Constitution in the new central government.[425]

This has direct implications for correcting a present-day misunderstanding that is alarmingly widespread. It is common to find those who believe that the Establishment and Free Exercise Clauses are in unavoidable "tension" and often in "conflict," as if free-exercise is pro religion and no-establishment holds private religion in check.[426] That

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[422] *See* LABUNSKI, *supra* note 295, at 178-255.

[423] *See* GOLDWIN, *supra* note 142, at 82, 144; THORNTON ANDERSON, CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS 176 (1933).

[424] MILLER, MAY NEXT, *supra* note 22, at 252-53.

[425] *See supra* note 7 (quoting CURRY, FIRST FREEDOMS, at 193-94).

[426] A typical example is as follows:

> There can be a natural antagonism between a command not to establish religion and a command not to inhibit its practice. This tension between the clauses often leaves the Court with having to choose between competing values in religion cases. The general guide here is the concept of neutrality. The opposing values require that the government act to achieve only secular goals

manner of misreading the text presumes that the Free Exercise Clause and the Establishment Clause run in opposing directions, and hence will often clash. If this were so, it would then become the Supreme Court's task to determine if the constitutionally questionable legislation is rightly "balanced" so as to be neither too pro religion nor too hostile to the free exercise of religion. Not only is this illogical, but it gives too much power to the judiciary.

A conceptual framework where the no-establishment and free-exercise texts are in frequent "tension" and at times are in outright contradiction is quite impossible given the underlying nature of the Bill of Rights. We start with two givens: that each provision in the first eight amendments comprising the Bill of Rights was designed to anticipate and negate a power wrongly imputed to the national government and that the national government is one of limited, enumerated powers. As to the latter, if a power is not delegated to the national government then the power resides with the states or with the people—a rule implicit in the 1787 Constitution and made explicit by the Tenth Amendment.[427]

It follows, for example, that the Free Speech Clause further limited national power, and the Free Press Clause did so as well. These two negatives on the overall net sum of federal delegated power over speech and press can overlap and thus reinforce one another, but they cannot conflict. Simply put, while the government can simultaneously violate both clauses, it is logically impossible for these two overlapping negatives of the government's power to be in conflict. Similarly, the Free Exercise Clause further restricted the nation's delegated powers and the Establishment Clause did likewise. These two negatives can overlap and thereby doubly deny the field of permissible action by the federal government concerning religion, but they cannot conflict. Again, it is impossible for two overlapping negatives of the government's power to conflict.[428] To be sure, the religion clauses, each in its own way, work to protect religious freedom. But when circumstances are such that the scope of the clauses overlap, they necessarily complement rather than conflict with each other.

By way of illustration, consider a fourth grade public school teacher who has thirty students in her classroom. Assume the teacher requires the students to recite in unison the Lord's Prayer to begin the school day. A Muslim student sues under the Free Exercise Clause claiming that her rights are violated and offers evidence that reciting the Christian prayer is a violation of conscience because its content contradicts several beliefs of Islam. The student will prevail, but the remedy will be our Muslim fourth-grader may now opt-out of the prayer while her classmates continue the daily

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> and that it achieve them in a religiously neutral manner. Unfortunately, situations arise where the government may have no choice but to incidentally help or hinder religious groups or practices.

JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 764-65 (3d ed. 2007).

[427] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[428] The clauses-in-conflict fallacy would also attribute to the drafters, the Federal Congress of 1789, the error of placing side by side two constitutional clauses that contradict and work against one another. That is just too implausible to take seriously.

recitation.[429] A second suit is filed, this time invoking the Establishment Clause. Once again our Muslim student will prevail, but this time the remedy will be to enjoin the recitation of the classroom prayer altogether.[430] Both clauses were violated by the required prayer. So, the two clauses complement each other; they do not conflict.

Finally, assume that a third lawsuit is filed. This claim is brought by three Christian students in the classroom who ask that the joint recitation of the Lord's Prayer be allowed to continue on a voluntary basis. With reference to the limits on the government's power embodied in the modern Establishment Clause, the court will deny relief to these three students. Given Supreme Court precedent, the trial court is correct to do so. There is no right under the Free Exercise Clause to capture the levers of government and put its machinery behind the advancement of Christianity.[431] If the Christian faith is to be advanced, it depends on the voluntary acts of Christians to do that work for themselves. In this third lawsuit there is once again no conflict in the clauses. Only the Establishment Clause is violated.

Illustrations can be generated where both the Establishment and Free Exercise Clauses are transgressed. While the clauses overlap they are compatible. If they appear to be in conflict, then at least one of the clauses is being judicially misapplied. Imagining these two denials of government power as frequently in "tension" and having to be judicially "balanced" is deeply at odds with the central reason that Americans demanded of the First Congress the addition of a Bill of Rights to the 1787 Constitution.

C. The First Amendment Restrains Government, Not the Private Sector

The Constitution is comprised of rights and structure (i.e., governmental powers). The structure of the Constitution (or frame of the government) delegates to the national government certain enumerated powers, as well as diffuses these powers among the three branches. All powers not delegated are presumed denied. Out of a desire for clarity, with respect to some subject matters the framers went so far as to expressly disclaim certain federal powers. Article I, Section 9 has a list of such disclaimers. And, finally, the vesting of rights in individuals (including groups of individuals) also works to deny government power. That is, the government has no power to violate a person's rights. But the 1787 Constitution and the 1789 Bill of Rights were designed to restrain only the federal government, not the private sector. We call this the "state action" or "government

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[429] *See* W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). In *Barnette*, the Court struck down a state public school requirement that all students begin the school day by saluting the United States flag and reciting the Pledge of Allegiance. The mandatory salute and recitation was successfully challenged by Jehovah's Witnesses who regard the flag salute and pledge as worship of a graven image. The basis of the ruling was the Free Speech Clause, and that clause protects *inter alia* freedom of belief. The remedy permitted the Jehovah's Witnesses was to remain quietly seated at their desks while the remainder of the students continued the exercise.

[430] *See Schempp*, 374 U.S. 203 (holding that public school practice of daily classroom prayer and devotional Bible reading was support for religion in violation of the Establishment Clause; the remedy was to enjoin the prayer and Bible reading altogether); *Engel*, 370 U.S. 421 (holding that public school practice of daily classroom prayer was support for religion in violation of the Establishment Clause; the remedy was to enjoin the prayer altogether).

[431] *Schempp*, 374 U.S. at 226 ("While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice it beliefs.").

action" doctrine. The doctrine is that there must first be some government action before a grievant can claim that the government has exceeded its constitutional powers.

While the Establishment Clause restrains the government's power, it does not restrain the actions of wholly private actors. Stated differently, the Establishment Clause does not run against private persons acting in their private capacity, nor does it run against private groups such as churches. It runs only against the government. This principle is so straightforward that it seems pedantic to raise it. However, there is frequent loose thinking about how one of the purposes of the Establishment Clause is to protect the state from the church. Consider this passage from the Court's opinion in *Everson*:

> The "establishment of religion" clause of the First Amendment means at least this: . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. 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."[432]

The "*vice versa*" is most certainly not true. Religious organizations may participate in governmental affairs and seek to shape governmental policy the same as any other organization. Indeed, such activities are protected as a matter of free speech and associational rights generally. This sort of carelessness usually issues from the Enlightenment concern with the manner by which religion can have negative effects on government. One is free to be of that persuasion, of course, but one is not free to enlist the Establishment Clause as an ally in bringing into fruition the Enlightenment project of emptying the public square of religion and religious thought.

The principle that the Establishment Clause restrains only government is frequently applied to the distinction between government speech about religion and private speech about religion. It makes no sense to invoke the Establishment Clause to restrain private speech about religion because there is no "government action." Indeed, such private religious speech is likely protected by the Free Speech Clause from any attempted government action to suppress it.

Government sponsorship of religious speech is a very different matter, and such sponsorship is in many instances prohibited by the Establishment Clause.[433] The Free Speech Clause does not, of course, protect speech attributable to the government. The government has constitutional powers and duties, but it does not have constitutional rights. Rights are to protect people from the government, not the other way around. However, depending on the facts, it can be a close call whether the speech in question is private or is fairly attributable to the government. An example of a close call is student-initiated prayer at the opening of a public high school football game. In *Santa Fe Independent School District v. Doe*,[434] a divided Supreme Court attributed a student's prayer to the government. That seems rightly decided given the fact that the public school was heavily involved in selecting the student speaker, along with this high school's history of prayer at its games.

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[432] Everson v. Board of Ed., 330 U.S. 1, 15-16 (1947).

[433] On the importance of distinguishing between government speech and private speech, as well as suggestions with respect to government's considerable powers of expression, see *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125 (2009).

[434] 530 U.S. 290, 315-17 (2000).

The Supreme Court took a wrong turn with the "government action" doctrine in *Widmar v. Vincent*.[435] *Widmar* was correctly decided but for the wrong reason. The case involved a state university that allowed student organizations to use classroom buildings after hours to hold their meetings. When a religious student organization sought to schedule space to conduct meetings that included worship, the university balked, citing the need for strict separation of church and state as required by the Establishment Clause. The Court, relying on a long line of precedent that prohibited the government from discrimination in access to a public forum based on the content of one's speech, had little trouble ordering the state university to give equal access to student organizations without regard to the nature of the group's religious expression—worship or otherwise.[436]

If only the justices had stopped there. It would have been sufficient to explain that the no-establishment principle did not justify the university's hostility to a religious message because the Establishment Clause runs only against the government and not private speakers. Alas, the Court fatefully went on to leave open the possibility that on a different set of facts the need to comply with the Establishment Clause could conflict with and override the students' rights under the Free Speech Clause.[437] Once again, this is logically impossible: two overlapping denials of government power—speech and no-establishment—can complement each other but they cannot conflict.[438] What the *Widmar* Court should have said—had it been attentive to the "government action" doctrine—is the Court deems pivotal its finding that the speech in question was private speech not government speech. When the expression is private speech, then there is no "government action" so the Establishment Clause cannot apply. Moreover, these private speakers have rights under the Free Speech Clause. In *Widmar*, the Court ruled for the students based on the Free Speech Clause.[439] That is the correct result. If we alter the facts, however, and the worship service had been conducted at the behest of the university (hence government speech), then no-establishment rather than free speech would have been the relevant restraint on the university as a government speaker. That would have been the straightforward result, and it is also the correct rationale given the "government action" doctrine. Instead, the *Widmar* Court asked if the Establishment Clause conflicted with, and thus on balance overrode, the Free Speech Clause. Taking that wrong path has made all the difference.

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[435] 454 U.S. 263 (1981). One could attribute the slip earlier in time to *Walz*, where the Court wrote that it "has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970). But *Walz* stopped short of saying that there was an actual "clash" and that the solution, in the event of a conflict, was that one clause should trump the other. *Widmar* took that fatal step.

[436] 454 U.S. at 276.

[437] *Id*. at 270-75. *See especially id.* at 273 n.13 ("Neither do we reach the question that would arise if state accommodation of free exercise and free speech rights should, in a particular case, conflict with the prohibitions of the Establishment Clause.").

[438] To further illustrate the folly in the Supreme Court's thinking, one might crowd the Court with this inquiry: When two First Amendment provisions conflict, why do the justices choose no-establishment to override free speech and free exercise rather than vice versa? Is there a sliding scale of rights in the Constitution, some more valuable than others? What is the basis for that assertion? Where are we to find this hierarchy of constitutional rights, or is that too to be trusted to the balancing of nine unelected justices?

[439] *Id*. at 273 n.13.

Failure to strictly attend to the distinction between government speech and private speech because of the "government action" doctrine can lead to all sorts of mischief. For example, in *Good News Club v. Milford Central School*,[440] the dissent worried that impressionable elementary school students might wrongly think that public school authorities were sponsoring a Bible Club that was seeking equal access to classroom space to hold its meetings after school hours.[441] As the majority pointed out, the same elementary school students might get the distinct impression that school authorities were hostile to the Bible Club (or to religion in general) if the Bible Club were excluded from the school when all the other students groups like Girl Scouts and 4-H Clubs were allowed to use the classrooms.[442] It makes no sense to hold that one private speaker loses his or her free speech rights because of the mistaken impression of other private actors. More to the point, however, once it was determined that the Bible Club was a private speaker (a matter agreed to by all parties), then the Establishment Clause simply cannot apply to restrain the Club's speech because of the absence of "government action." And, indeed, the private speech of the Bible Club is protected by the Free Speech Clause from viewpoint discrimination, and thus the Club cannot rightfully be excluded from the limited public forum on account of its speech being religious in its perspective.

The Supreme Court has reached the correct result on most of the equal-access cases to come before it,[443] but the justices have made the cases seem far more difficult than is necessary. It is a categorical mistake to invoke the Establishment Clause to suppress private religious speech. It is a double wrong: the Establishment Clause does not restrain speech in the absence of "government action," and it violates the Free Speech Clause to not require equal access for private speech without regard to its religious viewpoint.

VI. EARLY APPLICATIONS OF THE ESTABLISHMENT CLAUSE BY FEDERAL OFFICIALS

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[440] 533 U.S. 98 (2001).

[441] *Id*. at 141-44 (Souter, J., dissenting).

[442] *Id*. at 118-19 (Thomas, J., writing for the majority).

[443] In addition to *Widmar* and *Good News Club*, *see* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (holding the Establishment Clause did not justify state university denying to student religious newspaper equal access to limited forum defined in part by university subsidy); Capitol Sq. Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (plurality opinion in part) (holding that Establishment Clause did not justify state denying religious symbol equal access to limited public forum); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (holding that Establishment Clause did not justify public school denying religious speaker equal access to limited public forum after school hours); *cf.* Westside Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (plurality opinion in part) (upholding federal Equal Access Act of 1983, which provided that Establishment Clause did not justify public secondary school denying equal access to high school religious club). The one equal-access case to the contrary is *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010). In *Martinez*, a state law school's policy required that all university-recognized student organizations be open to full participation by "all comers" enrolled in the school. The law school's decision to deny recognition to a religious student organization that required adherence to a statement of faith and rules of moral conduct by all officers and voting members was found not to violate the organization's right of free speech in a nonpublic forum.

Part VI briefly examines how the first generation of federal officials who were bound by the Establishment Clause applied its strictures. The idea is that in close cases their behavior can be a guide with respect to the clauses' meaning. We have previously looked at the plain text of the Establishment Clause, as well as the clause as the product of debates within the First Federal Congress over its various drafts in the House and Senate. These debates ultimately turned on the scope of the power being denied to the federal government. And we have noted how the text of the clause does not prohibit making a law about religion but, more narrowly, prohibits making a law "respecting an establishment" of religion. The search for original meaning still leaves us with a major question: What was meant by "respecting an establishment" in 1789-1791?

At a minimum "establishment" meant that the new federal government could not establish a national church or multiple national churches.[444] But it almost certainly meant more than such a minimalist reading. Common sense tells us the government could not maneuver to create an establishment in all but name. Nor could it legislate bits and pieces of laws which, when added up, were tantamount to an establishment. But less clear is whether the Establishment Clause prohibits enacting into law just some of the elements, which when all elements are taken together comprise a fully developed establishment of religion, such as the Church of England well known to the founders.[445]

To learn more about what was meant by "establishment" we examine here how the actions of the first generation of federal officials applied the restraints of the Establishment Clause. Primarily this will be an examination of various actions by Presidents and Congresses in the early republic. Let it be said at the outset that this method of supplementing our understanding of the original meaning of the Establishment Clause has been frustrating and contentious. In part this is because the actions of early Presidents and Congresses have not been consistent. And in part this is because some of the actions are in contradiction with all but the minimalist reading of the Establishment Clause. Indeed, some of these actions appear to confuse the role of the state with the role of the church.

A threshold question is to ask what actions should count toward original meaning. First, it is best to confine the examination of events to official actions by the Executive and Legislative Branches in the early republic. Evidence of a founder's life of faith (or lack thereof) should not have bearing.[446] Second, it is best to confine the

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[444] *See supra* note 268 and accompanying text.

[445] *See supra* note 169 (Professors Witte and McConnell each set forth a list of the multiple elements that comprised the Church of England establishment). By way of example, two such elements were requiring the licensure of meeting houses of dissenter sects and the denial of licensure to dissenting clergy so that they could not perform marriages that civil authorities would recognize.

[446] An executive or congressional official's personal religious beliefs or acts of piety do not necessarily translate into that same official's thinking on church-government matters. It is disparaging to assume that religious persons are bent on imposing their personal religious beliefs through the government's official actions and lawmaking. Officials who also happen to be religious are just as capable of not imposing their explicitly religious beliefs through law because to do so is contrary to their belief in the protection of conscience. And officials who are not religious are quite as capable of seeking to advance religion because to do so will also advance some secular cause which is their ultimate goal. Further, the reality is that prominent figures such as James Madison, Thomas Jefferson, George Washington, and John Adams, as well as many in the early Congresses, disagreed among themselves in material respects when it came to church-

examination of events to official actions in which the boundaries set by the Establishment Clause were actually considered. Even more revealing is where there was some clash between officials over the clause's application. On the other hand, when officials were inattentive with respect to the applicability of the Establishment Clause, their actions are of reduced interpretative value. Third, official remarks of religious content (whether oral or written) by Presidents are more tied to the person and beliefs of the particular President than controlled by the text of the Establishment Clause.[447] Like a professor's academic freedom to publish the results of her research without having those results imputed to the University that employs her, the law understands that the President can issue a declaration (or otherwise use God talk in speeches) without the content being understood as a legal command or the God talk being attributed to the government.[448] An officeholder has a right to exercise his own religion. Moreover, many voters want to know all sorts of things about a candidate for elective office, including his religious faith or lack thereof. For many voters religious affiliation and practice gives them a quick read on the candidate's character, all of which becomes part of the mix for how that voter casts her ballot.

In 1789, both the House and Senate appointed chaplains and set for them an annual salary of $500 to be paid out of the federal treasury.[449] This occurred before the Establishment Clause was ratified, but Congress continued the practice unabated after being notified in early 1792 that the Bill of Rights had been successfully ratified. The selection and payment of chaplains is part of the internal operations of the House and Senate, thus these decisions are not subject to the approval of the President. No contemporaneous objection was made that the chaplaincies violated the Establishment Clause. In the years following his Presidency James Madison wrote in a document he never published that he thought the practice unconstitutional.[450]

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government relations, and none of these individuals was consistent during his own public life on religious freedom questions. *See* VINCENT PHILLIP MUNOZ, GOD AND THE FOUNDERS: MADISON, WASHINGTON, AND JEFFERSON 4 (2009) (explaining that one is misguided to attempt to form a generalized "consensus" of church-government relations based on what the founders believed because they held such differing views on the subject). Additionally, the constituents the officials served, Baptists, Presbyterians, Mennonites, German Brethren, Quakers, Deists, and other dissenters, exerted pressures that properly influenced what certain officials did irrespective of whether the official was personally religious. Finally, a given official may have had a more lofty vision of church-government relations but in a given clash settled for less, and this because less is the best he could get given the larger circumstance in which a political decision is being made.

[447] *See* WALDMAN, *supra* note 26, at 159-81.

[448] "When officials deliver public speeches, we recognize that their words are not exclusively a transmission from the government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity." Van Orden v. Perry, 545 U.S. 677, 723 (2005) (Stevens, J. dissenting).

[449] ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 23-24, 53-55 (1982) [hereinafter "CORD"]. *See generally* Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL OF RTS. L.J. 1171 (2009); Andy G. Olree, *James Madison and Legislative Chaplains*, 102 NW. U. L. REV. 145 (2008).

[450] Elizabeth Fleet, ed., *Madison's "Detached Memoranda,"* 3 WM & MARY Q. 534, 559 (1946) [hereinafter "*Detached Memoranda*"]. Madison went on to say he also oppose military chaplains. *Id.* at 559-60. Military chaplaincies are different because duty assignments for members of the armed forces often prevent attendance at a house of worship of one's choice. That is not the case with members of Congress.

President Washington issued a Thanksgiving Day Proclamation.[451] A House resolution urging the President to issue the proclamation passed on September 25, 1789, one day after the House adopted the final draft of the Bill of Rights for ratification by the states. Obviously the Establishment Clause was not yet law, but one Antifederalist did object to the provision as being religious and thus not within the authority of Congress. Madison was a member of the House committee that reported out the resolution but he remained silent.[452] President Adams also issued similar proclamations.[453] President Jefferson thought such proclamations unconstitutional and refused to issue them. President Madison sought to follow Jefferson's example, but during the War of 1812 was requested by Congress to issue proclamations. He issued four such Proclamations, but Madison was careful to note he was complying as requested by Congress and he phrased the documents as recommendatory only with respect to actual observance by citizens.[454] Once again, in his later years Madison wrote that he thought the practice unconstitutional.[455]

Presidents Washington and Adams issued proclamations declaring a national day of fasting and prayer, but President Jefferson declined to do so because he thought them prohibited by the First and Ninth Amendments.[456] Jefferson took pains to note that fasting and prayer, being religious observances, were practices within the province of each church and thus should not be the object of intermeddling by the government.

In February 1811, President Madison vetoed a bill incorporating the Protestant Episcopal Church of Alexandria, then in the District of Columbia.[457] In the absence of the now common statutory acts under which corporations are formed, a separate bill in the legislature was then required to form a new corporate body. Madison objected that the bill violated the Establishment Clause. Madison's veto message said the bill detailed the polity and internal administration of the church, even down to how a minister was to be appointed and removed. Such matters of internal church administration were not subject to the government's jurisdiction, wrote Madison, but lie within the sole power of the church. Madison also wrote that a matter of internal church administration should be alterable only by the bylaws and canons of the denomination of which this local church is a part. However, the details of this bill would require a congressional amendment to permit compliance with the instructions of the general denominational church. Finally, the grant of authority to support and educate the poor through a ministry of the church could be taken as vesting an agency in the church to assume a civic duty. Madison was sensitive so as to not be seen as delegating governmental functions to a religious body.

Also in February 1811, Madison vetoed a bill reserving public land for the use of a Baptist Church in the Mississippi territory.[458] Madison's veto message said that

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[451] CORD, *supra* note 449, at 27-29, 51-53.
[452] Having shepherded through no-establishment language better than he started with in early June 1789, perhaps Madison maintained his silence so as to not undo these good terms in the amendment that would eventually became the First Amendment. We simply cannot know why Madison failed to object.
[453] HUTSON, *supra* note 34, at 81-82.
[454] CORD, *supra* note 449, at 30-36, 47, 53.
[455] *Detached Memoranda*, *supra* note 430, at 560-62.
[456] CORD, *supra* note 449, at 40-41.
[457] *Id.* at 33.
[458] *Id.* at 34.

transfer of a parcel of land without consideration would set a precedent for funding religious societies in violation of the Establishment Clause. The bill sought to resolve various disputed land claims, one of which was by a church that had erected a building on the land in question. Madison obviously thought the resolution of the church's land dispute with the government must be by the payment of fair consideration depending on the merits of the dispute.

In January 1795, President Washington signed treaties with the Oneida, Tuscarora, and Stockbridge Indian tribes which included a $1,000 payment toward building a church to replace the one burned by the British during the Revolutionary War.[459] In June 1796, Congress passed a land statute entitled "An Act regulating the grants of land appropriated for Military services and for the Society of the United Brethren, for propagating the Gospel among the Heathen." Section Two provided for the issuance of land titles at no cost to the Society of United Brethren, said land to be held in trust for the benefit of Christian Indians living in a designated area. Some of the trust resources were used by the United Brethren to promote Christianity among these Native Americans.[460] Extensions of this act were passed during the Jefferson Administration.[461] In October 1803, President Jefferson asked the Senate to ratify a treaty with the Kaskaskia tribe. In return for a transfer of tribal land to the federal government, the United States agreed to provide funds to build a Catholic church and to pay an annual stipend to a Catholic priest to perform his priestly duties.[462] The Senate ratified the treaty in December 1803. In January 1819, President Monroe negotiated a treaty with the Wyandot Indian tribe which included a transfer of public land for the erection of a Catholic church.[463] Later presidents also provided federal funds to build churches on Native American land, as well as to provide aid to educate Indian children through Christian mission societies.[464] None of these treaties and other dealings with Indian tribes were challenged as being in violation of the Establishment Clause. Accordingly, we do not have the benefit of how officials would have responded had an objection under the Establishment Clause been raised.

Some of the actions described above are not at odds with how we presently think about the Establishment Clause, such as Madison's two vetoes in February 1811. Moreover, some actions which Madison successfully vetoed are near opposites of other actions by officials which drew no objection under the Establishment Clause. In such cases of diametrically opposite (or near opposite) actions, the vetoes by Madison ought to trump the inattentive actions by others as guides to construction.

There are various scholarly attempts to explain the uneven and inconsistent actions by early federal officials.[465] Professor Steven Smith suggests that the Establishment Clause disempowered the federal government from supporting a church or churches, but that the government can still act favorably with respect to religion more

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[459] *Id.* at 58.
[460] *Id.* at 42-43.
[461] *Id.* at 44-45.
[462] *Id.* at 38.
[463] *Id.* at 59.
[464] *Id.* at 59-60, 63-73.
[465] *See* Esbeck, *Establishment Clause as Structural, supra* note 347, at 18-21 (collecting sources).

generally.[466] Oftentimes this distinction will match with the facts, such as with Thanksgiving Day Proclamations and congressional chaplains. But there is no fit with some of the actions by officials recounted above such as those directly funding the building of a church or aiding a Catholic priest in performing his priestly duties.[467] Professor Douglas Laycock suggests explaining these official actions by drawing a line at tax support for religion.[468] In his view the Establishment Clause does its most important work in preventing monetary support for religion. But a fair number of the early actions by officials did involve aid to religion using tax funds, most notably the payments for missionary efforts to Native Americans. It is true that this financial aid to missionaries and mission schools was a religious means (inculcating Christian morality) to achieving a secular end ("civilizing" the tribes). But the use of religion as an instrument of civic policy has never been thought to circumvent the no-establishment principle.[469]

Context can be helpful. Disestablishment in the South came much earlier than in Puritan New England, with the New England establishments still being strong in 1789-1791. Accordingly, being a nonconformist in 1789 was a current controversy in New England and Congregational establishments were a cause of major agitation, whereas during the same period different issues were of interest to the churches in the Middle States and the South.[470] Churches in the Southern and Middle States were already moving beyond the question of disestablishment to focus on events that later came to be called the Second Great Awakening.[471] Additionally, Federalists were strongest in New England whereas Republicans had their base in the South. Thus, some of the variance between an original understanding of the Establishment Clause and early actions by federal officials can be explained by looking to see if the application of the clause was by an official sympathetic to the Federalist or Republican Party,[472] there being greater sensitivity to church-government relations by Republicans than by New England Federalists.

Also helpful—at least when it comes to the government's adoption as its own certain religious expression—is to acknowledge that the founding generation was steeped

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[466] Steven Douglas Smith, *The Establishment Clause and the "Problem of the Church,"* 13-14 (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1444606 (last visited July 13, 2010). He uses this distinction to permit government speech that has historically acknowledged God and endorsed religion in general. However, Smith's distinction would also allow state religious tests for public office, blasphemy laws, and Sunday Sabbath laws.

[467] Consider the conveyance of real estate to a church on which to build a house of worship or funds to a Catholic priest to perform his ecclesiastical duties. Moreover, these actions cannot be explained away as government funding to a religious organization to meet a need to provide education or a social service. On the other hand, these are not actions which were contemporaneously challenged as violative of the Establishment Clause. So inattentiveness to the Establishment Clause by the federal officials involved might explain the variance from Professor Smith's distinction.

[468] Laycock, *Nonpreferentialism*, *supra* note 204, at 913-19.

[469] James Madison's *Memorial and Remonstrance* protests the use of religion as an engine of civic policy. *See* Esbeck, *Virginia's Disestablishment*, *supra* note 5, at 83-84, 96.

[470] Esbeck, *Dissent and Disestablishment*, *supra* note 8, at 1457-1501 (Middle States and South), 1501-40 (New England).

[471] *Id*. at 1454-56, 1540-55.

[472] This can be helpful in comparing the proclamations and actions of Presidents Washington and Adams, on the one hand, with those of Presidents Jefferson and Madison.

in the pervasive faith, Protestant Christianity, and that officials in the new republic were sometimes indiscriminate in mixing their Protestant culture and civic matters. That begins to explain the government's adoption of religious events, symbols, and other expressions such as Thanksgiving Day, but it does not explain direct monetary support for Protestant missionary activities to Native Americans. Moreover, some of the early monetary support was for Catholic missions.

A distinction with superficial explanatory power is that many of the actions that are referenced above were on territorial land or involved Indian tribes. Congress has enumerated power to regulate territorial affairs[473] and to deal with Indian tribes.[474] In the new republic, federal officials took more care to not interfere with the states and how each state dealt with its church-state affairs. That same federalist sensitivity would not apply out in the territories or in dealing with tribal Native Americans. Moreover, when it came to the territories the national government may have envisioned itself as in a role similar to a state when it came to overseeing internal religious affairs.[475] However, once the Bill of Rights was ratified, all of the national government's powers, whether expressed or by implication, were subject to the full restraint of the Establishment Clause. So any juridical distinction with regard to federal action involving the territories or Indian tribes being less subject to the clause is illusory.

In the final analysis, the record concerning official acts in the early republic counsels an understanding of "establishment" that is kept within bounds. Most difficult to reconcile with present sensibilities are the monetary dealings with certain Indian tribes, but those transactions did not have the benefit of contemporaneous debate where someone raised a timely objection under the Establishment Clause. So just what this inattention teaches about original meaning is not at all conclusive. With respect to official actions on church-government relations by the Third Branch, the United States Supreme Court, we have no assistance at all with respect to the Establishment Clause. In the early republic, the judiciary was a non-player with respect to giving meaning to the clause. Indeed, for over a century the Court ignored the Establishment Clause.[476] It is not that cases involving religious freedom did not come before the Court in the nation's first 110 years.[477] Rather, the Court, for reasons of its own,[478] resolved those cases under other provisions of the Constitution or by resort to federal common law.[479]

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[473] U.S. CONST. art. IV, § 3, cl. 2, which provides in relevant part: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

[474] U.S. CONST. art. III, § 8, cl. 3, which provides in relevant part: "The Congress shall have power . . . To regulate Commerce . . . with the Indian Tribes."

[475] *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 247-49 (1998).

[476] The first Supreme Court case to actually apply the Establishment Clause (as distinct from giving the clause passing mention) is *Bradfield v. Roberts*, 175 U.S. 291 (1899) (holding that use of federal funds to assist in the construction of a Catholic hospital in the District of Columbia did not violate the Establishment Clause). *See* Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1571 (1995), noting that between ratification of the Bill of Rights in 1791 and ratification of the Fourteenth Amendment in 1868, there were few decisions in the Supreme Court that even mention the First Amendment.

[477] *See generally* 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

CONCLUSION

Careful attention to the text and original understanding cannot answer all contemporary questions with respect to the current application of the Establishment Clause, but the discipline does eliminate several false paths. Avoiding these wrong turns will go far in addressing the uneven character of the much criticized Establishment Clause jurisprudence in our federal courts.

From the record of the debate left by the First Federal Congress, we have seen that neither the House nor the Senate had in mind either nonpreferentialism[480] or specific federalism,[481] nor did the First Congress limit the Establishment Clause to instances where liberty of conscience alone is violated.[482] Instead, the focus in both houses was on the scope of the restriction on federal power with respect to an establishment of religion. The final text of the clause permits legislation to touch on religion generally, provided that the government does not legislate more narrowly on a matter "respecting an establishment" of religion.[483] One clear implication of this expressed scope of the no-establishment restraint is that statutory exemptions to accommodate religion are generally constitutional because they work, not to expand religion but to expand religious freedom by leaving religion alone.[484] Further, the Bill of Rights was drafted to state what powers the federal government was being denied.[485] Accordingly, the Free Exercise and Establishment Clauses are negatives on government power. As such, the clauses cannot be in tension or otherwise cancel one another out such that courts have to balance religious freedom against some undefined interest in holding religion in check.[486] Such balancing leaves far too much unguided discretion in the judiciary that was never conferred by the text. It also fails to recognize that the Establishment Clause is a restraint only on the government, not the private sector.[487] Both clauses, each in its own way, are protective of voluntary religious observance. Finally, it fully appears from the text that the Free Exercise Clause sought to acknowledge a pre-existing right, whereas the Establishment Clause is not rights-based but states an original structural limit on the federal government's power.[488] That not only harmonizes the clauses, but from the outset

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(2001); JAMES HITCHCOCK, THE SUPREME COURT AND RELIGION IN AMERICA: VOLUME I THE ODYSSEY OF THE RELIGION CLAUSES 3-42 (2004) (surveying the Supreme Court's religious freedom cases up to World War II).

[478] It is possible that the Supreme Court's early avoidance of the Establishment Clause is reflected in the Federalist Party leanings of Chief Justice John Marshall.

[479] *See generally* HAMBURGER, *supra* note 6 (describing political action in the Executive and Legislative Branches in the Nineteenth Century rather than the deployment of church-government separationist principles in the federal courts).

[480] *See supra* notes 155, 168, 170, 204, 211, 243, 247-51, 263 and accompanying text.

[481] *See supra* notes 156-57, 214, 243, 255, 270-81 and accompanying text.

[482] *See supra* Part IV.B.

[483] *See supra* Part IV.C.

[484] *Id.*

[485] *See supra* Part V.B. *See also supra* notes 163-65, 291-92.

[486] *Id.*

[487] *See supra* Part V.C.

[488] *See supra* Part IV.A.

made the Establishment Clause jurisdictional in nature. And in the main that is how it has been applied by the post-*Everson* Supreme Court.[489]

As a structural or power-limiting clause, the Establishment Clause polices the boundary between church and government. The scope of this disempowerment of government with respect to an establishment of religion is broader than just a ban on establishing a national church or multiple national churches.[490] The ban likely applies as well to the various elements that were historically associated with a fully developed establishment, such as the Church of England familiar to the founders. It seems proper to also extend the ban to governmental actions that bring about the sorts of evils the founders associated with religious establishments even if the particular actions in question were unknown in 1789.[491] It is, after all, a constitution we are construing.[492] Because there was never an establishment of religion at the national level, in looking for these "sorts of evils" the *Everson* Court relied on the disestablishment struggles in Virginia and other states.

The behavior of the Legislative and Executive Branches in the period shortly after ratification of the First Amendment was mixed and inconsistent.[493] There are instances during the early republic when the President and Congress acted counter to rules that since *Everson* most of us take for granted as logical implications of the Establishment Clause. However, some harmony can be brought to that historical record by looking only at those actions by federal officials in the new nation where the Establishment Clause was actually considered. Further, it is well known that those early officials with Republican leanings where far more attuned to church-government matters than were Federalists, especially New England Federalists where church establishments remained well into the Nineteenth Century.

In the popular vernacular the Establishment Clause is about the separation of church and state. This principle has its roots in the Western legal tradition dating back to the Fourth Century.[494] For well over a millennium there evolved a dual-authority pattern where both church and nation-state had its own center of power. While the line dividing authority between them shifted down through the centuries, that there was a line separating these powers did not change. When both church and government are limited because each has authority only as to the matters within its purview, then separation proved to be good for the body politic and good for organized religion. By good, I mean that the nation-state is not omnicompetent but limited. Such limits liberate the polity to practice religion (or not) as each is led. And, by good, I mean that religious freedom for religious organizations is secure, and the decision to support or to otherwise interfere in

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[489] *See generally* Esbeck, *Establishment Clause as Structural*, *supra* note 347.
[490] *See supra* note 268 and accompanying text.
[491] *See* McGowan v. Maryland, 366 U.S. 420, 441-42 (1961) (stating that the Establishment Clause prohibits not just a national church establishment but also laws which bring about "the evils it was designed forever to suppress," quoting *Everson*, 330 U.S. at 14-15); *Schempp*, 374 U.S. at 236, 237 (Brennan, J., concurring) (stating that it was proper to inquire "whether the practices . . . challenged threaten those consequences which the Framers deeply feared").
[492] By way of example, the "sorts of evils" which brought down the Virginia establishment are systematically catalogued at Esbeck, *Virginia Disestablishment*, *supra* note 5, at 92-98.
[493] *See supra* Part VI.
[494] *See* Esbeck, D*issent and Disestablishment*, *supra* note 8, at 1391-1448. *See also supra* note 373 (collecting authorities).

the matters of organized religion is no longer in the power of the government. Accordingly, such support for religion takes place (if at all) only as a voluntary act. In America, however, the dual-pattern relationship developed at the level of the states, where disestablishment took place from 1776 to 1832,[495] not at the national level where the Legislative and Executive Branches of the federal government were operating. So it transpired that the modern Supreme Court in *Everson* looked to the dual pattern as it developed in Virginia and other states to give substantive meaning to the text "respecting an establishment."[496] *Everson*, of course, also extended the Establishment Clause to apply to and bind the states and not just the national government. Whether that discrete act of "selective incorporation" was properly within the authority of the Supreme Court or not, I leave for the reader to decide.[497] But there can be no doubt that a reliance on the disestablishment experience in Virginia and other states is an accurate description of what the Court did in *Everson* and in its post-*Everson* cases. And given that there never was a national disestablishment experience, the Court acted properly when it looked to the experiences in the states to be tutored in the sorts of evils that the state struggles to disestablish were meant to remedy.

[495] *See* Esbeck, D*issent and Disestablishment*, *supra* note 8, at 1448-1540.
[496] *See supra* notes 4-7 and accompanying text.
[497] *See supra* note 395 and accompanying text.