Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation

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USES AND ABUSES OF TEXTUALISM AND ORIGINALISM IN ESTABLISHMENT CLAUSE INTERPRETATION

Carl H. Esbeck*

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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 journals of the First Congress, the *Everson* Court adopted the principles animating the disestablishment struggle in Virginia, and 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

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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, 1134-40 (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 religions, 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*. See *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“The concept of a ‘wall’ of separation is a useful figure of speech . . . . But the metaphor itself is not a wholly accurate
matter even a step further by generally conflating the beliefs of James Madison of Virginia with the meaning of the Establishment Clause.\(^5\)

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, but the Virginia House of Delegates of 1784–1785 and the First Congress of 1789 were also elected by very different constituencies, composed of quite different legislative officials, bore different responsibilities, and harbored different ambitions and allegiances. 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 President George Washington, 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

5\(^{\text{Everson, 330 U.S. at 33–43, 52, 57, 63 (Rutledge, J., dissenting):}}\)

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 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 (citations omitted). Justice Rutledge went so far as to attach an appendix to the Everson opinion, Madison’s Memorial and Remonstrance Against Religious Assessments, a petition written in June 1785 to oppose a special tax to pay the salaries of Christian clergy in Virginia. Id. at 63. 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].
altogether different audience than his earlier one in Virginia.\textsuperscript{6} He knew that the task of agreeing on what powers to deny to the national government with respect to religion, speech, press, and so on, was far simpler than the task of agreeing on what powers to grant it.\textsuperscript{7}

Notwithstanding the criticism concerning \textit{Everson}'s lack of fidelity to the text and original meaning of the Establishment Clause, the \textit{Everson} Court is certainly correct that formation of America's foundational principles concerning disestablishment—and in time, church-government relations—took place more at the state rather than at the national level. The reason is simple enough: because there was no 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.\textsuperscript{8} Of these eleven, eight of the disestablishments took place after the Constitutional Convention of

\textsuperscript{6} See \textit{Philip Hamburger}, \textit{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.” (citation omitted)).

\textsuperscript{7} Historian Thomas Curry captures the state of mind with respect to the First Congress:

\begin{quote}
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.
\end{quote}

\textbf{Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment} 193–94 (1986).


The War of 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, as they had fought alongside other patriots for liberty from Great Britain and now sought liberty from religious imposition.
1787: South Carolina (1790), Georgia (1798), Vermont (1807), Maryland (1810), Connecticut (1818), New Hampshire (1819), Maine (1820), and Massachusetts (1832–33). Accordingly, from 1776 to 1833, there were a total of eleven state disestablishments, each with similarities as well as some differences to the church-government resettlement 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 among commentators has been that the text of the Establishment Clause, as well as the original intent of the First Federal Congress, should reclaim some role—albeit perhaps a role short of controlling—with respect to the modern substantive meaning of the clause. While it has been over sixty years since Everson was decided, historical arguments show little sign of abating. If anything, they are being pressed with increased vigor. Moreover, reliance on history, as well as the text, is not exclusive to constitutional conservatives. Many 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 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 organized around six lines of inquiry. Answers to these inquiries cannot resolve all of the modern interpretative questions about church-government relations, but they do narrow the range of issues that are fairly disputed as well as firmly close the door to certain errant interpretations of the 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 II of this Article. 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 original Constitution, the document primarily focuses on who decides questions about religion and law, not on providing substantive answers. At the outset, religious freedom questions were left primarily in the hands of the several states. Leaving this issue to the states 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 the document’s approach to religious freedom? This is addressed in Part

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9 *Id.* at 1458, 1490–91.

III. The Federalists insisted that it was clear under the Constitution that the national
government had no power over relations between church and government, for all
authority not delegated to the national government 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 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, who drafted and debated
the Establishment Clause from June to September 1789, originally intend the text
to mean? Because three-quarters of the states had to ratify what eventually became
the First Amendment, we also need 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 IV. It is here that I argue against two
widely held theories said to capture the original meaning of the Establishment
Clause: (1) that government may support religion so long as it does so without
preferring some religions over others; and (2) that a House-Senate Conference
Committee’s last-minute decision to introduce “respecting” into the text was
specifically designed to preserve state sovereignty over church-government
relations, and thus create a federalist 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 House and Senate finally agreed to the wording 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 delegitimize certain
over-readings of the Establishment Clause. These matters appear in Part V of this
Article. Here I argue against a theory that conflates the religion clauses to a single
meaning, contending that no-establishment and free exercise together protect 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 narrower scope of the textual prohibition means that statutory
religious exemptions that merely accommodate voluntary religious observance are
generally permitted by the Establishment Clause. Exemptions do not advance
religion by leaving it alone.

Fifth, how might the 1787 Constitution’s overall frame of government and
underlying political theory, as amended by the Bill of Rights, contribute to the
meaning of the Establishment Clause? I turn to these questions in Part VI. For
example, the Bill of Rights vested no new powers in the national government. It
did just the opposite; it limited national powers. Therefore, I argue that the
“negative” nature of the Bill of Rights 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 are complementary, each in its own way
restraining the government and thereby working to enlarge religious freedom. I
further argue that specific federalism is not just wrong, but that it has diverted
attention to federalism when the focus with respect to the meaning of the
Establishment Clause should be on the scope of government’s limited *jurisdiction* over certain affairs relegated to the province of organized religion.

Sixth, to what extent do early applications of the Establishment Clause by officials in all three branches of the federal government inform us as to its original meaning? To the degree such actions are not in conflict with the plain text they may shed light on the clause’s original meaning. However, many of these actions were uneven, and at times, contradictory. I briefly address this state of events in Part VII.

To the extent that a hierarchy is useful, the fourth of these lines of inquiry—the plain text—is thought to be the most important for judicial interpretive purposes, followed by the third and fifth inquiries, respectively. The idea behind prioritizing the plain text is that the courts should not fall back on either the congressional debate or on rules of construction unless the text of the Establishment Clause is ambiguous. In other words, a jurist who is an originalist is first a textualist before she is an originalist. Unlike the historian who is unrestrained in asking what happened and why, the jurist is confined to asking, “What is the law?” Thus, the jurist is not at liberty to let the text of the Constitution be superseded by later actions or inattention of public officials. This ordering also gives due weight to those state legislators who, when asked to ratify each proposed amendment during 1789–1790, were presented with a fixed text and a take it or leave it proposition. With respect to the original meaning of the text, one must remember that when considering the merits of each proposed amendment, state legislators had little to go on but grammar and the ordinary definition of the words at that time, situated within the framework of the new government constituted by the 1787 Constitution.

Careful attention to the First Congress’ debates over the wording of the religion clauses, the theory of the United States Constitution, and the text of what we now call the Establishment Clause, show that certain widely held mega-theories of the clause are unlikely. So this Article explains what the Establishment Clause is not. But the same text and debates will not tell us the original understanding of religious “establishment” as used in the clause. Within certain parameters, the uses of the word “establishment” during the founding were sufficiently multiple that we cannot be certain of its intended definition. Or, more precisely, within a modest

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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* S. JOURNAL, 1st Cong., 1st Sess. 163 (1789), available at http://www.archive.org/stream/journalfirstses00senagoog#page/n7/mode/1up. 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 347–348 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.
range, the word "establishment" meant different things to different figures at the political center of the formative law-making process.

II. 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. It is worth asking why it was not.

A. Religion and Religious Freedom in the 1787 Constitution

A nation's constitution usefully can do three things. First, it can organize the government's branches, assign these offices their limited competencies, and carefully diffuse authority among them to avoid concentrations of power. Second, it can define the relationship between government, individual citizens, and groups, including the vesting of certain rights. And, third, it can declare 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 was added two years later in response to the second of these three tasks. However, the original Constitution's incompleteness with respect to the nation's founding principles was in large part calculated. In significant measure, the gap reflects the difficulty of achieving agreement on first principles. In the face of disagreement, a common way to get contending parties to sign a single document is to avoid topics on which there is no consensus. Religion was one of those topics.

The 1787 Constitution did take into account religious freedom—as distinct from religion qua religion—but only in three places. First, the various oaths of office set forth in the Constitution permit an affirmation in lieu of a prescribed oath. This was done to accommodate the then widely known scruples of Quakers.

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12 See, e.g., U.S. CONST. art. I, § 3, cl. 6; id. art. II, § 1, cl. 8; id. art. VI, cl. 3. During Connecticut's convention on the ratification of the 1787 Constitution, Oliver Wolcott argued that the taking of the oath was "a direct appeal to that God who is the avenger of perjury." It follows, argued Wolcott, that the oath was indirectly an "acknowledgment of [God's] being and providence." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 202 (Jonathan Elliot ed., William S. Hein & Co. 2d ed. 1996) (1836) [hereinafter ELLIOT'S DEBATES]. Wolcott was a signer of the Declaration of Independence and later governor of Connecticut. Cf. Steve Sheppard, What Oaths Meant to the Framers' Generation: A Preliminary Sketch, 2009 CARDozo L. REV. DE NOvo 273 (2002). Professor Sheppard argues that for one taking the oath it did not necessarily signal "a religious pledge or a God-fearing basis" for the oath. Id. at 281. In other words, a nonreligious person could, in good conscience, take the oath. As added
as well as other small Protestant sects, who could not swear or take an oath.  
Second, the Sunday Clause 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 a veto when the ten-day deadline happens to fall on a Sunday.  
Finally, of greater moment in 1787 than now, the Religious Test Clause relieves federal officials from the sort of religious prerequisites then extant in most of the states.  
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; it even omits those as basic as freedom of speech, freedom of the press, due process of law, and protection of property. So the fact that religious freedom was not comprehensively safeguarded puts it in good company. The Constitutional Convention's primary task was to create a framework for who decides important political and moral questions, not to decide them. Nevertheless, a smattering of rights are given special mention, such as the availability of a jury trial for those accused of a crime,

support for this position, Sheppard points out that the Oath Clause in Article VI, Clause 3, is immediately followed by the Religious Test Clause. That said, Sheppard admits people such as Oliver Wolcott are correct that the oath requirement is an indirect constitutional reference to God. Id. at 282. Such references, of course, fall well short of a claim that God is the foundation for the Constitution. Id.

13 The prohibition on oath-taking is 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 prevent its Return, in which Case it shall not be a Law.").
15 See David K. Huttar, The First Amendment and Sunday, ENGAGE, Oct. 2006, at 166, 169 (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); Jaynie Randall, Sundays Excepted, 59 ALA. L. REV. 507, 507–11, 525 (2008) (correctly arguing that the Sunday Clause provides no support for the claim that America was founded as a Christian nation, but her explanation being the less-convincing rationale that the extra Sunday was to afford the president full use of the counsel of his advisors—who might be hampered in their communication by state blue laws—as he deliberated over whether to veto a bill).
16 U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."); see also Note, An Originalist Analysis of the No Religious Test Clause, 120 HARV. L. REV. 1649, 1649–60 (2007).
17 In the period of 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 (Univ. of N.C. Press 1994) (1986). 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.
18 U.S. CONST. art. III, § 2, cl. 3.
preservation of the writ of habeas corpus,\textsuperscript{19} and prohibition of bills of attainder\textsuperscript{20} and ex post facto legislation.\textsuperscript{21} The few rights singled out for special mention in the 1787 Constitution appear to have little by way of a common theme. There is no obvious explanation as to why these were mentioned and others not.

Not only are there the mere 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 may 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.\textsuperscript{22} The American founders were not repudiating their Christian past or being hostile to it, hence, they absentmindedly used the Christian calendar and unconsciously assumed Sunday would be the president's Sabbath. Similarly, the Convention delegates worked six-day weeks from late May to mid-September, with Sunday excepted.\textsuperscript{23} While the American founders were intentional about breaking with their European past of a confessional state, it is also well documented that they viewed the Protestant religion as a friend to republicanism and as an aid to the expansion of liberty.\textsuperscript{24}

\textbf{B. Religion and Religious Freedom at the Convention}

Although the debate by Convention delegates had little to say about religion, it is not like God never got so much as a passing mention. For example, on May 14, 1787, as delegates awaited the arrival of a quorum, 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."\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{19} \textit{Id.} art. I, § 9, cl. 2.
  \item \textsuperscript{20} \textit{Id.} art. I, § 9, cl. 3; \textit{id.} art. I, § 10, cl. 1.
  \item \textsuperscript{21} \textit{Id.} art. I, § 9, cl. 3 (national government); \textit{id.} art. I, § 10, cl. 1 (state governments).
  \item \textsuperscript{22} \textsc{William Lee Miller}, \textsc{The Business of May Next: James Madison & the Founding} 113–14 (1992).
  \item \textsuperscript{23} \textsc{Richard Beeman}, \textit{Plain, Honest Men: The Making of the American Constitution} 367 (2009).
  \item \textsuperscript{24} \textit{Miller}, \textit{supra} note 22, at 114–15.
  \item \textsuperscript{25} \textsc{George Bancroft}, \textit{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.
\end{itemize}
with the politeness due the venerable statesman, but garnered so little enthusiasm that the matter was never brought to a vote.\textsuperscript{26}

While such references were few, they were not addressed to the impersonal God of Deism but rather to a nonspecific 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 of modern secularism to dub the Philadelphia Convention’s product the “Godless Constitution.”\textsuperscript{27} Unlike most organic documents of the states in that day, the 1787 Constitution’s Preamble did not mention God, nor was this or anything like it apparently suggested by any of the delegates.\textsuperscript{28} Indeed, 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 was 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 was being founded.

\textit{C. The Constitution’s Overall Theory}

What is apparent from the 1787 document is that the frame of the new government was a constitutional federalist republic of limited delegated powers. The atom of sovereignty had been 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

\textsuperscript{26} Franklin explained that with age he had come to realize that God rules in the affairs of men. \textit{Beeman, supra} note 23, at 178. Roger Sherman seconded Franklin’s motion. Alexander 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 dodge 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 \textit{Beeman, supra} note 23, at 177–79; \textit{Steven Waldman, \textit{Founding Faith: Providence, Politics, and the Birth of Religious Freedom in America}} 127–29 (2008).


\textsuperscript{28} See \textit{Colonial Origins of the American Constitution: A Documentary History} (Donald S. Lutz ed., 1998). For example, consider the Fundamental Orders of Connecticut, \textit{id.} at 210, 211, the Pennsylvania Charter of Liberties, \textit{id.} at 290, 292, and the Articles, Laws, and Orders, Divine, Politic, and Martial for the Colony in Virginia, \textit{id.} at 314, 315. See also the Articles of Confederation and Perpetual Union Between the States, \textit{id.} at 377, which the Constitution of 1787 replaced. The Articles of Confederation closes with “And Whereas it hath pleased the Great Governor of the World to incline the hearts of the legislatures we respectively represent in congress.” \textit{id.} at 384.
other federal laws. James Madison’s hope to extend a republic over a vast geographic area was codified. A geographically large republic had never in history succeeded. To achieve this vision, the document acknowledges throughout that, given the flawed nature of the human character, power was not to be concentrated in any one office or branch but instead balanced and checked by others. Hence, the presumption that power breeds corruption 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 the executive, intended to carry out and enforce the laws enacted by the legislature. The third branch was composed of an independent judiciary. Finally, and certainly implicit in the document, was that government opposition was not treasonable but just a differing point of view to be tolerated in an ever-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 were 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. This was no small matter for female citizens denied the right to vote or slaves denied citizenship, voting rights, and even something as fundamental as inclusion in the human race.

Historian Richard Beeman attributes the Preamble’s silence on religion and first principles other than republicanism 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 delegated the task of assembling all the decisions the Convention had made to date into a coherent document. Within the Committee, to Randolph fell the task of putting pen to paper and producing a first draft. Concerning Randolph’s view on the proper role 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, “a 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

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29 See BEEMAN, supra note 23, at 255-56.
30 See id. at 246-47.
31 Id. at 270.
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.32

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

We must figure three additional matters into the "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. At one point, the small states refused 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 that was not accomplished until July 16th.33 Other issues, from navigation laws to slavery, sharply divided the delegates, and ratification by the required nine states nearly failed but for a late concession by Federalists that the First Federal Congress would consider adding amendments that in time would become the Bill of Rights.34 With so many details respecting the mere frame of the new government to quarrel about, why would the delegates drill down to first principles and multiply their divisions? Some disputed things are best left unresolved and thus unstated. Religion was one of them.35

Second, the near silence with respect to the character of the nation's first principles does not necessarily mean indifference to presuppositions, including religious ones, let alone a deliberate decision to reject a theistic worldview (i.e., the "Godless Constitution").36 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 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 Convention delegates held religious values,37 those religiously derived values (along with other values) would

32 Id. at 271; see also id. at 278.
33 Id. at 218–20.
34 See infra notes 74–75, 96, 131, 137–142 and accompanying text.
36 Id. ("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.").
37 BEEMAN, supra note 23, at 180–81 (noting that it is undisputed that most of the delegates would have called themselves Christians, and that some were men of great piety,
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 they represented. That means there was an 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 was fixed in the frame of the written Constitution. And even the charter's structural frame of checks and balances was subject to alteration. It provided not one but two ways for a supermajority to amend the written Constitution. This was done, for example, by the Seventeenth Amendment implementing the popular election of U.S. senators with an attendant sharp diminution of power previously vested in the states.

The Constitutional Convention of 1787 focused far less on lofty theory and far 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 of an extended republic was that power be widely diffused with potential factions balanced one against the other. 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 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, to have been richly corrected by the First Federal Congress submitting amendments to the states that in time became the Bill of Rights. Religious freedom, as distinct from religion qua religion, was doubly addressed in the proposed Third Article of Amendments (later renumbered 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 also makes sense when one appreciates that in 1787, church-government relations (as distinct from religious conscience) were thought highly divisive, were widely regarded as a

38 Either two-thirds of each house of Congress can propose amendments which must then be ratified by three-fourths of the states, or a convention sought by two-thirds of the states can propose amendments which must in turn be approved by three-fourths of the states. U.S. Const. art. V.

39 The Federalist No. 51 (James Madison), reprinted in 1 The Founder's Constitution 330, 331 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter Founder's Constitution].

40 The matter of slavery, however, had to await the Civil War (1861–1865) followed by ratification of the Thirteenth Amendment in 1865. The matter of women's suffrage had to await adoption of the Nineteenth Amendment in 1920.
state-level matter, and varied considerably from state to state.\textsuperscript{41} One can easily imagine the delegates thinking, "why take up establishmentarianism, 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.\textsuperscript{42} Virginia had concluded a very public and bruising struggle over disestablishment from 1784 to 1786.\textsuperscript{43} In most of New England, however, the Congregational Church establishment was still secure at the parish level in the early 1790s, albeit there was heated agitation by outnumbered dissenters, mostly Baptists.\textsuperscript{44} It is no accident that much of the criticism regarding 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."\textsuperscript{45} Other Christians regarded such thinking as civil religion, which is to say, idolatry.\textsuperscript{46} This further illustrates why the framers were being wise, not hostile toward religion, when they chose to avoid theistic 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 aware because they travelled widely (unlike most other Americans) and thus came into frequent contact with the church-state arrangements in other states. Contending with this religious pluralism was manageable internally within 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 divisive increase in religious diversity. So it is easy to see how the delegates thought it best to view religion qua religion to be too controversial to address explicitly in the Constitution, a state rather than a federal responsibility, or both.

\textsuperscript{41} HUTSON, supra note 35, 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.").

\textsuperscript{42} 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).

\textsuperscript{43} For an overview of the then recent disestablishment in Virginia, see Esbeck, Virginia Disestablishment, supra note 5, at 65–92.

\textsuperscript{44} Esbeck, Dissent and Disestablishment, supra note 8, at 1432–47, 1498–1523.


\textsuperscript{46} See Esbeck, Dissent and Disestablishment, supra note 8, at 1432–48; Esbeck, Virginia Disestablishment, supra note 5, at 95 nn.180, 184 & 96 nn.186–88 (quoting from various Presbyterian petitions arguing for disestablishment in Virginia).
D. Historians and the Business of Over-Reading the Constitution

Historian Frank Lambert has a variation on the quietude of the 1787 Constitution concerning church-government relations. In his view, the Constitution’s near silence was an intentional way of dealing with the relationship. Silence was the delegates’ way of endorsing the view that religion as such was not within the authority of the government—at least, not within the authority of the new central government 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 national 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 hold on their existing flocks.47

Historian William Lee Miller agrees that by virtue of the new 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.”48 Steven Waldman also thinks the “absence of God from the Constitution was proreligion . . . . The Constitution demanded a paradigm shift, away from public responsibility [for religion] and toward private.”49 Lambert hastens to add that the delegates did believe that a virtuous citizenry was necessary to maintain a republic and that traditional religion contributed in teaching the people the basic tenets of virtuous living.50 But the Constitutional Convention, they argue, broke with the past in its belief that religion needed the sustaining hand of the central government. Rather, enlightened statesmen like Madison, as well as religious dissenter in America, saw that when government actively worked to sustain religion it had just the opposite effect: corruption of religious institutions and decline of religion’s affection among the people. In sum, Lambert argues, the Constitution’s quietude on religion was not avoidance of the church-government question but a conscious choice to side with the disestablishmentarian viewpoint.51

A serious problem with the perspective of Lambert, Miller, and Waldman is that at no time during a Convention session did even a single delegate articulate such a motive behind the inaction of the Convention. Moreover, it is not fanciful to suppose that the matter was intentionally never brought up, whether in formal sessions or during informal discussion groups. 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

48 MILLER, supra note 22, at 110.
49 WALDMAN, supra note 26, at 134.
50 LAMBERT, supra note 47, at 248–49.
51 Id. at 250, 252; see also MILLER, supra note 22, at 112–16 (the Constitution was not hostile to religion, nor was religion opposed to the republic).
because the new nation’s charter did not expressly rely upon God’s providence.\footnote{52} Washington wrote back giving his expectation that the American “publick councils” would 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.”\footnote{53} However, Washington expressed no such view two years before in Philadelphia. And it is curious, indeed, that no delegate in Philadelphia gave public expression of Lambert’s view at the Convention, or in his 1787 private papers.

Lambert, Miller, and Waldman argue that the delegates were affirmatively motivated to keep the federal government out of religion because it was a voluntary matter. One can look at the same evidence and easily conclude that their reasons were quite different. The delegates were motivated to not exercise federal authority over religious matters for two reasons: it was a matter for the states, and it was divisive such that it could contribute to a failure of the Convention or failure of the states to ratify the Constitution. Lambert, Miller, and Waldman underappreciate the extent to which the delegates’ quietude was because the matter of church-government relations was thought wholly within the jurisdiction of the states. Hence, it did not matter what individual delegates thought about establishmentarianism. Collective silence meant that the subject of church-government affairs was not a question within the Convention’s purview. The subject best remained in the hands of the colonies turned states, where the authority had been for 180 years. Many Americans would eventually embrace Lambert’s views, but the delegates did not do so in 1787.

The principal aim of the Constitutional Convention was getting an agreement on those matters to which agreement was possible and most pressing: namely, replace the Articles of Confederation with a more robust central power that could regulate interstate and foreign commerce; acquire the means to generate national 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 on 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 become bogged down in religious division.

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\footnote{52} Letter from the Presbytery of the Eastward, convened in Newberry-Port (New England), to President George Washington (Oct. 28, 1789), (on file with the The Library of Congress), available at \texttt{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); \textit{see also} WALDMAN, \textit{supra} note 26, at 134–35.

Although limited, the matter of religious freedom did generate specific proposals during the Constitutional Convention. As mentioned above, the Religious Test Clause (or 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, Charles Pinckney of South Carolina proposed the Test Clause, and it was referred to the Committee of Detail.\(^5\) Not reported out favorably by the Committee, Pinckney’s own motion brought the clause before the Convention.\(^5\) Roger Sherman of Connecticut argued that the limitation was unnecessary because of “the prevailing liberality being a sufficient security against such tests.”\(^5\) Gouverneur Morris of Pennsylvania and Charles Cotesworth Pinckney of South Carolina spoke in favor of the motion in unreported remarks.\(^5\) When brought to a 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 religious freedom.

The Religious Test Clause gave rise to an individual religious right, albeit modest in scope. More importantly, the Test Clause showed that religious division was something that the framers did not want to risk, for the Test Clause was more than just an individual right. During Connecticut’s convention to consider ratification of the Constitution, Oliver Wolcott argued that the Test Clause acted as an additional hedge against a national establishment of religion,\(^5\) as a common

\(^{54}\) Elliott’s Debates, supra note 12, at 445–46 (“No religious test or qualification shall ever be annexed to any oath of office, under the authority of the United States.”); see also Beeman, supra note 23, at 288–89; Levy, supra note 17, at 80. 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, with the weight of authority rejecting it as revisionist. Id. at 93–98; Levy, supra note 17, at 80 n.1. One provision of the Pinckney Plan, as reported after the Convention 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 Elliott’s Debates, supra note 12, at 131; see also Lambert, supra note 47, at 251; Levy, supra note 17, at 80 n.1.

\(^{55}\) Elliott’s Debates, supra note 12, at 498 (Pinckney altered the terms of his initial proposal to read as follows: “[B]ut no religious test shall ever be required as a qualification to any office or public trust under the authority of the United States.”).

\(^{56}\) Id.

\(^{57}\) Id.

\(^{58}\) 2 Elliott’s Debates, supra note 12, at 202. Wolcott was a Federalist and Congregationalist. See M. Louise Greene & I.A. Bunin, The Development of Religious Liberty in Connecticut 171 (2004). He signed the Declaration of Independence, the Articles of Confederation, and he later served as a governor of
feature of establishmentarianism was to require all office holders to join the national church. The clause also did important work as an antidivisive measure because it kept 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 religious conscience clauses had about them a feature of no-establishment as well, in the sense that the government aspired to avoid having citizens divide over political questions along religious lines.

The constitutional delegates 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. At the time of the Philadelphia Convention, a geographically extended republic was still experimental and thought by many to be unstable. 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 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 avoid stirring up the people, as well as to aid religiously plural (albeit overwhelmingly Protestant) Americans to begin to develop affection for their new 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.” Pinckney had earlier proposed such a power, but without the reference to religion. The motion was referred to the Committee of Detail, and later came before the


59 Oliver Ellsworth, The Landholder, No. 7 (Dec. 7, 1787), reprinted in 4 FOUNDERS’ CONSTITUTION, supra note 39, at 639–41. Ellsworth was a delegate to the Connecticut constitutional convention. He wrote several letters in favor of ratification of the Constitution; No. 7 was a defense of the Religious Test Clause.


61 See SAMUEL RAWSON GARDINER, OLIVER CROMWELL 9–10, 316–317 (2d ed. 1901) available at http://www.archive.org/stream/olivercromwell00gardgoog#page/n332/mode/ 2up (discussing how Cromwell’s political leadership was resisted because of the spiritual view he attempted to impose on other Protestants).

62 5 ELLIOT’S DEBATES, supra note 12, at 544; see also BEEMAN, supra note 23, at 288–89; WALDMAN, supra note 26, at 129.
Convention for consideration.\textsuperscript{63} James Wilson of Pennsylvania spoke favorably about the motion in unrecorded remarks. Gouverneur Morris suggested that Congress already had such an authority given its exclusive power over the federal seat of government. No one spoke to the prohibition on a religious test for student admission. The motion lost, with four states in favor and six states opposed.\textsuperscript{64} It is suggestive of religion's major influence on civil society in the new nation that in 1787 all of the existing colleges were founded by Protestant churches. The proposal's defeat perhaps indicated that the Madison/Pinckney idea could become religiously divisive and thus was best avoided, or that higher education was not thought to be a governmental 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 of 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 to read much into that silence. One is 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 confessional sense a Christian nation. Lastly, as the delegates were keenly aware, the signed Constitution had no legal effect.\textsuperscript{65} As stated in its 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 those several debates that we now take up in Part III.

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

Once the document was signed by thirty-eight of the fifty-five delegates that attended at least part of the Convention during the summer of 1787,\textsuperscript{66} the draft Constitution was transmitted to the Confederation Congress meeting in New York City. The draft was accompanied by a resolution of the delegates and a letter

\begin{itemize}
\item \textsuperscript{63} \textit{Elliot's Debates, supra} note 12, at 440.
\item \textsuperscript{64} \textit{Id.} at 544; see also \textit{Beeman, supra} note 23, at 288–89; \textit{Waldman, supra} note 26, at 129. This was not the first time the formation of a national university had been raised. To these reasons for the proposal's defeat, historian Mark McGarvie notes that some presumed that the proposed university would be founded on a secular basis. If the university was to be nondenominational, that would raise a question of on what moral precepts the university would base its teaching of the virtues needed to sustain a republic. \textit{Mark Douglas McGarvie, One Nation Under Law: America’s Early National Struggles to Separate Church and State} 61–62 (2004).
\item \textsuperscript{65} \textit{Beeman, supra} note 23, at 370.
\item \textsuperscript{66} \textit{Id.} at 359, 363 (explaining that of the forty-one delegates present on September 17, 1787, Edmund Randolph, George Mason, and Elbridge Gerry did not sign).
\end{itemize}
signed by George Washington as president of the Constitutional Convention. The resolution recommended that Congress should not itself consider the merits of the Constitution but transmit the draft to each of the states for the calling of a state convention formed for the sole purpose of debating the Constitution's ratification. The Confederation Congress set September 26th to begin its discussion of how to deal with the draft Constitution. Meanwhile, newspapers printed copies of the Constitution, and drafts circulated 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 part of their state's delegation to the Confederation Congress. Opponents also were present at the Congress, such as Richard Henry Lee of Virginia. Additionally present were former Convention delegates from New York who did not sign 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.

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 whole, but they 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.” 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 suggested in the resolution. Rather, each legislature set an election date for the

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67 Resolution signed by George Washington, President of the Convention, to the Confederation Congress (Sept. 17, 1787), reprinted in 1 FOUNDERS’ CONSTITUTION, supra note 39, at 194–95. 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 also BEEMAN, supra note 23, at 351–53.

68 BEEMAN, supra note 23, at 371.

69 Letter from Richard Henry Lee to Edmund Randolph, Governor of Virginia (Oct. 16, 1787), in 1 ELLIOT’S DEBATES, supra note 12, at 503–05.

70 Letter from Robert Yates and John Lansing to Governor Clinton of New York (undated), in 1 ELLIOT’S DEBATES, supra note 12, at 480–82 (reproducing a letter sent when Yates and Lansing quit as delegates to the Constitutional Convention).

71 1 FOUNDERS’ CONSTITUTION, supra note 39, at 198; see also BEEMAN, supra note 23, at 372–73.
selection of convention delegates, as well as set the beginning date for the ensuing state convention. To the degree there was resistance, it was manifested by setting a late start 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 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: (1) the aforementioned delegate campaigns; (2) state by state in the ratification conventions; and (3) 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 multistate distribution. There were also letters; many of them were written with the intent that they be made public. Those favoring ratification of the Constitution took for themselves the name “Federalists,” and thereby managed to hang the unattractive moniker “Antifederalists” on those opposing—though “Antiratificationists” 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, and all thirty delegates were unanimous in their support. Table 1 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 national 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, 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 state convention’s acceptance of recommended amendments to the Constitution. Antifederalists pressed for ratification on condition that amendments were first agreed to, but the


73 1 ELLIOT’S DEBATES, supra note 12, at 319; see also BEEMAN, supra note 23, at 382–83.

74 1 ELLIOT’S DEBATES, supra note 12, at 320–21 (New Jersey), 321–22 (Connecticut), 323–24 (Georgia); see also BEEMAN, supra note 23, at 383–85.
Federalists were able to hold the list of amendments to recommendations only. \(^7^5\) North Carolina voted not to ratify but nevertheless recommended amendments. \(^7^6\)

**Table 1: Ratification of the 1787 Constitution**\(^7^7\)

<table>
<thead>
<tr>
<th>State</th>
<th>Date</th>
<th>Passed?</th>
<th>Amendments Recommended?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1  Delaware</td>
<td>December 7, 1787</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>2  Pennsylvania</td>
<td>December 12, 1787</td>
<td>Yes</td>
<td>No*</td>
</tr>
<tr>
<td>3  New Jersey</td>
<td>December 18, 1787</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>4  Georgia</td>
<td>January 2, 1788</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>5  Connecticut</td>
<td>January 4, 1788</td>
<td>Yes</td>
<td>No*</td>
</tr>
<tr>
<td>6  Massachusetts</td>
<td>February 6, 1788</td>
<td>Yes</td>
<td>Yes*</td>
</tr>
<tr>
<td>7  Rhode Island</td>
<td>March 24, 1788</td>
<td>No</td>
<td>Not at this time.</td>
</tr>
<tr>
<td>8  Maryland</td>
<td>April 26, 1788</td>
<td>Yes</td>
<td>No*</td>
</tr>
<tr>
<td>9  South Carolina</td>
<td>May 23, 1788</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>10 New Hampshire</td>
<td>June 21, 1788</td>
<td>Yes</td>
<td>Yes*</td>
</tr>
<tr>
<td>11 New York</td>
<td>July 25, 1788</td>
<td>Yes</td>
<td>Yes*</td>
</tr>
<tr>
<td>12 North Carolina</td>
<td>August 1, 1788</td>
<td>No</td>
<td>Yes*</td>
</tr>
</tbody>
</table>

* Pennsylvania and Maryland considered amendments, but they were voted down. Among the rejected amendments in both states were ones to protect religious freedom. Massachusetts also considered recommending an amendment to protect religious freedom. While other amendments were reported out, the one on religious freedom did not pass. Finally, New Hampshire, Virginia, New York, and North Carolina had among their recommended amendments ones 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 non-Protestants to hold federal office. \(^7^8\) On the other hand, there were principled defenses of the Test

\(^7^5\) BEEMAN, *supra* note 23, at 386–403.

\(^7^6\) 1 ELLIOT'S DEBATES, *supra* note 12, at 331–33; see also BEEMAN, *supra* note 23, at 403–05.

\(^7^7\) BEEMAN, *supra* note 23, at 375–405; The Convention Timeline, U.S. CONST. ONLINE, http://www.usconstitution.net/consttime2.html (last visited Mar. 14, 2011). On August 1, 1788, North Carolina proposed amendments, but it did not ratify the Constitution. 1 ELLIOT’S DEBATES, *supra* note 12, at 331–33. North Carolina would eventually ratify on November 21, 1789. Id. at 333. Rhode Island proposed amendments on June 16, 1790, after its eventual ratification of the Constitution, id. at 334–37, 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 id. at 321, 325.

\(^7^8\) LAMBERT, *supra* note 47, at 253–54, 257–58; LEVY, *supra* note 17, at 86, 91–92; MILLER, *supra* note 22, at 110–11; WALDMAN, *supra* note 26, at 133–34, 139. For example, fear that the Religious Test Clause would permit office holding by “pagans and
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 free to cast their ballots in a manner that imposed a religious test if that was their personal criteria for selecting qualified officials. 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. But this issue likewise did not figure large in the contest. As the overall struggle for ratification unfolded, these two objections were inconsequential compared to the question of whether the newly 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 on aid to religion qua religion, but due to regional differences, it was both subtle and uneven. At the

Roman Catholics" was voiced in North Carolina. A letter by the governor summarizing the ratification debate in New Hampshire noted that the Test Clause was criticized because it would allow those not Protestant to hold office. See 3 LETTERS AND PAPERS OF MAJOR-GENERAL JOHN SULLIVAN 567–68 (Otis G. Hammond ed., 1939). The governor's letter made clear that he disdained the delegate's religious prejudice. 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. LAMBERT, supra note 47, at 257; MILLER, supra note 22, at 111; WALDMAN, supra note 26, at 134. These are illustrative of the extremes, but they were not widespread.

79 LAMBERT, supra note 47, at 258.

80 Id. at 253–57; WALDMAN, supra note 26, at 133–34; Muñoz, supra note 45, 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 of ratification. Id. at 347–57. Rush's post-ratification observation of the wishes of others, that he does not name and fails to number, carries little 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 serving 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.

81 STORING, supra note 60, at 22–23, 64. While favoring the protection of religious conscience, many Antifederalists were establishmentarians. They reasoned in a circular fashion that saw republican self-government as 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 aided and 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 follow their conscience. As
time of the ratification struggle (1787–1788), the Anglican Church in the southern
states had either been disestablished or was very weak.82 In New England,
however, the Congregational Church was still strong and at the parish level, tax-
supported.83 There were no establishments remaining in the middle states.84 The
Antifederalists tacitly conceded that a national establishment was not possible
because of state-by-state religious differences.85 These sharp regional differences
tended to reinforce the Federalists’ argument that the proposed Constitution
should—and did—leave the matter of church-government relations 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 implied national power over church-government relations. This
unease gave rise to the question of whether the implied powers of the proposed
national government really did grant authority to disturb either religious
conscience or 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 a power vested in the states, as well as to disable any
implied national power to invade religious conscience. New England Federalists
agreed in principle, for they too did not want their Congregational Church parish-
level control disturbed by the national government. But they did not see any
language in the Constitution giving rise to a fear that the document 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

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 the needed virtue was religion.
However, they broke with establishmentarians over the wisdom and need for government
financial aid to religion. Active government aid to religion, argued disestablishmentarians,
corrupted the church and caused conscientious citizens to reject a faith which has been co-
opted and now served the needs of the state rather than God.

82 Esbeck, Dissent and Disestablishment, supra note 8, at 1457–1501.
83 Id. at 1501–40. The law journals seem not to take note of a reason for the renewed
strength of the Congregational establishment in New England so soon after the War,
preferring instead to assume establishmentarianism was everywhere weak and it was just a
matter of time before it crumbled under the combined forces of reason and evangelical
dissent. Such weakness was certainly true in the South where the Church of England
establishment was the church of the defeated foe. But in New England the Congregational
clergy had not merely supported the Revolution, but they had been aggressive agitators for
the Great Cause Liberty against perceived British oppression. See GORDON S. WOOD, THE
generation had to pass before the people began to look past the service paid by the
Congregational Church in aid of the Revolutionary War.

84 Esbeck, Dissent and Disestablishment, supra note 8, at 1457–1501.
85 Muñoz, supra note 45, at 617.
implied powers that could impair religious conscience. Dissenters, as well as those who had previously been dissenters before their state disestablished, initially regarded the proposed union as a potential threat to their religious freedom. The general unease was only exacerbated by the absence of a bill of rights. It was this growing unease that first threw the Federalists on the defensive in Massachusetts.

The Federalists thereby found themselves making a twofold argument. First, the newly proposed government had no authority over the matter of religion. And, second, a bill of rights was unnecessary to reaffirm this lack of national 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 amendments including a bill of rights thereafter.

The principle that the 1787 Constitution created a government of enumerated powers was first articulated by James Wilson, the highly able Constitutional Convention delegate from Pennsylvania, in a speech given on October 6, 1787. Wilson delivered his famous speech before a crowd outside the Pennsylvania State House. It was so well reasoned that the speech was printed and distributed throughout the states as Americans became immersed in the ratification debate. Wilson argued that, because the proposed central government had no powers other than those expressly delegated, it would be superfluous and even absurd to expressly deny powers never delegated. Wilson also served as a delegate to the Pennsylvania state ratification 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.”

Delaware, New Jersey, and Georgia did not keep a record of the debate at their ratification conventions. In Pennsylvania, Antifederalists proposed amendments to the Constitution, and one proposed amendment addressed religious liberty. Following the reasoning of James Wilson, the Federalist majority successfully turned back all proposed amendments to the Constitution.

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86 WALDMAN, supra note 26, at 138–39. In current terminology, we would call these Americans the independent swing voters.

87 1 FOUNDERS’ CONSTITUTION, supra note 39, at 449; see also BEEMAN, supra note 23, at 379; STORING, supra note 60, at 65.

88 2 ELLIOT’S DEBATES, supra note 12, at 455. To the superfluous aspect of the Wilsonian argument a second was soon added, namely, it is risky to deny powers never granted for that can be twisted into an argument that other powers not denied by an amendment are impliedly granted. That argument led to what is now the Tenth Amendment.

89 LEVY, supra note 17, at 87.

90 2 ELLIOT’S DEBATES, supra note 12, at 545–46.

91 COMPLETE BILL OF RIGHTS, supra note 72, at 12 (“The rights of conscience shall be held inviolable, and neither the legislative, executive, nor judicial powers of the United
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, 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.

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

Massachusetts had a strong Congregational Church supported by a parish-level religious tax (which they called a personal “assessment”). The dissenting Baptists had twenty delegates at the convention, including the Reverend Isaac Backus, a longtime vocal opponent of the mandatory assessment. The Baptists, however, supported ratification of the Constitution and expressed no concern about national church-government relations. That would not have happened if the Baptists had thought that the Constitution offered yet a new threat to the religious 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.

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.”

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92 1 ELLIOT’S DEBATES, supra note 12, at 319–20.
93 LEVY, supra note 17, at 86.
94 2 ELLIOT’S DEBATES, supra note 12, at 202.
95 BEEMAN, supra note 23, at 386–89.
96 Id.
97 1 ELLIOT’S DEBATES, supra note 12, at 322–23.
98 COMPLETE BILL OF RIGHTS, supra note 72, at 12 (“[T]hat the said Constitution be never construed to authorize Congress to infringe . . . the rights of conscience . . .
99 Esbeck, Dissent and Disestablishment, supra note 8, at 1432–47.
101 BEEMAN, supra note 23, at 390.
As in Pennsylvania, there were amendments to the draft Constitution proposed in Maryland that were all voted down. Also, as in Pennsylvania, the Maryland proposals were not rejected because the delegate majority disagreed with them. Rather, they were rejected because the dominant Federalists wanted to unconditionally ratify the Constitution. Juridically, a conditional ratification was not a 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.”

The proposed amendment dealt 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 the proposed amendment.

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, 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. 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. One of Rhode Island’s amendments protected religious conscience and required that no one religion be preferred over others. 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 its 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 North Carolina and Virginia. Perhaps the copying explains Rhode Island’s

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1. LEVY, supra note 17, at 88.
2. ELLIOT’S DEBATES, supra note 12, at 553; see also COMPLETE BILL OF RIGHTS, supra note 72, at 11.
3. 1 ELLIOT’S DEBATES, supra note 12, at 333–35; see also BEEMAN, supra note 23, at 391–92.
4. 1 ELLIOT’S DEBATES, supra note 12, at 335–37.
5. See LEVY, supra note 17, at 92.
6. Rhode Island adopted the same religious freedom language, 1 ELLIOT’S DEBATES, supra note 12, at 334, recommended by North Carolina on August 1, 1788, id. at 331; 4 ELLIOT’S DEBATES, supra note 12, at 244, which in turn had repeated the Virginia proposal of June 26, 1788, 1 ELLIOT’S DEBATES, supra note 12, at 327; 3 ELLIOT’S DEBATES, supra note 12, at 659. See also COMPLETE BILL OF RIGHTS, supra note 72, at 12–13.
inattention; we do not know. In any event, it is most unlikely that Rhode Island intended its selection of amendment text to be a backhanded way of vesting Congress with the power to create multiple establishments where all religions are supported equally.\textsuperscript{109}

Next to ratify was South Carolina.\textsuperscript{110} 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 Reverend Francis Cummins was quoted in a Charleston newspaper as disparaging "religious establishments; or the states giving preference to any religious denomination."\textsuperscript{111} At the time, South Carolina had a general Protestant establishment, but it was weak and was formally disestablished in 1790.\textsuperscript{112}

The New Hampshire convention first met in February 1788. Fearing defeat, the Federalists obtained a recess until early June. No record was kept of the debate. The New Hampshire convention again took up its work on June 2nd and ratified on June 21, 1788.\textsuperscript{113} 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

\begin{enumerate}
\item \textsuperscript{109} LEVY, supra note 17, at 93.
\item \textsuperscript{110} 1 ELLIOT'S DEBATES, supra note 12, at 325.
\item \textsuperscript{111} LEVY, supra note 17, at 88–89.
\item \textsuperscript{112} Esbeck, Dissent and Disestablishment, supra note 8, at 1493–94.
\item \textsuperscript{113} 1 ELLIOT'S DEBATES, supra note 12, at 325–26; see also BEEMAN, supra note 23, at 391, 395. However, a long letter by John Sullivan, the New Hampshire governor, to the Reverend Jeremy Belknap of Massachusetts dated February 26, 1788, summarized the early debate, which was decidedly against ratification. Sullivan supported ratification. While religious freedom figured in the contest, the arguments about religion, as summarized by Sullivan, are not always clear:

[S]ome good men . . . were short Sighted . . . many who were Distressed & in Debt; numbers who conceived that This System would compel men to be honest against both their Inclination & their Interest[,] some who were blinded through excess of Zeal for the Cause of Religion and others who by putting on the masque of sanctity thought to win proselites—Thus arranged we entered the Field of Action: And you cannot be surprized if I tell you that all the objections made against the new plan & published in your State were handed out here by Rote with such amendments, alterations, Embellishments and Disfigurements as Ingenuity[,] folly[,] obstinacy[,] & false piety could Suggest . . . but Sir lest you should conceive that we have no talents at Invention in this state and that all our objections were borrowed from Massachusetts I will now give you some Specimens of New Hampshire Ingenuity[:] a pious Deacon Liked the plan or rather would have liked it if it afforded any Security of our having the holy Scriptures continued to us in our mother Tongue. The want of a religious test was used here as well as with you but even if that was given up in all other cases The president at Least ought to be compelled to Submit to it for otherwise says one “a Turk, a Jew, a Roman Catholic, and what is worse than all a universalist may be president of the united States.”

3 LETTERS AND PAPERS OF MAJOR-GENERAL JOHN SULLIVAN, supra note 78, at 567–68.
founding document of a new nation. New Hampshire did recommend amendments, one of which addressed religious freedom. The amendment read: "Congress shall make no laws touching religion, or to infringe the rights of conscience." 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. The Congregational Church was firmly established in New Hampshire, and the establishment continued until 1819.

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 populous state, so its participation seemed essential to the success of the government. Disestablishment of the Anglican Church in Virginia spanned a ten-year period from 1776 to 1786, and there were cleanup issues that still simmered well into the next century. 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.

The opposition to ratification of the 1787 Constitution had able leaders, such as Patrick Henry, Richard Henry Lee, and George Mason. Mason had been one of Virginia’s delegates to the Constitutional Convention in Philadelphia and had famously refused to sign when the other delegates summarily dismissed consideration of a bill of rights. Edmund Randolph, the governor of Virginia, was also a Philadelphia Convention 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 newfound support for the Constitution.

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. The issue of religious freedom came up only occasionally, and each time in reply to rather vague claims by Henry that the Constitution put civil liberties at risk, including the right of conscience, while

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114 1 ELLIOT'S DEBATES, supra note 12, at 326; see also COMPLETE BILL OF RIGHTS, supra note 72, at 12.
115 See Esbeck, Dissent and Disestablishment, supra note 8, at 1533–34.
116 See Esbeck, Virginia Disestablishment, supra note 5, at 65–89.
117 See H.J. ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA: A STUDY IN THE DEVELOPMENT OF THE REVOLUTION 130–55 (1910) (describing how the Anglican Churches, formerly established, had to eventually give back their real and personal property acquired during their pre-Revolution establishment).
118 Esbeck, Virginia Disestablishment, supra note 5, at 75, 85–87.
119 1 ELLIOT’S DEBATES, supra note 12, at 494–96 (Mason’s statement on objections to the Constitution).
120 BEEMAN, supra note 23, at 397.
121 Id. at 396.
possibly empowering Congress to establish a national religion. Randolph was first to respond to Henry’s claim that the congressional powers enumerated in Article I of the Constitution endangered a litany of rights including religious freedom. Randolph said, “I inform those who are of this opinion, that no power is given expressly to Congress over religion.”122 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.”123

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 freedom when a popular majority of the people was pressuring a legislature to favor one sect. Like Randolph, Madison said safety would be found where there is a multiplicity of sects, each checking the ambitious plans of the others, as was the case in the vast United States.124 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.”125 Then, in an oft-quoted passage Madison said, with reference to the proposed 1787 Constitution, “[t]here is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation.”126 The Madisonian passage is singled out today because it conforms to the broad reading of “no cognizance over religion” principle in Madison’s 1785 Memorial and Remonstrance.127 No bill of rights was needed, argued Madison. He appealed to the delegates to trust him on this, for he was well known in Virginia as a champion of religious freedom.128 Zachariah Johnson, a Federalist, extolled the Religious

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122 3 ELLIOT’S DEBATES, supra note 12, at 204. Randolph spoke prudently here when he said that no national power was “expressly” given over religion. He wisely left open the likelihood that general legislation on nonreligious subjects within Congress’ enumerated powers 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 exempt religious pacifists.

123 Id.

124 Id. at 330.

125 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 beaten back an attempt led by Henry to create a multiple establishment of Christian churches. See Esbeck, Virginia Disestablishment, supra note 5, at 76–87.

126 3 ELLIOT’S DEBATES, supra note 12, at 330. The absoluteness of Madison’s remark contrasts with Randolph’s more prudent claim that the Constitution delegated no express power to touch on religion or religious freedom. Id. at 204.

127 See Esbeck, Virginia Disestablishment, supra note 5, at 82–83 (referencing numbered paragraph 1 of Madison’s Memorial).

128 3 ELLIOT’S DEBATES, supra note 12, at 330.
Test Clause as a protection of religious conscience and also relied on the “rival sects” theory as sufficient assurance against a national religious establishment.129

Patrick Henry managed to undermine the Wilsonian argument that “all that is not delegated is denied,” relied on by 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? Henry further noted that Article I, Section 9, expressly denied certain powers to the federal government. The powers listed in Section 9 were not in need of being expressly denied if never delegated.130 Thus, the Wilsonian argument did not ring true with all the text.

On June 25, 1788, Virginia ratified the Constitution by the narrow margin of eighty-nine to seventy-nine. However, in order to secure ratification, the Federalists in Virginia, like those in Massachusetts and South Carolina before them, had agreed to a list of amendments recommended by the Virginia convention.131 A motion by Patrick Henry had forty amendments, but the first twenty substantially paraphrase Virginia’s Declaration of Rights.132 The proposed twentieth amendment 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.133

The phrasing here was a combination of section 16 of Virginia’s Declaration of Rights as adopted in 1776134 with language tacked on at the end requiring that no one religion be preferred over others. This language of nonpreferentialism, said to be the work of Patrick Henry,135 added a puzzling no-establishment feature to

129 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 FEDERALIST NO. 51 (James Madison), reprinted in 1 FOUNDER’S CONSTITUTION, supra note 39, at 330–31. The Federalist Papers were first published in a New York City newspaper.

130 Muñoz, supra note 45, at 622.


132 BEEMAN, supra note 23, at 399–400; 3 ELLIOT’S DEBATES, supra note 12, at 593 (Henry’s motion).

133 3 ELLIOT’S DEBATES, supra note 12, at 659; COMPLETE BILL OF RIGHTS, supra note 72, at 13.

134 Esbeck, Virginia Disestablishment, supra note 5, at 69.

Virginia’s rights-based declaration. Did Virginia presume that the national
government—absent adoption of the Virginia amendment—had the power to
affirmatively support religion so long as all religions were supported without
preference? Certainly Madison strongly opposed multiple establishments of
religion, for that was the object of his contest with Henry just three years before.
Multiple establishments would also violate Madison’s promise to the Virginia
Baptists. But surely Henry did not intend that adoption of his nonpreferential
language was an indirect way of vesting Congress with the power to support all
religions 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. Yet
words are stubborn things. The text of the Virginia amendment is
nonpreferentialist, and fourteen months later that would temporarily cause trouble
in the United States Senate.

Overlapping the dates of the Virginia convention, the New York convention
commenced on June 17, 1788. As the ratification debate came to focus on New
York, the assembled delegates had full knowledge that the Confederation Congress
would be dissolved and that the new central 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. Antifederalist Thomas Tredwell said that he favored the addition of a bill
of rights, inter alia, because presently the Constitution did not expressly prohibit a
national establishment of religion. Another Antifederalist, John Lansing,
introduced several amendments as a condition of ratification, but his motion was
defeated. The meanings of Lansing’s amendments were not debated, albeit they
were eventually adopted as recommendations. 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.”

This language is quite different from that used in the New York Constitution
of 1777, which disestablished the Church of England in the four lower counties
that comprised the City of New York. There never was an establishment

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136 See Levy, supra note 17, at 93.
137 2 Elliot’s Debates, supra note 12, 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.
138 2 Elliot’s Debates, supra note 12, at 410–12.
139 See Beeman, supra note 23, at 403.
140 1 Elliot’s Debates, supra note 12, at 328; Complete Bill of Rights, supra
note 72, at 12.
141 See Esbeck, Dissent and Disestablishment, supra note 8, at 1480 n.324.
142 See id. at 1473–80 (telling the full story of establishment and eventual
disestablishment in New York).
elsewhere in the State of New York. The word "established" in Lansing's amendment is not defined. The free exercise language speaks of an 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 thirty to twenty-seven, and the next day adopted as recommendations the proposed amendments.

North Carolina's ratification convention did not assemble until July 21, 1788. In early August, the convention voted not to ratify. Thus, North Carolina joined Rhode Island as the only other holdout. However, there was lively debate in North Carolina concerning religious freedom and the incipient Constitution. The discussion began with 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." 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.

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. 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

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143 BEEMAN, supra note 23, at 404; see also 1 ELLIOT'S DEBATES, supra note 12, at 331 (giving the date as Aug. 1, 1788).
144 4 ELLIOT'S DEBATES, supra note 12, at 192.
145 Id. (emphasis omitted).
146 Id.
147 Id. at 193; see also id. at 196–98 (additional comments by James Iredell on the Test Clause).
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.

... 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 it? It made much greater progress for itself, than when supported by the greatest authority upon earth.  

Iredell envisions here a central government that is barred from more than just the establishment of a national church. Rather, the prohibition goes to any interference in matters of religion. Organized religion is to be left to wax or wane on the merits of its own beliefs and practices.

Reverend 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." A leading Antifederalist, Samuel Spencer, took Reverend Caldwell's remarks to be proposing an exclusive establishment by way of a religious test. He 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." 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." Lenoir's long 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, he 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

\[148 Id. at 194. The "greatest authority" referred to is the Roman Empire. See also id. at 198–99 (comments by Governor Samuel Johnston on how America's many sects were an assurance against a religious establishment).\]

\[149 Id. at 199.\]

\[150 Id. at 200.\]

\[151 Id.\]

\[152 Id.\]

\[153 Id. at 203.\]
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.\textsuperscript{154}

Spaught was thus in agreement with Iredell's understanding of the Wilsonian principle. As one can see, there was more discussion about religious establishment 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 additional amendments sought to alter the particular frame of the new government.\textsuperscript{155} North Carolina's proposed amendment with respect to religious freedom was nearly identical to that of Virginia.\textsuperscript{156} This is puzzling. Recall 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 congressional support for all religions. However, from the debate set out above most delegates—especially the remarks of the Federalist James Iredell and the Antifederalist Samuel Spencer, as well as Richard Dobbs Spaught, 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. Accordingly, the thrust of the debate was to oppose all affirmative support because 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 1784–1786. Thus, in their view, government had no jurisdiction over organized religion, which is left on its own to find voluntary support. With this in mind, it is most unlikely that North Carolina chose its religious freedom amendment with an eye to vesting in Congress a wholly new implied power to directly aid religion so long as the aid was without preference.

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From the foregoing, we see that the Federalists were of the firm conviction that even in the absence of the First Amendment the new Congress had no power

\textsuperscript{154} Id. at 208. Richard Dobbs Spaught's argument relies on James Wilson's point that when a power is not delegated it is thereby denied.

\textsuperscript{155} BEEMAN, \textit{supra} note 23, at 405.

\textsuperscript{156} 4 ELLIOT'S DEBATES, \textit{supra} note 12, at 244 (there were minor changes in punctuation from the Virginia version); see also COMPLETE BILL OF RIGHTS, \textit{supra} note 72, at 12.
to directly legislate on religious conscience or to establish a church or multiple churches. Many 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 establishments proposed by some of the states created confusion. 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 some religions over others. Did these states only fear a national 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 churches. Accordingly, it is well to look for additional evidence of the intended power of the new government with respect to 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 IV of this Article, and, in time, to the overarching theory of the combined 1787 Constitution and Bill of Rights discussed in Part VI.

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

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 Antifederalists who opposed ratification. The House had forty-nine Federalists and ten Antifederalists; the Senate had twenty Federalists and only two Antifederalists. ¹⁵⁷ 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, to desire retaining more power in the several states. President George Washington opposed the formation of political parties and discouraged partisan division in his administration and within Congress ¹⁵⁸. It was not until Washington’s second term that parties calling themselves Federalists and Republicans began to coalesce. ¹⁵⁹ It was during John Adam’s four-year presidency that the partisan lines hardened. ¹⁶⁰ Accordingly, the

¹⁵⁷ ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION 144 (1997).
¹⁵⁹ 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 (2007). 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.
¹⁶⁰ Id. at 205–06.
congressional debates in the summer of 1789 over what would eventually be called the Bill of Rights were not partisan in the modern sense of that term, and the key figure, 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.\(^1\)

In carefully preparing a draft of amendments to the Constitution, James Madison had a pamphlet that compiled all of the two hundred plus state constitutional amendments that had been recommended by six of the eleven states at their ratifying conventions.\(^2\) Madison did not just dispassionately sift through the recommended amendments, selecting those that had merit. Rather, he sorted with an eye to retaining all national 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, but he also maneuvered to discourage a second constitutional convention, something Antifederalists earnestly sought. Further, Madison did not hesitate to fashion amendments entirely of his creation, such as those stating rights that limited state powers.\(^3\) 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.\(^4\)

In chronological order of their recommendation for adoption, the state amendments on religious freedom that Madison had before him were from New Hampshire, Virginia, New York, and North Carolina. We cannot be certain, but Madison likely also had copies of the failed amendments from Pennsylvania, Maryland, and Massachusetts.

\(^1\) The reliability of the congressional drafting history of the First Amendment is not altogether certain. The House debate appears in 1 ANNAI LS OF CONG. (1789) (Joseph Gales ed., 1834), available at http://memory.loc.gov/ammem/amlaw/lwaclink.html. It is drawn from the observations of visitors and much was taken from the notes of newspaper reporter Thomas Lloyd. Marion Tinling, Thomas Lloyd’s Reports of the First Federal Congress, 18 W.M. & MARY Q. 519, 519 (1961). The Senate debates were closed to visitors, so all that we have is the minutes of the Secretary to the Senate which recorded committee reports, motions, and votes. Id. at 520. As to the reliability of the congressional record, see id. at 520; James H. Hutson, The Creation of the Constitution: The Integrity of the Documentary Record, 65 TEX. L. REV. 1, 20–21 (1986).

\(^2\) BRANT, supra note 135, at 264–65; MILLER, supra note 22, at 252.

\(^3\) BRANT, supra note 135, at 265.

\(^4\) MILLER, supra note 22, at 252. Halfway 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 135, at 273–74.
A. Before the House of Representatives

May 4, 1789

"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." Madison made this announcement because he had advance knowledge of a letter to be presented the next day by his fellow Virginian, Theodoric Bland. The letter was known to be hostile to Madison’s plans.

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 Congress could call such a convention 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,

Mr. Bland moved to refer it to the Committee of the whole on the state of the Union.

Mr. Boudinot—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.

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165 1 ANNALS OF CONG. 257. There are two printings of the first two volumes of the Annals of Congress. See Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 HARV. L. REV. 1409, 1427 n.84 (1990). 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.

166 BRANT, supra note 135, 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. 4 GEORGE LANKEVICH, ROOTS OF THE REPUBLIC: THE FIRST HOUSE OF REPRESENTATIVES AND THE BILL OF RIGHTS 116 (1996).

167 Elias Boudinot was a Federalist from New Jersey and an evangelical. LANKEVICH, supra note 166, at 68–69.
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." 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.

Eventually the Virginia letter was entered into the Journal of the House of Representatives of the United States, and the original placed in the files of Congress.

It will be helpful at the outset of the House and latter Senate debates to identify three of the major crosscurrents among scholars with respect to the Bill of Rights and establishmentarianism about to be discussed. One current comes under the heading of "nonpreferentialism," another under "specific federalism," and a third under "scope" of the power that is denied to the national government. These three disputes are taken up later in this Part of the Article. A fourth crosscurrent, which this Article takes up in Part V.B., is whether the religion clauses of the First Amendment only protect liberty of conscience.

Contrary to the theory of nonpreferentialism, the scope of the text in the 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 scope of the New Hampshire disempowerment was very broad. By way of contrast, the scope of the text in the amendments from Virginia, New York, and North Carolina would not

168 Quoting U.S. CONST. art. V.
169 1 ANNALS OF CONG. 260 (May 5, 1789).
170 Id. at 261 (May 5, 1789); see also H. JOURNAL, 1st Cong., 1st Sess. 28 (May 5, 1789), 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.
have prohibited the national government from aiding religion so long as the aid was available to all religions without preference. For example, the national government could have aided all religions, without preferring or establishing any, by offering annual $1,000 cash payments to all clerics or other ecclesiastical leaders. 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 the national government did so without preferring some religions over others.

This latter claim, called nonpreferentialism, is paradoxical insofar as it was Antifederalists who had put forward the state-proposed amendments from Virginia, New York, and North Carolina. As discussed above, Antifederalists wanted to reduce Congress’ power, not increase it. Yet, to infer nonpreferentialism into the First Amendment would necessarily imply an increase in national power. While some Antifederalists would have preferred a multiple establishment, they were aware of America’s religious pluralism, particularly stark as one moved along the Atlantic seaboard. There were large pockets of religious opposition to establishmentarianism of any sort, and thus any such multiple establishment was possible only at a state level. Moreover, from the perspective of the Federalists, nonpreferentialism made 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 organized religion. If the power was not delegated, it was denied. And that was soon made explicit in the Tenth Amendment. The Wilsonian argument necessarily meant there was 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 to permit national 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 advanced 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 enhancing state power was an amendment that expressly disempowered Congress when it came to the establishment of any or all religions, preferentially or nonpreferentially, thereby leaving relations between church and government entirely in the power of the states. Moreover, the New England Federalists would have been open to such an approach, as they did not want the central government intermeddling in the advantages then enjoyed by the Congregational Church in Connecticut, Massachusetts, and New Hampshire. These three states had mandatory religious assessments at the parish level, but a taxpayer could designate his assessment to the local church of his choice. In practice, this worked to the advantage of the far more numerous Congregationalists. Such an amendment would also have served

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171 Muñoz, supra note 45, at 585, 617.
the interests of those like James Madison who wanted to keep the national government altogether out of the matter of establishing religion. Once again, Federalists were entirely in control of the parliamentary procedure so whatever they wanted would hold sway. But if Antifederalists' concerns could be accommodated by the Federalists through inserting particular wording into the amendment on no-establishment, then all the better for the eventual success of the upcoming 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 meant to bind only the new national government was not a source of contention in 1789, nor is it a matter of contention today.\(^{172}\) This fact will be referred to here as the "general federalist" character of the Bill of Rights, and obviously includes the Establishment Clause. What is presently debated among scholars is whether the final text of the Establishment Clause, first introduced by 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 the matter of religious establishment. This I call "specific federalism." Specific federalism is a unique claim. The theory attributes to the Establishment Clause alone a specific federalist character not present in free exercise, free speech, free press, or other provisions of the first eight amendments. The difference between the general federalist character of the Bill of Rights and specific federalism did not become important until the mid-twentieth century when the United States Supreme Court faced the question of whether to "incorporate" the Establishment Clause through the Due Process Clause of the Fourteenth Amendment, thereby making its restraints applicable to state and local governments.\(^{173}\)

Finally, there is the question with respect to the "scope" of the congressional disempowerment by virtue of the Establishment Clause. When Congress (and by extension, the executive or judicial branches)\(^{174}\) exercised one of its enumerated powers to "make . . . law," the more foresighted members in the First Congress envisioned instances where such a law would have an incidental effect on religion.

\(^{172}\) 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.

\(^{173}\) 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 Education, 330 U.S. 1, 14–15 (1947). Specific federalism is refuted infra Part IV.H.

\(^{174}\) Although the text says "Congress," it is widely understood 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.
For example, a congressionally adopted copyright law would necessarily raise the question of whether a new translation of the Bible could be copyrighted. Or assume that in formulating general legislation to implement the constitutionally required census, Congress made a decision that one item usefully surveyed are the trades and professions of Americans. That would necessarily mean counting those Americans who are professional clerics or otherwise employed in full-time religious service. So the census would incidentally touch on religion. That raises a question 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. The First Federal Congress, as we shall see, finally settled on the scope of the subject matter of federal disempowerment: laws “respecting an establishment of religion,” the meaning of which is only partly revealed by the congressional debates.

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With the foregoing 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 the House resisted this motion. It was resisted by both Federalists, who thought amendments a poor use of time, and Antifederalists, who wanted a second constitutional convention to consider a bill of rights and structural amendments to reclaim state power. Madison sought to

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175 See U.S. CONST. art. I, § 8, cl. 8 (stating 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 . . .”).
176 See id. art. I, § 2, cl. 3.
177 A situation similar to this actually occurred when James Madison was President. Madison reversed an administrative decision by the census bureau to catalog clerical professions. He did so because of his view of the restraints on Congress imposed by the Establishment Clause. See BRANT, supra note 135, at 272.
178 See the debate involving Smith, Jackson, Madison, Goodhue, Burke, Sherman, White, Page, and Vining. 1 ANNALS OF CONG. 441–48 (June 8, 1789) (Joseph Gales ed., 1834); cf. BRANT, supra note 135, at 264, 267–68. For some Federalists, time spent on a bill of rights was a double mistake. Most importantly, the First Congress was busy writing needed legislation to set up the infrastructure of the new government (e.g., the Federal Judiciary Act). RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 195–96 (2006). Second, some High Federalists believed the 1787 Constitution was a model needing little improvement, and focus on amendments only encouraged continuing criticism by Antifederalists. CHARLENE BANGS BICKFORD & KENNETH R. BOWLING, BIRTH OF THE NATION: THE FIRST FEDERAL CONGRESS 1789–1791, at 52–53 (1989).
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. 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." The proposed amendments were thereby not designed to vest new substantive powers in the national government, but rather to state what powers did not lay with Congress under the original 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 Wilsonian 1787 Constitution (in the view of the Federalists). Agreement on what powers Congress did not have was a much easier task. Madison also stressed that the amendments were to "satisfy the public mind" worried about the lack of a bill of rights, and thereby gain the peoples' support for the new government.

The proposed amendments were thereby not designed to vest new substantive powers in the national government, but rather to state what powers did not lay with Congress under the original 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 Wilsonian 1787 Constitution (in the view of the Federalists). Agreement on what powers Congress did not have was a much easier task.

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

The amendments which have occurred to me, proper to be recommended by Congress to the State Legislatures, are these:

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.

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179 1 ANNALS OF CONG. 454 (June 8, 1789).
180 See CURRY, supra note 7, at 193–94.
181 1 ANNALS OF CONG. 453–59 (June 8, 1789).
182 The interlineations were later changed at the insistence of others in the House, in particular Roger Sherman. BRANT, supra note 135, at 268, 275.
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.\(^\text{183}\)

Madison’s proposed Fourth Article did not resemble in the least any of the four state-proposed amendments.\(^\text{184}\) In particular, he avoided the explicit no-preference language from Virginia, New York, and North Carolina. And the no-establishment scope of disempowerment was narrow (“any national religion”). Part of the amendment was overly wordy, with the first and last parts addressing the relationship between government, religion, and the individual, whereas church-government relations occupied a brief middle.

As we shall see, stylistic changes—and more—were in the offing to substantially alter the text. It is not uncommon to have the title of author (or “father”) of the Establishment Clause attributed to Madison because he was first to introduce the religious freedom amendment. More accurately, though, Madison gave continuing and close attention to the text of the religious freedom amendment. Thus, while the text that emerged on September 24–25 bore his fingerprints, the work was not of his sole paternity. Indeed, from Madison’s perspective, the no-establishment provision, reported out to the states in late September, was an improvement over what he had first offered in June. On the other hand, as we shall see below, the provisions on conscience were greatly diminished from Madison’s aspirations.

Madison’s initial treatment of church-government relations was brief (“nor shall any national religion be established”), with considerable but undefined weight placed on what is meant by the word “established.”\(^\text{185}\) On June 8th, its

\(^{183}\) 1 ANNALS OF Cong. 450–51 (June 8, 1789) (emphasis added).

\(^{184}\) The no-establishment text in Madison’s version does resemble the amendment voted down in Maryland. See supra note 103 and accompanying text.

\(^{185}\) Professor John Witte suggests the following meaning for “establishment” as a beginning point in defining the term as it was understood in 1789:

[T]he 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.
meaning was 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 interpretation. A more natural reading of Madison’s text is that the use of “any” means that the establishment of one or more religions is prohibited. Thus, Congress’ establishment of the Episcopal, Methodist, and Congregational churches would constitute three violations of the no-establishment principle in the amendment. Likewise, to establish all Protestant churches, separately or combined, would be multiple violations of the amendment; and to establish all religions would be multiple violations of the amendment as well.

Those of the nonpreferentialist view, however, argue that the proper reading is that although Congress is prohibited from establishing any religion, there is implied congressional power (stopping short of an establishment) to aid religion 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 a full establishment, it is argued, and thus by implication be permitted under Madison’s proposed text. However, Madison’s text does not require equal treatment, so the nonpreferentialist argument proves too much because the text is also open by implication to government aiding some clerics with $1,000 payments, but giving $500 to others, and nothing at all to yet others.

In Madison’s explanation of the other amendments that concern religion, he 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 free press and of jury trials in criminal cases. This was the only amendment Madison proposed that would bind the states. We know that Madison wanted to protect conscience inclusively defined. The prior year he had written Jefferson as to why he opposed a bill of rights. One of the reasons was that in the debate over such a bill “the rights of Conscience in particular, if submitted to public definition would

JOHN WITTE JR., GOD’S JOUST, GOD’S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION 186 (2006). Professor Michael McConnell identifies six elements of the Church of England’s 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, 2176 (2003). Professors Witte and McConnell take into account that the English Act of Toleration accommodated certain dissenters. Accordingly, while the English establishment had the listed requirements, “approved” dissenters were excused by law from compliance. But that official toleration did not change the definition of an establishment.
be narrowed.’” In open debate Madison feared being unable to protect the non-Christian and the nonreligious, citing as an example, during the ratification of the Constitution, the intolerance in New England to the Religious Test Clause “open[ing] the door for Jews, Turks, and infidels” to serve in government. Knowing he had a difficult task in advancing an inclusive protection of conscience in public debate, especially with respect to the state, Madison plunged ahead:

I wish also, in revising the constitution, we may throw into that section, which interdicts the abuse of certain powers in the State Legislatures, 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.

By seeking to protect the equal right of conscience, Madison would extend the same safeguard of conscience to the non-Christian and the nonreligious.

After further explanation with respect to his proposed amendments before the House, Madison closed 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.” Those seeking delay still resisted. So,

186 11 THE PAPERS OF JAMES MADISON 297 (WILLIAM HUTCHINSON ET AL. EDS., 1977). See also id. at 404–05 (reprinting a letter from Madison dated January 2, 1789, to George Eve, a Baptist minister from Madison’s congressional district in Virginia, stating with reference to a bill of rights that “it is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it, ought to prepare . . . the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude”).

187 Id. at 297. For an account of the larger context of the Madison-Jefferson exchange of letters on a bill of rights, see PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 443–46 (2010). For reference to additional evidence supporting Madison’s fear that conscience could not be secured in sufficient scope in open debate to protect non-Christians and the nonreligious, see id. at 444.

188 This is a reference to Article I, Section 10.

189 1 ANNALS OF CONG. 441–48 (June 8, 1789) (Joseph Gales ed., 1834) (emphasis added).

190 Id. at 459 (June 8, 1789).
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. The House promptly voted to refer the amendments to a committee of the whole and then adjourned for the day. The House did not return to the matter of amendments until mid-July, testing Madison’s patience.

July 21, 1789

Madison “begged” the House to take action on the subject of the June 8th amendments. The House responded by referring the matter to a Select Committee of Eleven, one member from each of the states. The Select Committee consisted of Vining, Madison, Baldwin, Sherman, Burke, Gilman, Clymer, Benson, Goodhue, Boudinot, and Gale.

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191 BRANT, supra note 135, at 264.
192 1 ANNALS OF CONG. 467–68 (June 8, 1789).
193 Id. at 685–86 (July 21, 1789).
194 Id. at 685 (July 21, 1789); see, e.g., BRANT, supra note 135, 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).
195 1 ANNALS OF CONG. 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 166, 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 Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith, 102 NW. U. L. REV. 1189, 1254 (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. (internal citations omitted).
196 1 ANNALS OF CONG. 690–91 (July 21, 1789). John Vining, a Federalist from Delaware, was designated chair and Madison was designated vice-chair. BRANT, supra note 135, 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 166, at 36.
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 was tabled without discussion. 197 The phrases on religious freedom, as emerging from the Select Committee, were not just simplified but were materially altered with respect to no-establishment and matters of conscience. The report read:

The fourth proposition being under consideration, as follows:

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. 198

... 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. 199

The committee then proceeded to the fifth proposition:

Article 1, Section 10, between 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. 200

The Fourth Article produced by the Select Committee maintained a clear pattern of two relationships: first, that of government and organized religion, and, second, that of government, religion, and individual conscience. With respect to church-government relations, the word “national” was omitted, probably because it was thought redundant. The amendment was, after all, to be inserted into Article I, Section 9, of the Constitution, and that section spoke only to limits on the national government. The real scope of the disempowerment still lay with the meaning of “established.” Thus, the establishmentarian alterations by the Select Committee of Eleven were stylistic. 201 Not so with respect to the relationship between the national government and individual conscience. No longer were the “full and equal

197 1 ANNALS OF CONG. 699 (July 28, 1789).
198 Id. at 757 (Aug. 15, 1789) (emphasis added) (internal quotation marks omitted).
199 Id. at 778 (Aug. 17, 1789) (emphasis added) (internal quotation marks omitted).
200 Id. at 783 (Aug. 17, 1789) (emphasis added) (internal quotation marks omitted).
201 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 national 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 it leaves the government open by implication to provide national aid for some religions but not others.
rights of conscience" protected, but only the "equal rights" thereof. Further, the Select Committee omitted the reference to "religious belief and worship" not being abridged. The changes appear to be for reasons other than mere brevity. "Religious belief and worship" are easily said to be subsumed into the "full rights of conscience," but it is unconvincing to claim that the "full rights" of conscience is subsumed into the mere "equal rights" of conscience.

August 13–14, 1789

Richard Bland Lee moved for the House to resolve itself into a Committee of the Whole. Working as a Committee of the Whole permitted House 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. Having so resolved, the Committee of the Whole began by discussing the Preamble to the Articles of Amendment. The next day, August 14th, the Committee resumed consideration of the amendments, debating matters unrelated to the proposals concerning religious freedom.

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. This day was the longest discussion of the no-establishment principle in the House. The House ultimately adopted an amended version proposed by Samuel Livermore, a Federalist from New Hampshire. 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:

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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202 Richard Bland Lee was a Federalist from Virginia. See LANKEVICH, supra note 166, at 121.
203 See U.S. CONST. art. V.
204 1 ANNALS OF CONG. 730 (Aug. 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.
205 Id. at 745–57 (Aug. 14, 1789).
Mr. S[i]lvester[206] 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.207

Peter Silvester’s remark is initially puzzling. The Select Committee’s draft amendment is rightly said to “abolish establishment,” but it hard to see how it might “abolish religion.” Moreover, the Select Committee’s amendment unquestionably applied only against the national government, given its placement in Section 9 of Article I, whereas all then-existing establishments in America were at the state level. Silvester was a Federalist from New York. New York had completed its disestablishment in 1777, so he could not have been motivated to protect an established church in his home state.208 Silvester’s “apprehensions” and “fears” make sense only if his concern was that the amendment’s text (“no religion shall be established by law”) was understood as “abolishing religion” because it affirmatively protected the nonreligious and even the atheist. Today we are quick to regard Silvester as intolerant. But in this period, many shared his concern that latitudinarianism and the Enlightenment were on the rise. They thought that orthodox religion was instrumental to good government and thus government should not help to further religion’s decline by safeguarding its opposite. Silvester’s belief was not an outlier because, as we will soon see, others joined in his concern.

The debate continued:

Mr. Vining[209] suggested the propriety of transposing the two members of the sentence.

Mr. Gerry[210] said it would read better if it was, that no religious doctrine shall be established by law.211

Elbridge Gerry’s suggestion was an attempt by an Antifederalist to define “established” narrowly, confining it to the legal codification of a religious creed. His proposal goes to the scope of the disempowerment of Congress. The Federalists proceeded to ignore Gerry. The debate continued:

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206 Peter Silvester was a Federalist from New York. See LANKEVICH, supra note 166, at 81.
207 1 ANNALS OF CONG. 757 (Aug. 15, 1789) (emphasis added).
208 Esbeck, Dissent and Disestablishment, supra note 8, at 1480.
209 John Vining was a Federalist from Delaware and an Episcopalian. See JOHN A. MUNROE, HISTORY OF DELAWARE 85 (2006).
210 Elbridge Gerry was an Antifederalist from Massachusetts and an Episcopalian. See M.E. BRADFORD, A WORTHY COMPANY 6 (1982) (listing Gerry as an Episcopalian); LANKEVICH, supra note 166, at 52–53.
211 1 ANNALS OF CONG. 757 (Aug. 15, 1789) (emphasis added).
Mr. Sherman[^212^] thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the constitution to make religious establishments; he would, therefore, move to have it struck out.

Mr. Carroll.^[213^]—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.^[214^]

Roger Sherman was a Federalist from Connecticut who thought the amendment process a waste of time because the 1787 Constitution delegated no congressional authority to establish religion. Again, this is the Wilsonian argument. Sherman also contemplated the possibility of multiple establishments.

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.^[215^] They were widely discriminated against, albeit much less so in Maryland, which at its founding was a refuge for Catholics leaving Great Britain.^[216^] Perhaps Carroll rose in answer to Sherman for he spoke in favor of protecting "conscience" but said nothing about "establishment." Carroll reassures the House that many well-meaning Americans, not just a few vocal dissenters in New England, were sincerely fearful because the 1787 Constitution lacked a Bill of Rights, and such was of particular concern to religious minorities. Everyone in the room knew that Carroll was one such minority.

Madison responded to the remark by Silvester ("tendency to abolish religion altogether"), as well as that of Sherman ("amendment altogether unnecessary"), as follows:

[^212^] Roger Sherman was a Federalist from Connecticut and a Congregationalist. See BRADFORD, supra note 210, at 22 (listing Sherman as a Congregationalist); LANKEVICH, supra note 166, at 22–23.

[^213^] Daniel Carroll was a Federalist from Maryland and a Roman Catholic. See LANKEVICH, supra note 166, at 42–43.


[^216^] Esbeck, Dissent and Disestablishment, supra note 8, at 1484.
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 prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit.\textsuperscript{217}

Madison made four points in this reply. The first was that the no-establishment and conscience texts limit only Congress. Thus, state establishments or other forms of local favoritism with respect to religion were left undisturbed by the amendment. This is general federalism that is uncontested even today. Moreover, as a Federalist, Madison was still unwilling to say that the no-establishment and conscience texts were necessary. In this he agreed with Roger Sherman’s earlier remark,\textsuperscript{218} but Madison went on to note that several state-proposed amendments suggested that a religious freedom amendment was prudent because, as Carroll had confirmed, many Americans needed reassuring.\textsuperscript{219}

Second, with respect to Silvester’s fear, Madison unabashedly confirmed that the text on conscience did indeed protect the nonreligious. Madison said that the amendment would prohibit laws that “compel men to worship God in any manner contrary to their conscience.” This would include not just the dissenter, but the non-Christian and the atheist.

Third, Madison noted that some of the fears expressed in the state ratification conventions were not about the abuse of power expressly delegated to the national government, but in the “effects” on both conscience and no-establishment that were a consequence of the use by Congress of its delegated powers. The Necessary and Proper Clause\textsuperscript{220} had been singled out by opponents, notes Madison, as one source of such implied power and hence detrimental “effects.” It can thus be said

\textsuperscript{217} 1 ANNALS OF CONG. 758 (Aug. 15, 1789).

\textsuperscript{218} 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 Antifederalists’ most effective argument 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 was careful to not take a position inconsistent to the one he had maintained during 1787–1788.

\textsuperscript{219} As discussed earlier, New Hampshire, Virginia, New York, and North Carolina had all proposed language for a religious-freedom amendment. See supra notes 114, 133, 140, 156 and accompanying text.

\textsuperscript{220} See U.S. CONST. art. I, § 8, cl. 18.
that one of the issues expressly thought about by the First Congress was how
general legislation pursuant to its enumerated powers in the 1787 Constitution may
have consequential—and indeed detrimental—effects on religious freedom.
Whatever the detrimental effects of Congress’ powers on conscience or no-
establishment, real or speculative, Madison argued that the proposed amendment
would be fully corrective.

Madison’s fourth point was that the amendment not only restrained a
congressional establishment of religion but, in his opinion, also restrained the
national 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 was not just a bar to a full-
fledged establishment but that the amendment disempowers Congress from
legislating elements (“legal observation of it 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 were compelled by law.

In the course of this colloquy, Madison said that he apprehended the meaning
of the no-establishment text as “Congress should not establish a religion,” and not
“establish a national religion.” Madison could be understood here as altering the
meaning of the no-establishment text. By implication, it could be claimed that
Madison thought the text only denied power to establish one church, thereby
leaving Congress free to establish all religions without preference. Not only is such
an interpretation 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 reading because it attributes to the amendment a
meaning more narrow than nonpreferentialism. That is, the claim proves too
much because such an interpretation of Madison’s remark would also allow
preferential multiple establishments.

The debate continued:

Mr. Huntington said that he feared, with the gentleman first up on
this subject [Mr. Silvester], that the words 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

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221 1 ANNALS OF CONG. 758 (Aug. 15, 1789).
222 Professors Witte and McConnell indicate that a fully developed establishment had
multiple elements. See supra note 185.
223 1 ANNALS OF CONG. 758 (Aug. 15, 1789).
224 See Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim about
225 Benjamin Huntington was a Federalist from Connecticut and a Congregationalist.
See LANKEVICH, supra note 166, at 26; Religious Affiliation of the Senators and
Representatives in the First United States Congress, ADHERENTS.COM (Dec.
7, 2005), http://www.adherents.com/gov/congress_001.html (listing Huntington as a
Congregationalist, the established church in the parishes of Connecticut).
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.

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.[226] 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.

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 conform. He thought if the word national was introduced, it would point the amendment directly to the object it was intended to prevent.[227]

Benjamin Huntington, a Federalist from Connecticut, said he shared Silvester’s concern that the “equal rights of conscience” text could be construed to be “hurtful to the cause of religion” by protecting the nonreligious.228 He favored a rephrasing so that the amendment secured “a free exercise of the rights of religion, but not to patronize those who professed no religion at all.”[229] Huntington also

226 This is an unflattering remark directed at Rhode Island about the negative effects on the state of never having had an establishment. See McConnell, supra note 165, at 1427 n.84 (“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.’”).

227 1 ANNALS OF CONG. 758–59 (Aug. 15, 1789) (emphasis added).

228 Historian Thomas Curry interprets Huntington’s remarks as being fearful that the proposed amendment gave Congress the power to interfere with state establishments. Curry, supra note 7, at 202–03. If correct, Curry’s view would help bolster the “specific federalism” argument. However, neither Silvester nor Huntington mentioned any concern about Congress’ enumerated powers being impliedly vested by the amendment to overturn establishments at the state level. Rather, their expressed concern focused on the wording of the amendment itself and how the federal judiciary might misconstrue the wording to restrain state and local officials.

229 1 ANNALS OF CONG. 758 (Aug. 15, 1789).
wanted to shield the Connecticut church-state arrangement favoring the Congregational Church. Connecticut’s arrangement was left unaffected by the amendment because the proposed amendments were binding only on the national government. 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. Huntington goes on to supply an illustration of such a misconstruction. He thought the amendment could be read by a federal court 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 in Connecticut and Massachusetts was mandatory, but each taxpayer could direct the amount assessed to the local 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. Huntington made this clear in his remarks by saying that he supported “the rights of conscience,” and feared 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 contributions to a church must be voluntary, and thus the mandatory assessment was an affront to religious conscience even when the money was ultimately paid over by the local assessor to their 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 viewed as such.

230 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 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 disdain for the moral character of Rhode Island’s people and attributed it to the state’s lack of support for religion and the reduced level of orthodox belief by its citizens.

231 Esbeck, Dissent and Disestablishment, supra note 8, at 1439–48, 1512–24 (Massachusetts); 1501–11 (Connecticut); 1533 nn.537–38 (New Hampshire).

232 Id. at 1533 n.539 (illustrative of the interplay between religious taxes, on the one hand, and both conscience and establishment, on the other hand).

233 Congregationalists contrasted their religious assessment laws with “true establishments” such as the Church of England in Great Britain. See Curry, supra note 7, at 129–33.


235 Id. at 919, 925–26, 937–38.
Baptists argued that this arrangement was not only a violation of conscience but also an establishment of the Congregational Church.\textsuperscript{236}

To illustrate his concern over the amendment being misconstrued, Huntington hypothesized a lawsuit in Connecticut federal court where a local assessor’s claim involved the nonpayment by a citizen of his religious assessment.\textsuperscript{237} Huntington wrongly assumed that a federal judge assigned the case would have to follow the proposed amendment. However, the amendments did not bind state and local officials. General federalism was obviously a point on which Huntington was confused.

Of greater interest is Madison’s passing contemplation during the foregoing exchange with respect to the scope of the amendment. Madison said that the proposed no-establishment phrase 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.\textsuperscript{238} Thus, Madison’s focus went beyond prohibiting a single national church establishment. For example, he also sought to prohibit several large denominations combining to form a national Protestant establishment. Nonpreferentialists claim Madison’s remarks as helping their cause by implying that Congress could aid all religions without favoring any, while stopping short of a full establishment.\textsuperscript{239} 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 their reading does not take into account Madison’s broader and well-known view of church-government separation.

Rather than quarrel with Huntington about his confusion over the amendment applying to state and local officials, Madison suggested wording that made it even clearer that the amendment only applied to the central government. He proposed inserting the word “national” to point the object of the amendment to the only government it bound. Madison’s fix backfired because, as the debate is about to show, it drew the scorn of 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.

\textsuperscript{236} \textit{Id}.

\textsuperscript{237} If the local tax assessor was the proper party-defendant, as is likely, then a federal trial court would have subject matter jurisdiction under Article III, Section 2, Clause 1.

\textsuperscript{238} Soon after the end of the Revolutionary War rumors began to circulate that there might be an attempt by the Presbyterians and Congregationalists to join in an effort to have them become an established national religion. Both churches were Calvinist, albeit their polity was markedly different. MCLoughlin, supra note 234, at 852 n.45 (1971); 1 E.H. GILLETT, HISTORY OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA 200–01 (1864). There was no basis to the rumors, but they persisted well into the crucial years of 1787 and following. Such fear, however groundless, may have come to the attention of Madison, leading to this remark on the House floor.

\textsuperscript{239} See Laycock, supra note 224, at 891–93 (arguing against these nonpreferentialist interpretations of the debate).
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 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.

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 . . . .

Angering Gerry is one of the few recorded occasions where Madison slipped-up during debate. He repaired the error by quickly withdrawing the motion. The debate continued:

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.

Like Madison, Samuel Livermore was a Federalist and he had a religious background that lent itself to his being ecumenical and thus perhaps favorable to religious freedom for all. He also hailed from New Hampshire, and moved for the substitution of a text nearly identical to that recommended by the New Hampshire ratification 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. Livermore’s opening phrase (“Congress shall make no laws”) unmistakably pointed the object of the amendment to the

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241 *Id.* (emphasis added).
242 Samuel Livermore, the son of a clergyman, was a Federalist from New Hampshire with ties to both the Congregational and Episcopalian churches. *See Lankenich, supra* note 166, at 64–65; 1 ANSON PHELPS STOKES, 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 developing his interest in religious toleration.”).
federal government and not the states, thus meeting the fear of Huntington. It achieved what Madison had tried to do by insertion of the word “national,” but without angering Antifederalists.

Livermore’s text also had the consequence of preventing Congress from enacting legislation to overturn state laws on religion, which had not been part of the discussion so far. Nor was it a consequence discussed following 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 where the subject matter impacted is a state’s manner of dealing with religion. That such an intent was not claimed or disclaimed, or even remarked upon by anyone, is perhaps suggestive of no intent along the lines of specific federalism. The text says one thing but the silence of the Representatives implies another.

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 disempowerment from negating national lawmaking that established religion to one of negating national lawmaking that merely touched on religion. All sorts of national 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. This broad scope surely would have caused someone in the House to think about congressional legislation’s consequential effects on religion, not just about ultra vires actions clearly outside of Congress’ enumerated powers. It would have caused attentive Representatives to ask themselves whether there were unintended consequences brought on by the sheer breadth of Livermore’s amendment. We learned the result five days later.

Finally, in the day’s debate Livermore’s amendment dropped the word “equal” before “rights.” Madison doubtlessly would have preferred to retain “equal” so that it was clearer that the consciences of the nonreligious were protected.

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 digested. For the present, there was general relief all around that the 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.
At the end of the day the proposed Article of Amendment now 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 because it was a Sunday.

August 17, 1789

The House, still sitting as a Committee of the Whole, took up the proposed amendments respecting conscientious objectors to war and prohibiting states from infringing on the rights of conscience. The debate with respect to the amendment directed against the states is reproduced below. It yields an important insight concerning what the Representatives meant by the word "conscience." In complete control of proceedings in the House, Madison and other Federalists were willing to restrain states from infringing the 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 powerful establishments and were not about to have the national Constitution order them abolished. Indeed, many of the New England Representatives were High Federalists. Their votes were essential to Madison's efforts at shepherding amendments through the House, and they were already 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:

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—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.

246 Id. at 778–80 (Aug. 17, 1789).
247 Thomas Tudor Tucker was an Antifederalist from South Carolina. GOLDWIN, supra note 157, at 130; LANKEVICH, supra note 166, 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. See also infra note 287 and accompanying text.
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.

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. 248

The House majority clearly thought they had the votes to pass an amendment restraining states from infringing the rights of conscience 249 but members knew it was foolhardy to attempt a restraint on state establishments. That meant that Madison and the Federalists in the House regarded the liberty of conscience and disestablishment as two different matters, and in this debate they did not regard a state establishment as a violation of conscience. 250 This is hardly surprising. In England today there is liberty of conscience, but at the same time the Church of England is established. 251 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. 252 Accordingly, in the context of this debate, "coercion" of conscience must truly confront an individual with a cruel choice between obedience to the civil law or obedience to one's conscientious beliefs. Without such coercion, there is no violation of conscience.

248 1 ANNALS OF CONG. 783–84 (Aug. 17, 1789) (emphasis added).
249 As an Antifederalist, Tucker 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 should come as no surprise that the amendment restraining the states was eventually dropped in the Senate, and that the House made no attempt to restore it.

250 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, 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 one can have an absence of coercion and a mild establishment. This is what the Congregationalists thought they had in New England.


252 Esbeck, Virginia Disestablishment, supra note 5, at 65–69, 85–89.
At the end of the day the proposed Fifth Article read: “Article I, Section 10, between paragraphs 1 and 2 insert ‘Fifthy. 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 had achieved a material advance. By virtue of the requirement of equality, he could argue that the conscience of the nonreligious was protected same as the conscience of those who held to a religion.

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 binding on the states. The latter would have created a firestorm in New England where mandatory religious assessments at the parish level were still popular.

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. Thomas Tudor Tucker, also proposed sixteen new amendments to the Constitution. 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. The Test 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.” Tucker’s aim was to characterize the oath to support the Constitution as religious in nature. By deduction, that would mean that the nonreligious could not take such an oath because they subscribed to no religion, effectively barring atheists from national public office. All of Tucker’s proposals, including this amendment to the Religious Test Clause, were defeated. Once again, the House rejection of Tucker’s amendment indicated great tolerance for its day.

August 19, 1789

The full House began consideration of the amendments as reported by the Committee of the Whole. A two-third majority was now required. The House

253 1 ANNALS OF CONG. 783–84 (Aug. 18, 1789) (Joseph Gales ed., 1834).
256 Id. at 792 (Aug. 18, 1789).
257 U.S. CONST. art. VI, cl. 3 (emphasis added).
258 1 ANNALS OF CONG. 792 (Aug. 18, 1789).
decided to place the amendments in a “supplement” (or “bill”) at the end of the Constitution. 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 High Federalists who 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 the amendments lesser importance by placing them at the end. History shows 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 was 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' 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, and agreed to the same.

259 Id. at 796 (Aug. 19, 1789); see also BRANT, supra note 135, at 275 (Madison finally yields to Sherman's persistence).
260 GOLDWIN, supra note 157, at 141-42, 145.
261 Fisher Ames was a Federalist from Massachusetts. See WINFRED E.A. BERNHARD, FISHER AMES: FEDERALIST AND STATESMAN, 1758-1808, at 3 (1965); see also LANKEVICH, supra note 166, at 50-51; 2 VERNON LEWIS PARRINGTON, The Romantic Revolution in America, in MAIN CURRENTS IN AMERICAN THOUGHT 1800-1860, at 280 (1930).

262 The "third amendment" referenced here could be either the amendments the Committee of the Whole made to the report of the Select Committee of Eleven, see H. JOURNAL, 1st Cong., 1st Sess. 82 (Aug. 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 OF CONG. 451 (June 8, 1789). Either way, the record in the House Journal on the next day, August 21st, lists the Third Amendment as having the phrases on religious freedom, reflecting a change in the numbering of the Articles of Amendment. See H. JOURNAL, 1st Cong., 1st Sess. 85 (Aug. 21, 1789) ("3. Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.").
On motion of Mr. Ames, the fourth amendment 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.

Some accounts have Madison, working behind the scenes, enlisting Fisher Ames of Massachusetts to put forth this version on church-government relations and religious liberty. The first thing to note is that this text restores the scope of the disempowerment of Congress' authority to "establishing" religion and thereby abandons Livermore's impossibly broad "laws touching" religion. No one can say for certain, but likely the House had come to realize over the last five days that the scope of the amendment's restraint needed to be narrowed lest countless and unavoidable effects of general legislation unintentionally impacting religion were to be within the negation of congressional power. The second matter of note is that the term "free exercise" was introduced for the first time into the text of the amendment, and it was stated separate from "conscience." The relationship between "free exercise" and "conscience" is not explained. Five days before Madison had lost the adjective "equal" modifying conscience, which diminished the likelihood that the amendment would be interpreted as protecting the

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263 The "fourth amendment" referenced here could be either the amendments the Committee of the Whole made to the report of the Select Committee of Eleven, see H. JOURNAL, 1st Cong., 1st Sess. 82 (Aug. 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 OF CONG. 451 (June 8, 1789).

264 1 ANNALS OF CONG. 795–96 (Aug. 20, 1789). The "first proposition" referenced here is Fisher Ames' motion to alter Madison's original Fourth Amendment introduced on June 8, 1789.


266 1 ANNALS OF CONG. 759 (Aug. 15, 1789).

267 The founding generation reserved conscience to mean "the right to be left alone" in embracing (or rejecting) religious beliefs, whereas free exercise meant a "right to act publicly" on those beliefs so long as the observance did not directly harm others. JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 45 (3d ed. 2011). Accordingly, the free exercise of religion was at once broader and narrower than conscience. It was broader because it was fully expected that the exercise of one's faith might bear on public matters and it was more narrow in that a prerequisite was that one first had to subscribe to a religion before its exercise could be protected.
nonreligious. The addition of "free exercise" opened the possibility of arguing that the conscience phrase was broader and thus protected the nonreligious.

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. Madison used the term in Virginia back in 1776. As a freshman legislator, Madison had successfully substituted the right of "free exercise" of religion in place of George Mason's use of "toleration" in the draft 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 day. The Annals of Congress make no mention of any additional debate over any of the religious freedom provisions. The House Journal reads:

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.

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268 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 72, at 17.

269 H. JOURNAL, 1st Cong., 1st Sess. 85 (Aug. 21, 1789); see also Laycock, *supra* note 224, at 875, 879 n.27.

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. Thomas Tudor Tucker again proposed an amendment inserting the word "other" into the Religious Test Clause, and the motion was again defeated.

August 24, 1789

The Style Committee issued its report to the House. There was only one minor change of interest. The amendment barring 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.

The House ordered the clerk to deliver an engrossed copy of the Resolve of the House to the Senate for its consideration. In all, the House proposed a total of seventeen Articles of Amendment.

* * *

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 concerning what was debated by Representatives in the House. Once again, because of their overwhelming numbers, the Federalists controlled the real give-and-take. The House did not debate over a choice reflecting the Representatives struggling between nonpreferential support for religion, on the one hand, and prohibiting the establishment of religion, whether single or multiple, on the other hand. Only

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271 1 ANNALS OF CONG. 808 (1789) (Joseph Gales ed., 1834). The Style Committee was composed of Egbert Benson, Roger Sherman, and Theodore Sedgwick. All were Federalists. See LANKEVICH, supra note 166, at 27, 58, 74.

272 1 ANNALS OF CONG. 807; see supra notes 255–258 and accompanying text.

273 H. JOURNAL, 1st Cong., 1st Sess. 89 (Aug. 24, 1789); 1 ANNALS OF CONG. 808–09 (Aug. 24, 1789). Professors Witte and Nichols state that the religious provisions of the amendments were revised in the Style Committee. See WITTE & NICHOLS, supra note 267, at 87–88, 107 (citing 3 LINDA DEPAUW ET AL. EDS., DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 159, 166 (1972)). However, the language cited 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 H. JOURNAL, 1st Cong., 1st Sess. 85. The Style Committee apparently altered only the order of the amendments on religious freedom. Compare id. at 85 (Aug. 21, 1789), with S. JOURNAL, 1st Cong., 1st Sess. 103–06 (Aug. 24, 1789).


275 Professor Douglas Laycock explores the claims of nonpreferentialist scholars during the drafting stages in the House up to this point, and he convincingly refutes them. See Laycock, supra note 224, at 885–94; see also CURRY, supra note 7, at 207–15.
once had Federalists expressed concern that state establishments might need protection. On August 15th, Huntington expressed concern about religious assessments in Connecticut. At the end of that long debate, however, Huntington was satisfied that the revised text (“Congress shall make no laws . . .”) was clear that the amendment did not bind the states. That undermines the theory of specific federalism which claims that additional federalist wording was later thought to be needed and, hence, the theory’s explanation for the late 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 importantly, on August 20th the House trimmed back Samuel Livermore’s version of “laws touching religion” to the one Fisher Ames introduced, namely “no law establishing religion.” Also, on August 15th, the Federalists ignored the Antifederalist Elbridge Gerry’s attempt to narrow the scope of the restraint on congressional power to merely “no religious doctrine.”

The pattern of two independent phrases on religion—one addressing no-establishment and the other conscience—during the House debate through August 24th, was replicated in the Senate. We turn there now.

B. Before the United States Senate

This is an apt point to remember that senators were elected by the legislature of each state, and thus they were more likely than the House representatives to be sympathetic to federalist concerns if there were any. This works to make the theory of specific federalism, which did not emerge during Senate debate, even less probable.

*August 24, 1789*

The engrossed Resolve of the House was read into the *Senate Journal.* 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 rejected a motion to put off the subject of amendments to the next congressional session.

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277 *Id.* at 106 (Aug. 24, 1789).

(dispelling nonpreferentialism, but by a different path than that taken by Professor Laycock, namely highlighting historical inconsistencies and contrasting them with the beliefs of the founders).
September 3, 1789

The Senate extensively debated 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 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,"[278] It passed in the Negative.

On motion, For reconsideration,

It passed in the Affirmative.[279]

The Third Article now read: "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 implied that Congress has among its enumerated powers in the 1787 Constitution the authority to legislate about religious establishments,[280] then the only power denied by the scope of this Senate version is where Congress prefers one religion over others. The proceeding continued:

On motion, That Article the third be stricken out,

It passed in the Negative.

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.[281]

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[278] This proposal has an establishment clause similar to the amendment proposed by New York. See supra note 140 and accompanying text.
[280] Such an assumption is unlikely to be correct. The assumption would have meant rejecting the argument by James Wilson that all powers not delegated were denied. See supra, notes 87–88 and accompanying text. While Antifederalists questioned Wilson's argument the Federalists did not, and it was the Federalists who were in complete control of the process in the Senate.
This rejected version of the amendment would have dropped explicit use of the no-preference language. Nonetheless, had this version passed it could be said to still align with nonpreferentialism theory because Congress is denied only the power to establish a "Religious Sect or Society," leaving the no-preference option. Once again, however, this rejected version could also be read to imply Congress had the power to create multiple establishments—countermanding a no-preference reading. Of course, the nonpreferentialist's rejoinder would be that the proposal was voted down for just that reason. The proceedings continued:

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.\(^{282}\)

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. The proceedings continued:

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.\(^{283}\)

This was a sudden turnabout in two respects. First, a no-preference amendment was rejected in favor of the House's no-establishment language. The Third Article now read: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof." This textual formulation is not to change, thus making an uphill battle for the proponents of nonpreferentialism.

Second, the new text drops "rights of conscience." This narrowed the protection of individual religious rights. No doubt a law can violate conscience whether the individual subjected to coercion subscribes to a religion or not. But, the "free exercise" of religion can only be violated if one first has a religion to exercise. Madison's desire to protect the nonreligious began to slip away just as Silverster and Huntington had advocated during the House debate on August 15th.

\(^{282}\) *Id.* at 117 (Sept. 3, 1789) (emphasis added).

\(^{283}\) *Id.* (emphasis added).
September 4, 1789

The Senate adopted an amended version of the Fifth Article on bearing arms that eliminated its religious scruples clause.\textsuperscript{284} While unexplained, this change likely reflects a compromise whereby it was agreed that the matter of a military draft and religious pacifism are best handled in Congress with the flexibility of legislation.\textsuperscript{285}

September 7, 1789

The Senate refused to adopt the proposed Fourteenth Article which would bind the states with respect to the rights of conscience (as well as trial by jury, speech, and press).\textsuperscript{286} 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.\textsuperscript{287}

The probable rationale is that the Senate did not want the Fourteenth Article to disturb the varied state arrangements with respect to even the matter of liberty of conscience, a question on which there was some agreement among Americans at that time. In a larger sense, however, the First Congress (reflecting the concern that animated many Americans) envisioned a bill of rights as restraining only the national government. The national government alone presented a new threat and thus the national government alone was in need of restraining by a new bill of rights. This thinking underlies what I earlier called general federalism.

The theory of specific federalism might be said to be mildly bolstered by the rejection of Madison’s “rights of conscience” binding on the states. The rejection could be said to be evidence that the First Congress thought the matter of religious liberty 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. Specific federalism,

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\textsuperscript{284} S. JOURNAL, 1st Cong., 1st Sess. 119 (Sept. 4, 1789).
\textsuperscript{285} WITTE, supra note 185, at 203–04.
\textsuperscript{286} The Senate also rejected an amendment characterizing 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 255–258 and accompanying text.
\textsuperscript{287} S. JOURNAL, 1st Cong., 1st Sess. 121 (Sept. 7, 1789).
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by way of contrast, focuses on the 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 does not support the theory of specific federalism.

September 9, 1789

For reasons not stated, the Senate reconsidered its work of September 3rd and passed yet a new version of the Third Article. For reasons of style, it also combined 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 to the Government for the redress of grievances”—

It passed in the Affirmative.

This change operated to greatly narrow the scope of the congressional disempowerment over establishmentarian issues. Two familiar elements of Great Britain’s Church of England 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” focused 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 congressional disempowerment considered in either the Senate or the House, with the exception of that offered by the Antifederalist 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.

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288 See supra text accompanying notes 184, 201.
289 S. JOURNAL, 1st Cong., 1st Sess. 129 (Sept. 9, 1789) (emphasis added).
290 See supra text accompanying notes 210–212.
C. Back to the House of Representatives

September 10, 1789

The House received the message that the Senate had passed amendments to its Resolve of the House on Articles of Amendment. 291

September 19, 1789

The House considered the Senate’s amendments to the Resolve of the House on Articles of Amendment. The House debate at this stage is not recorded. 292

September 21, 1789

The House resumed consideration of the amendments proposed by the Senate to the Resolve of the House and requested a Committee of Conference with the Senate concerning points of disagreement. 293 The House Journal recorded which amendments proposed by the Senate that the House disagreed 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 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. 294

Ordered, That the Clerk of this House do acquaint the Senate therewith, and desire their concurrence. 295

291 1 ANNALS OF CONG. 923 (Sept. 10, 1789) (Joseph Gales ed., 1834).
292 Id. at 938 (Sept. 19, 1789); H. JOURNAL, 1st Cong., 1st Sess. 115 (Sept. 19, 1789).
293 1 ANNALS OF CONG. 939 (Sept. 21, 1789); H. JOURNAL, 1st Cong., 1st Sess. 115–16 (Sept. 21, 1789).
294 The three House members of the Conference Committee had earlier been on the House Select Committee of Eleven. See supra note 196. Madison, Sherman, and Vining were all Federalists. Concerning Vining, see supra notes 196 and 209.
295 H. JOURNAL, 1st Cong., 1st Sess. 115–16 (Sept. 21, 1789).


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, was received. The Senate "receded" on its third amendment, but insisted on all others. It thus agreed to the House-Senate 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 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—

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, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a 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.

E. The Committee of Conference

Going into the Committee of Conference the Senate’s version of the Third Article read, “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.\textsuperscript{298} Whereas the House version of the Third Article read, "Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."\textsuperscript{299}

The Conference Committee was comprised of five Federalists and one Antifederalist, so the Federalists remained firmly in control. Of the six, only Madison was from a state whose ratifying convention had recommended the adoption of amendments. The Conference did not face a choice between a nonpreferentialist Senate version and a no-establishment House version. So nonpreferentialism was not in play. Nor was specific federalism a feature of either of the two choices going into Conference. Rather, the difference between the Senate and House versions was over the scope of the disempowerment of Congress with respect to the establishment of religion. That is, the Conference Committee faced a choice between a narrow Senate disempowerment ("no law establishing articles of faith or a mode of worship") and a broader House disempowerment ("no law establishing religion"), albeit a House version not as broad in scope as the earlier Samuel Livermore proposal in the House.

\textit{September 22–24, 1789}

No record of the negotiations among members of the Committee of Conference exists. 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. The Conference altered these two Articles,\textsuperscript{300} and then the joint agreement was reported back to the House and Senate.

Senator Oliver Ellsworth's handwritten notes are the most contemporaneous record emerging from the Committee of Conference. They reflect his report to the

\textsuperscript{298} \textit{S. Journal, 1st Cong., 1st Sess.} 129 (Sept. 9, 1789) (emphasis added).
\textsuperscript{299} \textit{H. Journal, 1st Cong., 1st Sess.} 85 (Aug. 21, 1789) (emphasis added).
\textsuperscript{300} Irving Brant, one of James Madison's biographers, claims Vining and Sherman had displayed little interest in the amendment with respect to religious freedom. Brant then speculates that the Conference Committee language was likely that of Madison. \textit{Brant, supra} note 135, at 271. Some evidence supports this claim. As previously noted, John Vining, a Federalist, \textit{see supra} notes 196, 209, thought the House was wasting valuable time drafting a bill of rights. \textit{See supra} note 196. Roger Sherman, also a strong Federalist, sought to downplay the importance of the amendments by listing them separately at the back of the Constitution. \textit{See supra} notes 212, 259–261 and accompanying text.
Senate on the results of the negotiations but not its rationale.\textsuperscript{301} His entry on the Third Article is reproduced below:

\begin{quote}
[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 to petition the Government for a redress of grievances . . . .”\textsuperscript{302}
\end{quote}

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 of disempowerment had prevailed.\textsuperscript{303} There also may have been a trade-off in Conference. The Conference Committee favored the Senate version when it came to adopting the stand-alone “free exercise” text rather than the broader House protection for both “free exercise” and “rights of conscience.” The alteration was not one of mere style, as if “conscience” was thought redundant and could be subsumed under “free exercise.” Neither the House nor Senate had been using these terms as if they were interchangeable. So perhaps a broader no-establishment restraint on Congress was traded for a narrower free exercise right in people if they subscribed to a religion. Madison’s hope to safeguard the conscience of the nonreligious was lost. We know the result, but we cannot know if it was a conscious trade-off.

Both sides, including Madison, expressed disappointment with the overall process and substance of amendments.\textsuperscript{304} The final scope of the no-establishment disempowerment was broader than Madison’s initial proposal on June 8th. On the other hand, Madison’s amendment binding on the states was defeated in the Senate, and his June 8th text with respect to conscience and the national government had been narrowed such that it did not protect the nonreligious.

As a starting point, a normative meaning of “an establishment” suggests a single national religion established by law. Nevertheless, from the congressional debate we know that combined church establishments were also contemplated as prohibited by the amendment, not just the establishment of a single national religion. Madison hypothesized such a combination during the debate of August

\begin{itemize}
\item \textsuperscript{301} \textit{COMPLETE BILL OF RIGHTS}, \textit{supra} note 72, at 8; \textit{see also} S. JOURNAL, 1st Cong., 1st Sess. 145 (Sept. 24, 1789).
\item \textsuperscript{302} \textit{COMPLETE BILL OF RIGHTS}, \textit{supra} note 72, at 8 (emphasis added, underline and strikethrough in original).
\item \textsuperscript{303} \textit{See} BRANT, \textit{supra} note 135, at 271 (Brant claims a “House victory” with respect to no-establishment.).
\item \textsuperscript{304} MAIER, \textit{supra} note 187, at 454–55.
\end{itemize}
15th. If the drafters had intended to prohibit the establishment of only a single religion, it is likely they would have said so explicitly. So the amendment permits reading the restraint on Congress’ power as being broader than just a bar on the establishment of a single national religion.

For the sake of argument, assume the narrowest reading of the Establishment Clause, namely that it only prohibits the establishment of a single national religion. If that is all that the clause does by way of disempowering Congress, then the First Federal Congress certainly selected a circuitous way of saying so. If this narrowest of interpretations is correct, then why not simply say there is no congressional power to “establish a single religion.” Instead, the text disempowers Congress from “mak[ing]... law respecting an establishment of religion.” Certainly the greatest fear would be the establishment of a single religion, but that was not the only fear. So the final text leaves open additional possibilities that are also outside of Congress’ power. For example, the text is easily understood as prohibiting Congress from establishing two or three large Protestant denominations, or all Protestant churches. It comes down to what is meant by “an establishment,” and once again originalism gives no clear answer to that question.

F. Final Action in the House of Representatives

September 24, 1789

The House considered the Report of the Committee of Conference. As the Report recommended, the House agreed to recede from its disagreements with the Senate’s amendments on all but the Third and Eighth Article.

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, are now proposed to be inserted as the third and eighth articles, shall be amended to read as follows:

305 See supra note 238 and accompanying text.
306 It is unlikely that the use of the indefinite article “an” before “establishment” was intended to mean that the restraint on national power is limited to the establishment of a single national church—thereby allowing the national establishment of two or more churches. Cf. Laycock, supra note 224, at 884–85.
307 A way to think about the operation of the text is: if Congress’ establishment of the Congregational Church would be one violation of the “an establishment” text, then Congress’ establishment of both the Congregational and Presbyterian Churches would be two violations of the text.
308 The Eighth Article was the proposed amendment securing a right to a jury in a criminal trial.
ART. 3. Congress shall make no law respecting an establishment of religion, or prohibiting [a or 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.

The Report of the Committee of Conference as recited in the House Journal and in the Annals was passed by a vote of thirty-seven to fourteen, thus adopting the Conference’s version of Article Three.

The House then resolved that the president of the United States forward copies of the twelve Articles of Amendment to the eleven states, along with copies to Rhode Island and North Carolina.

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.

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.” 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.

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311 1 Annals of Cong. 948 (Sept. 24, 1789).


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

314 1 Annals of Cong. 948 (Sept. 24, 1789); H. Journal, 1st Cong., 1st Sess. 122 (Sept. 24, 1789).


316 Id. at 148 (Sept. 24, 1789).
September 25, 1789

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

The Senate proceeded to consider the Message from 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 RESOLVED, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.317

Two-thirds of both the House and Senate had now 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, was 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—

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 a redress of grievances.318

The congressional Preamble leaves it beyond doubt that the amendments vested no new powers in the national government. On the contrary, the amendments were to reassure Americans that the national powers delegated in the 1787 Constitution are not to be misconstrued or abused so as to impute powers to the national government that it did not have. Understanding this limited purpose is

317 Id. at 150–51 (Sept. 25, 1789).
318 This final record of the proposed Third Article 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 (Sept. 24, 1789), with id. at 163 (Sept. 29, 1789) (emphasis added, italics in original).
crucial in rightly interpreting the relationship between the Establishment and Free Exercise Clauses to not be in tension. By reassuring the American people, the Federalists hoped to take away much of the support for a second constitutional convention. In this they succeeded.

H. Refuting the Theory of Specific Federalism

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.” A first reading is that in comparison to even the House version, the introduction by the Conference of the word “respecting” seemingly broadens the disempowerment of Congress from laws “establishing religion” to “respecting an establishment of religion.” It appears broader because now Congress cannot establish or disestablish religion. Hinging as it does on the first appearance of the word “respecting” and that its introduction is said to specifically prevent interference with those state establishments still in existence, such a reading is the theory of specific federalism.

To one focused only on the text as it emerged from Conference Committee, the introduction of “respecting” appears to fit with 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 national government. This aligns with the Wilsonian argument, made again during the House debate by Roger Sherman on August 15th, and the attitude of Federalists generally, that the 1787 Constitution delegated no national power over the matter of religion, including over religious establishments in the states. And Huntington's confusion during the House debate of August 15th led to a rewriting of the text so that he was satisfied a federal court could not enforce the Establishment Clause against the parish-level religious assessments which favored the Congregational

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319 See supra notes 179–181, 318–319 and infra notes 488–490 and accompanying text (when introducing the proposed bill of rights, Madison stated that the amendments would not expand national powers, but would limit and qualify them); see also infra Part VI.B. (discussing the impossibility of tension between the religion clauses).

320 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, it is used in the sense of “relation to” or “regarding.”


322 See supra notes 7, 179–181 and infra notes 488–490 and accompanying text.
establishments in New England. Finally, whatever the suspicions and objectives of the Antifederalists, the Federalists were in firm control of the Conference Committee. These combined factors strongly indicate that in the Conference Committee the manner by which the states (in New England and elsewhere) dealt with establishmentarian matters was not 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 national 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.

1. Grammar

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 more simply accounts for the modification in Conference. A straightforward explanation is that the Conference made a grammatical improvement to sharpen the focus of the no-establishment text that first 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 first we 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 Third Article was to emphasize both aspects of religious freedom: no-establishment and free exercise. However, there are two participles (“establishing” and “prohibiting”) that brought 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 places the desired focus on the new object (“establishment”). This stylistic change was desirable because the Third Article now begins with two parallel participial phrases (“respecting an establishment” and “prohibiting the free exercise”) that place the desired focus on “establishment” and “free exercise,” respectively. Finally, the now parallel participial phrases are modified by the same prepositional

323 See supra notes 207–208, 218–222, 225–245 and accompanying text. When the founding generation was truly concerned about federalism and religious freedom it knew how to plainly say so. Consider two of the amendments during the state ratification conventions. See supra, notes 91 (Pennsylvania) and 98 (Massachusetts). And when federalism was truly threatened, such as Madison’s amendment to protect conscience from state violations, Congress knew how to bury the threat. See supra notes 247–248 (Tucker’s opposition based in federalism) and 287 (Senate voting down the amendment).

phrase ("of religion"). The focus of no-establishment before and after the Conference was the same: assure the American people that Congress had no power to establish religion. Accordingly, on this reading the grammatical improvement had no substantive impact.

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

2. Reason

Those holding to the theory of specific federalism seize on "respecting" as central to their argument that the Establishment Clause had embedded in it at the last moment by the Conference Committee a federalist principle specifically designed to preserve state sovereignty over how each state handles its church-state affairs. If the national government had no power over the subjects of creeds and liturgy and a particular state had an establishment, it would follow that this Senate version would have had some federalist impact in helping preserve that state's creeds and liturgy in the face of congressional legislation to the contrary. The Conference Committee's substitution of the participle "respecting" for the participle "establishing" did not make the Conference version uniquely federalist. Rather, all of the versions in play indirectly restrained some congressional power concerning how states handled certain of their establishmentarian matters. What evolved over the various House

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325 Muñoz, supra note 45, at 630.
326 Professor John Witte calls the evidence for this "reading of the 'respecting' language . . . very thin." Witte, supra note 185, at 229. He suggests an additional argument concerning specific federalism: if Congress had intended the no-establishment principle to do the work of both general and specific federalism it would have been easy for the Conference Committee to have drafted the phrase to read, Congress shall make no laws respecting "a state establishment" of religion. Id. at 197 (emphasis added); see also id. at 229.
327 S. JOURNAL, 1st Cong., 1st Sess. 129 (Sept. 9, 1789).
and Senate versions was not a first-time introduction in Conference of a federalist
text, but debate over the *scope* of the congressional disempowerment. In sum,
nothing in the text indicates that the Conference Committee was suddenly seized
by a new and irresistible "state's rights" urge and led to insert "respecting" into the
Establishment Clause with the aim to uniquely preserve state establishments.

Second, the Establishment Clause restraint on congressional power works to
limit the national government with respect to a given subject matter: the pros and
cons of establishmentarianism. This is a jurisdictional restraint: the Establishment
Clause limits Congress with respect to *both* the state and national governments.
True, the participle "respecting" meant that Congress was prohibited from
interfering with laws "respecting an establishment" of religion at the state level via
laws. However, the participle "respecting" also meant that Congress was
prohibited from interfering at the national level "respecting an establishment" of
religion. 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 national or state). Moreover,
the scope of this disempowerment is the *same* with respect to both levels of
government, state and national. Accordingly, overblown claims that "respecting"
means that the national government can have nothing to do with church-state
relations at the state level but that "respecting" means only that Congress cannot
establish a single religion at the national level rely on an asymmetry that defies
the plain text. The same words ("no law respecting an establishment of religion")
grammarically define an identical scope of congressional disempowerment,
whether that disempowerment has the consequence of protecting residual state
sovereignty or limiting the national government when acting within its enumerated
powers such as governing the territories or regulating the Army and Navy. Specific
federalism is not just wrong, but it diverts attention to federalism when the focus
should be on the full scope of the national disempowerment, namely the limited
jurisdiction of the national government with respect to establishment. I return to
this mischief in Part VI.A.

Third, 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 at the state level within the scope

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328 Hereafter Congress must be mindful of the Establishment Clause whenever it
exercises delegated national powers. For example, when establishing post offices pursuant
to Article I, Section 8, Clause 7, Congress should 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 Article IV,
Section 3, Clause 2, Congress can touch on religion but it cannot "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 I and III but did so in a manner
that was not "an establishment" of religion. See Act of Mar. 7, 1789, ch. 8, 1 Stat. 50, 52
(Aug. 7, 1789). 329 See AMAR, supra note 321, at 32; Muñoz, supra note 45, at 630.
of a participial phrase (i.e., "abridging the freedom of speech, or . . . press, or the right . . . to assemble, and to petition."). In other words, the Conference Committee's substitution of the participle "respecting" for the participle "establishing" appears unremarkable with respect to federalism—in contrast to an exotic claim that the Conference uniquely reached out and embedded a specific federalist provision in the Establishment Clause. What is noteworthy in the Conference Committee's substitution of participles from "establishing" to "respecting" is that the substitution more clearly causes the first participial phrase in the First Amendment to focus on the meaning of "establishment" as opposed to the meaning of "religion." That stylistic improvement does not help the theory of specific federalism.

Fourth, as the matter went to Conference, the record in the House and Senate were without complaint that any state believed that her sovereignty over church-state arrangements was in need of additional protection. The concern voiced earlier by Huntington during the House debate of August 15th was resolved to his satisfaction by Livermore's phrase ("Congress shall make no laws . . .") that pointed the object of the disempowerment solely at Congress.

3. Answering the Proponents

Professor Vincent Muñoz subscribes to the specific federalism theory, namely, that the addition of the word "respecting" by the Conference Committee was solely about preventing interference in state establishments. He finds in the early Senate versions of the Third Article a felt need to protect how the states dealt 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, which Muñoz rightly traces back to Patrick

330 S. JOURNAL, 1st Cong., 1st Sess. 163 (Sept. 24, 1789).

331 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 397-401.

332 See supra notes 241-245 and accompanying text. As we have seen, when they ratified the 1787 Constitution neither Connecticut nor Massachusetts asked for an amendment to protect their religious establishments. Additionally, as will be shown below, see infra table accompanying notes 349-358, neither state ratified what became the First Amendment. If citizens in these states had truly feared for their Congregational establishments as claimed by specific federalism, it makes no sense that citizens in these states would not even bother to ratify a federalist provision meant to protect their Congregational Churches.

333 Muñoz, supra note 45, at 629-30.

334 See supra note 133 and accompanying text (Virginia's proposed amendment).
Henry. For example, the Senate text from September 3rd read in nonpreferential terms: “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 national powers and thereby increase retained state powers. The final Senate version that went to Conference Committee denied Congress the power to make “law establishing articles of faith or a mode of worship.” Muñoz argues that Congress “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).” Muñoz 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 suggested Congress had the implied power to establish religion except with respect to “articles of faith or a mode of worship.” Muñoz reads the choice between the House and Senate versions, and the Conference Committee’s decision to favor the House version, as “unmistakably federal[ist].” It was “unmistakably federal[ist]” and hence a choice in favor of retained state powers, reasons Muñoz, because a rejection of the Senate version was a rejection of the notion that Congress had implied power in the 1787 Constitution 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 assurance that the 1787 Constitution delegated no power to the national government over the matter of religious establishment. Additionally, the proposed amendments, including the Third Article, did not vest new powers in the national government. Indeed, the focus of the amendments was just the opposite: the amendments, including the Third Article, were offered to expressly put into words certain powers that Congress did not have, thereby reassuring the American people that citizens had little to fear from the new government. The six members of the Conference, five of whom were Federalists, would have immediately recognized any suggestion that the Senate version of the Third Article implied power in Congress over establishmentarianism as a false implication. All this being so, it is pure fancy to suppose that the Conference, in order to avoid a supposed power-vesting Senate version, favored the House version. Indeed, as Muñoz would have it, the Conference chose the House version but then beefed-up

335 Muñoz, supra note 45, at 628–29.
337 It is thus counterintuitive for Muñoz to link Patrick Henry and Virginia’s proposed amendment, on the one hand, to a conjectural desire in the Senate to expand congressional power.
338 S. JOURNAL, 1st Cong., 1st Sess. 129 (Sept. 9, 1789).
339 Muñoz, supra note 45, at 629. Earlier Senate versions augmented congressional power, according to Muñoz, because to expressly deny to Congress the power to prefer one religion over others implied that Congress had the power to support all religions.
340 Id.
the federalist nature of that version by inserting "respecting" into the amendment's text.

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 built on the House version with respect to religious no-establishment. In these few respects, Muñoz 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—a maneuver that had no substantive importance until Everson\textsuperscript{341} was decided in 1947—158 year later!

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 limitation to impose on congressional power. The House choice with respect to scope was "no law establishing religion,"\textsuperscript{342} and the Senate choice with respect to scope was "no law establishing articles of faith or a mode of worship."\textsuperscript{343} The Conference's decision to favor the House version was a decision to choose the broader of the two disempowerments on Congress. That decision was not "unmistakably federal[ist]," as Muñoz claims. Rather, it was jurisdictional. The decision has all the traits of a straightforward choice about the desirable scope of the disempowerment of Congress' authority with respect to church-government affairs. This is particularly so given that even Muñoz 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 Muñoz's exotic explanation, an explanation that had no legal consequence until Everson incorporated the Establishment Clause in 1947. If anything, rather than "unmistakably federal[ist]," the decision by the Conference to choose the House version, with grammatical improvements motivating the insertion of "respecting," was unmistakably pro religious freedom. The Conference text favored religious freedom because when the national government has no jurisdiction with respect to the affairs of organized religion, then organized religion is free to govern its own affairs. This was the repeated call of the dissenters: free the church.

In order to interject Antifederalist influence into the drafting process, Muñoz has to go back to the origin of the Senate-rejected nonpreferential language from Virginia, 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 his own state's sovereignty over establishmentarian affairs was insecure and thus in need of more protection from interference by the national 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 national

\textsuperscript{341} 330 U.S. 1 (1947).
\textsuperscript{342} H. JOURNAL, 1st Cong., 1st Sess. 85 (Aug. 21, 1789).
\textsuperscript{343} S. JOURNAL, 1st Cong., 1st Sess. 129 (Sept. 9, 1789).
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*.344

The better reading is that the no-establishment text as it emerged from Conference was jurisdictional, not merely federalist. As acknowledged above, a rejection of the theory of specific federalism345 is not a rejection of the idea that the text of the Establishment Clause had some consequential effect on federalism by limiting congressional power to interfere in a state’s church-state affairs.346 That

344 5 FOUNDERS’ CONSTITUTION, supra note 39, 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 Adams 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*. 5 FOUNDERS’ CONSTITUTION, supra note 39, 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, 435–36 (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. 5 FOUNDERS’ CONSTITUTION, supra note 39, 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 Muñoz: 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 power delegated to Congress; any doubt that the amendments were not a grant of more 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, 146–47.

345 See supra text between notes 326–328.

346 Arguments based on the larger historical context have been assembled against the idea that the Establishment Clause was intended to protect state establishments. See 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 Establishment Clause having had a federalist intent because: (1) while there were establishments in the New 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
said, the primary focus of the congressional debate which led to the final text of the Establishment Clause was to limit the power of the national government, not to protect the states.

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

After receiving the twelve 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. About two and one-half 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 agree with Professor Green insofar as the conscious purpose of the Establishment Clause was to limit national power. However, the Establishment Clause surely did have the consequence of protecting state establishments from some national interference. See supra text between notes 326-328. Green’s assertion that others have “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 Representative Huntington tells us that much.

New Englanders, other than those from Connecticut, did deny that 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 religious tax payment. The dominant Congregationalists thought this arrangement 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 the First 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. Moreover, the terms were often used in overlapping ways. If calls for disestablishment were down, it was because by 1789, only New England still had established churches. 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 national government. The Baptists and Madison agreed that the means for achieving that promise was a Bill of Rights that denied national power over matters of establishment. Although I reject specific federalism, unlike Green, I can understand how those devoted to specific federalism find some reinforcement for their theory in Madison’s promise to the Virginia Baptists.

years later, on March 1, 1792, Secretary of State Thomas Jefferson formally announced that ten of the twelve proposed amendments (Articles Third through Twelfth) had been ratified by the requisite three-fourths of states, thereby ending the formal period of ratification.  

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 surviving record is in various letters and newspaper accounts.

Table 2: Ratification of the Amendments by the States, November 20, 1789–March 1, 1792

<table>
<thead>
<tr>
<th>Date of Ratification by State</th>
<th>Date Ratification Reported to the Federal Congress</th>
<th>State</th>
<th>Amendments Ratified</th>
<th>Record of Debate?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>November 20, 1789</td>
<td>August 6, 1790</td>
<td>New Jersey(^{349})</td>
<td>1, 3–12</td>
</tr>
<tr>
<td>2</td>
<td>December 19, 1789</td>
<td>January 25, 1790</td>
<td>Maryland(^{350})</td>
<td>1–12</td>
</tr>
<tr>
<td>3</td>
<td>December 22, 1789</td>
<td>June 11, 1790</td>
<td>North Carolina(^{351})</td>
<td>1–12</td>
</tr>
<tr>
<td>4</td>
<td>January 18, 1790</td>
<td>April 1, 1790</td>
<td>South Carolina(^{352})</td>
<td>1–12</td>
</tr>
<tr>
<td>5</td>
<td>January 25, 1790</td>
<td>February 15, 1790</td>
<td>New Hampshire(^{353})</td>
<td>1, 3–12</td>
</tr>
<tr>
<td>6</td>
<td>January 28, 1790</td>
<td>March 8, 1790</td>
<td>Delaware(^{354})</td>
<td>2–12</td>
</tr>
<tr>
<td>—</td>
<td>February 2, 1790</td>
<td>—</td>
<td>Massachusetts</td>
<td>3–11</td>
</tr>
</tbody>
</table>

\(^{348}\) Id.

\(^{349}\) LABUNSKI, supra note 178, at 245; SCHWARTZ, supra note 347, at 1181, 1200–01.

\(^{350}\) SCHWARTZ, supra note 347, at 1172, 1176, 1193–94.

\(^{351}\) LABUNSKI, supra note 178, at 245; SCHWARTZ, supra note 347, at 1184, 1199.

\(^{352}\) SCHWARTZ, supra note 347, at 1195–96.

\(^{353}\) Id. at 1179, 1182–83, 1194–95.

\(^{354}\) Id. (letter to President Washington from the Governor of Delaware, which omits the exact date of ratification by the Delaware Legislature); see also Amendments to the Constitution of the United States of America, FINDLAW, http://caselaw.lp.findlaw.com/data/constitution/amendments.html (last visited Mar. 12, 2010) [hereinafter Amendments] (see footnote 2).
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. The point became 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 did not include Massachusetts. The legislature of that state had never sent notification of ratification to anyone in the national government. As secretary of state, Jefferson asked Christopher Gore, the U.S. attorney for Massachusetts, about the status of Massachusetts' ratification and was informed on August 18, 1791, of the legislative failure.

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355 SCHWARTZ, supra note 347, at 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).

356 Id. at 1176, 1180, 1197.

357 Id. at 1199–1200; see also Amendments, supra note 354 (see footnote 2).

358 SCHWARTZ, supra note 347, at 1202–03; see also Amendments, supra note 354 (see footnote 2) (President Washington's correspondence to Congress does not include the date of Vermont's ratification).

359 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 347, at 1172 (“The state ratifications . . . ended when Virginia became the tenth state to ratify at the end of 1791.”).

360 By February 2, 1790, both houses of the Massachusetts legislature had passed the third through the eleventh amendments, but the legislature failed to finalize the ratification by formally declaring their passage. This anomaly is explained in SCHWARTZ, supra note 347, at 1172.

361 See LABUNSKI, supra note 178, at 246; see also SCHWARTZ, supra note 347, at 1175–76 (including the letter from Christopher Gore, explaining the failure of notice by the Massachusetts legislature).
The Massachusetts ratification process was problematic.\textsuperscript{362} The Massachusetts House and Senate provisionally approved the third to eleventh proposed amendments, omitting the first, second, and twelfth.\textsuperscript{363} Final ratification stalled because a special committee dominated by Antifederalists declined to give approval to the earlier passage of the Third through Eleventh Articles.\textsuperscript{364} 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.\textsuperscript{365}

Massachusetts is the first state where some official transcript of the debate over the amendments was recorded.\textsuperscript{366} The Massachusetts House was particularly troubled over the proposed twelfth amendment, which said powers not granted by the Constitution to the federal government or reserved to the states were retained by the people.\textsuperscript{367} While it is clear from the House and Senate journals that the Massachusetts House struggled over this amendment, no official record of the House’s objections exists.\textsuperscript{368} However, in other transcripts 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 began by suggesting that the House objection was to the Twelfth Article reserving powers not expressly delegated to either the federal or state government being retained by the people. One such power reserved to the state, said Hancock, was “to support the faith.”\textsuperscript{369} The reference may well be a nod to Massachusetts’ power to levy religious assessments 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, he was perhaps reassuring the dominant Congregationalists that ratification of the Twelfth Article did not negate the state’s power to impose religious assessments.

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 ratification to Congress on November 14, 1791.\textsuperscript{370} When Virginia ratified the balance of the amendments on December 15, 1791, President Washington

\begin{footnotes}
\footnotemark[362]\textsuperscript{362} LABUNSKI, \textit{supra} note 178, at 246; \textit{see also} SCHWARTZ, \textit{supra} note 347, at 1172, 1174–75.
\footnotemark[363]\textsuperscript{363} SCHWARTZ, \textit{supra} note 347, at 1179, 1182–84.
\footnotemark[364]\textsuperscript{364} LEVY, \textit{supra} note 17, at 107; SCHWARTZ, \textit{supra} note 347, at 1175, 1182–84.
\footnotemark[365]\textsuperscript{365} \textit{Id.} at 107.
\footnotemark[366]\textsuperscript{366} LABUNSKI, \textit{supra} note 178, at 245; \textit{see also} SCHWARTZ, \textit{supra} note 347, at 1173–76, 1178–79, 1183–84.
\footnotemark[367]\textsuperscript{367} LABUNSKI, \textit{supra} note 178, at 246.
\footnotemark[368]\textsuperscript{368} SCHWARTZ, \textit{supra} note 347, at 1174–75.
\footnotemark[369]\textsuperscript{369} \textit{Id.} at 1178–79 (speech by Governor John Hancock to the Massachusetts legislature, Jan. 28, 1790).
\footnotemark[370]\textsuperscript{370} \textit{Id.} at 1201.
\end{footnotes}
forwarded the full ratification message to the U.S. House and Senate on December 30, 1791.\textsuperscript{371}

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.\textsuperscript{372} 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.\textsuperscript{373} The letters complained that Virginia's amendments proposed in 1788 had not been adopted by Congress, that the powers of the central government remained unchecked, and that civil liberties were endangered by the new government. However, neither the Third Article nor religious freedom was explicitly mentioned. The Virginia House, a majority of which were Federalists, approved all the amendments on December 24, 1789.\textsuperscript{374}

Dividing by a vote of eight to seven, the Virginia Senate held up ratification for almost two years, ostensibly because of objections to the Third, Eighth, Eleventh, and Twelfth Articles.\textsuperscript{375} The eight Antifederalist senators claimed that the proposed Third Article neither protected the right of conscience nor prohibited certain features commonly associated with an established church. The eight senators explained their opposition 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.

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

\textsuperscript{371} Id. at 1201–02.
\textsuperscript{372} Id. at 1185, 1188–89.
\textsuperscript{373} Id. at 1186–89.
\textsuperscript{374} Id. at 1176–77, 1184, 1188–91.
\textsuperscript{375} Levy, supra note 17, at 109; Schwartz, supra note 347, at 1191–93.
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 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.  

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 left Congress free to impose some features of what were commonly associated with an “establishment,” while stopping short of a full establishment or national church. 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. Finally, the senators point as to the Third Article implying congressional powers never granted ignores the operation of the proposed Twelfth Article.

What casts suspicion on these objections by the eight state senators is not just that they were known to be Antifederalists, but also 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 and still sought more state-friendly amendments taking power away from the national government. If these twelve Articles of Amendment 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 with the amendments, James Madison questioned these state senators’ sincerity and confidently stated his belief that the eight Antifederalists would be unsuccessful in blocking the amendments. 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

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376 S. JOURNAL, 14th. Sess., at 62–63 (Va. 1789); see also LEVY, supra note 17, at 107–08. For the amendment on religious freedom originally proposed by Virginia, see supra note 133 and accompanying text.

377 Professors John Witte and Michael McConnell each give a multipart definition of a full establishment. See supra note 185.

378 See Esbeck, Virginia Disestablishment, supra note 5, at 82–85.


380 LEVY, supra note 17, at 109–10.
had entirely satisfied the disaffected of his Sect, and that it would appear in their subsequent conduct.\textsuperscript{381}

The referenced letter from Virginia Baptists to Madison\textsuperscript{382} is important because it was the Baptists who had, along with the Presbyterians, allied with Madison and other statesmen in Virginia to defeat Henry's General Assessment Bill. And the Baptists 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 religious freedom at the national level.\textsuperscript{383}

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.\textsuperscript{384}

Almost two years later, Madison's confidence was rewarded by the Virginia Senate's ratification on December 15, 1791.\textsuperscript{385} Considered in the context of the Antifederalists' goal to reduce the power of the new national 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 opposition to Virginia disestablishment, there is every reason to

\textsuperscript{381} 12 The Papers of James Madison, supra note 186, at 453 (letter from Madison to President Washington dated Nov. 20, 1789).

\textsuperscript{382} Schwartz, supra note 347, at 1185. The Baptist letter is found in 5 Documentary History of the Constitution of the United States of America, 1786–1870, at 215 (1905) [hereinafter Documentary History].

\textsuperscript{383} Miller, supra note 22, at 194, 240, 248–49. See Documentary History, supra note 382, at 144 (Madison clarifying to a Baptist minister that he now supported a bill of rights); id. at 137–41 (Letter from George Nicholas to James Madison (Jan. 2, 1789)) (Madison supporter urging further outreach to Reverend Reuben Ford, a Baptist minister); Labunski, supra note 178, at 167 (Letter from Benjamin Johnson to James Madison (Jan. 19, 1789)) (supporter reporting that Reverend Eve had held a meeting at a Baptist Church recalling Madison's spirited services on behalf of Baptists).

\textsuperscript{384} 12 The Papers of James Madison, supra note 186, at 453; see also Documentary History, supra note 382, at 230.

\textsuperscript{385} Levy, supra note 17, at 111.
fully discount the understanding of the religion clauses that had been published in October 1789 by the eight senators.  

On March 1, 1792, Secretary of State Jefferson officially notified the several states that the Third through Twelfth Articles of Amendment had been successfully ratified, thus implying the First and Second Articles had thus far failed. A stylist renumbered the successful Articles the “First through Tenth,” and only after some time did they take on the popular appellation “Bill of Rights.” Madison, Jefferson, Washington, and their contemporaries did not call the ten amendments a “Bill of Rights.” That began to occur only after the Civil War. With uncharacteristic understatement, Secretary 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 . . . .

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

In summary, so far as indicated from the sparse convention records, state ratification of the Third Article 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 reasons other than opposition to the

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386 Id. at 111 (“[T]here is every reason to believe that Virginia [ratified] the First Amendment [in December 1791] with the understanding that [the clauses] had been misrepresented [back in October 1789] by the eight senators.”).  
387 MAIER, supra note 187, at 463-64.  
388 SCHWARTZ, supra note 347, at 1203.  
389 Id. at 1172, 1201, 1203.  
390 LEVY, supra note 17, at 106.  
391 SCHWARTZ, supra note 347, at 1181.  
392 LEVY, supra note 17, at 106.  
393 SCHWARTZ, supra note 347, at 1172.
Third Article. In Virginia, the opposition was by eight 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 what we now know as 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 record of state ratifications yields no 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.

V. PLAIN MEANING OF THE TEXT OF THE ESTABLISHMENT CLAUSE

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. Finally, “of religion” is a prepositional phrase. “Religion” modifies “establishment,” confirming that the key to the original meaning of the phrase is the meaning of establishment in the context of constitution making in 1789–91.

In this Part, we take up the matter of the plain meaning of the text of the Establishment Clause as finally agreed to by both houses of Congress on September 24–25, 1789, with a greater focus on examining what “establishment” did not mean rather than what it did mean. Some of these issues necessarily arose in Part IV, 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 phrasing of many of the first eight amendments in the Bill of Rights does not suggest that these 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

394 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.”

395 That “religion” modifies “establishment” is grammatically evident: “of religion” is a prepositional phrase and is thus unnecessary to retain a complete sentence. That is, “Congress shall make no law respecting an establishment,” is a complete sentence. Or one could turn “religion” into an adjective without changing the clause’s meaning, as in “Congress shall make no law respecting a religious establishment.”
being made explicit, as a matter of reassurance and thus hedge against future abuse, and accordingly they were not superseded by the powers delegated to the new government in the 1787 Constitution.  

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, which begins by stating an existing right and then negating Congress’ power to “violate[]” that right. That textual pattern is evident in most of the First Amendment as well. Participles like “prohibiting” and “abridging” and the noun “right” characterizing both “assemble” and “petition” in the First Amendment, as well as the verb “infringed” in the Second Amendment, are all indicative of preexisting rights that the new government is acknowledging. The Ninth

396 See McDonald v. City of Chicago, 130 S. Ct. 3020, 3091 (2010) (Stevens, J., dissenting) (“The Due Process Clause [of the Fourteenth Amendment] cannot claim to be the source of our basic freedoms—no legal document ever could . . . .”). District of Columbia v. Heller, 554 U.S. 570, 592 (2008) (“[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of 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: “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.” 5 FOUNDERS’ CONSTITUTION, supra note 39, 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 the First Amendment did not in the first instance grant these two rights, but only acknowledged the rights which “rest[ed] . . . on . . . original ground.” The founding generation viewed the declaration of rights in the earlier-adopted state constitutions in the same manner. WOOD, supra note 83, at 271–73.

397 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. This understanding that rights are acknowledged but not granted by a constitution was hardly novel.

398 In relevant part, the First Amendment 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.” Id. amend. I.

399 The Second Amendment 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.” Id. amend. II.
Amendment even speaks in terms of other rights “retained by the people,” suggesting many of the foregoing explicitly listed rights in the first eight amendments are already possessed by Americans.\footnote{400}

The participle “respecting” in the phrase “Congress shall make no law respecting an establishment of religion” stands out as quite different. The distinction is not that no-establishment is a direct command to Congress restraining its use of powers delegated elsewhere, as this command is also present with regard to 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”) with regard to which Congress is not empowered to “make . . . law.” In that sense, the Establishment Clause does not read as if it is describing an existing right (e.g., free exercise, free speech, or free press) already held by the people. Rather, it is as if the Establishment Clause is describing a limit on Congress’ power to legislate on a discrete subject matter or topic.

Of course, the congressional drafters did not mean to imply that Congress, in the absence of the Establishment Clause, had an enumerated 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.\footnote{402} Rather, to the drafters the Establishment Clause meant only that readers of the 1787 Constitution should be reassured that Congress had no jurisdiction concerning the subject matter of “an establishment.” In short, the plain text of the first participial phrase in the First Amendment is different from all the rights-based phrases in the First Amendment, as well as those in the Second and Fourth Amendments.

It follows that text of the Establishment Clause reads like part of the structural frame of the national 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 national jurisdiction over a narrow, but nonetheless

\footnote{400} The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Id. amend. IX. 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, the failure to mention a right among those explicitly listed in a bill of rights left 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.

\footnote{401} 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, supra note 185, at 202.

\footnote{402} See supra notes 87–88 and accompanying text.
highly important, subject matter described as "an establishment," thereby leaving power over that subject matter to the states or to the people and their religious societies.\footnote{See U.S. CONST. amend. X.} The phrase is silent with respect to who holds the authority over "an establishment" denied to the national government, but implicitly, such authority is vested in organized religion. That is the assumption behind the now popular idiom "the separation of church and state." It is easy to see how some federal courts later came to characterize the Establishment Clause as a limit on their subject matter jurisdiction as defined in Article III, Section 2 of the United States Constitution.\footnote{Carl H. Esbeck, The Establishment Clause as a Structural Restraint on Governmental Power, 84 IOWA L. REV. 1, 42–51 (1998) [hereinafter Esbeck, Establishment Clause as Structural] (collecting cases where the Court dismissed for lack of subject matter jurisdiction).} When a branch of government exceeds its limited authority, the other branches are constitutionally brought to bear to check such abuses of power. Similarly, on crucial (but hopefully rare) occasions, the nation will check organized religion and at times religious societies will in turn check and thereby serve as a limit on the authoritarian pretensions of the government.

It seemed common sense for religious conscience, free speech, free press, freedom to assemble, and freedom to petition to have been regarded by Americans as preexisting rights. However, in the period 1789–1791 the choice between establishment and disestablishment was still contested in many states. Indeed, in the New England states it was highly disputed terrain with establishmentarians in the dominate role. So it would have made no sense to have thought of the Establishment Clause as protecting a preexisting right.

When Congress reported the proposed Articles of Amendment to the states for ratification, some New England states still had tax-supported churches and a strong establishmentarian constituency, whereas other states had recently gone through a disestablishment struggle and placed authority over religious societies in the hands of voluntarily supported houses of worship. At the national level, however, the new government never had to choose between establishment and disestablishment as there had never been a national church. Rather, the structural nature of the Establishment Clause meant it denied national power to establish a national church and likely more. Such a limitation on the power of the national government left a jurisdictional restraint on its authority, thereby leaving matters respecting "an establishment" in the hands of the people and their religious societies.

Given the different nature of the text of the Establishment Clause, one can hardly fault the modern Supreme Court when, after its \textit{Everson} decision in 1947, it began to read the Establishment Clause as allocating power between two centers of authority, church and state.\footnote{See generally id. at 25–32 (arguing that the \textit{Everson} decision began the Court's modern era of separationism between church and state).} The Court envisioned the Establishment Clause as policing the boundary between church and state and its judicial task to keep governmental power from trespassing over a line delineated as matters about "an establishment of religion." This was a division of the institutions of organized
religion from the offices of the nation-state, however, not a separation of religion from public affairs. The latter would be quite impossible, for it would mean cleaving in half the very heart of those citizens who have allegiance to both church and state.

Since Everson, the Court has made this 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 in a myriad of state and local governmental arenas, not just with respect to the national government. This line-drawing task has also become more difficult because of the increase in the size and regulatory activity of government. Lastly, the people and their religious allegiances have become more plural.

B. The Establishment Clause Is Not Limited to Protecting Only Conscience

Professor Noah Feldman suggests narrowing the scope of religious freedom as understood by the modern Supreme Court. Feldman argues that the Establishment Clause protects only liberty of conscience. His proposition is based on the historical claim that in the late eighteenth century the only American consensus on religious freedom was that liberty of conscience ought to be protected. Feldman thus believes that the protection of conscience is all that

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406 See, e.g., McDaniel v. Paty, 435 U.S. 618, 640–42 (1978) (Brennan, J., concurring in the judgment) (reasoning that the Establishment Clause may not be used to keep religious adherents from full participation in public life).


408 Feldman, The Intellectual Origins, supra note 407, at 378–79, 397–98. Feldman’s claim that by 1789 there was near universal agreement on the protection of religious conscience is somewhat exaggerated. Consider, for example, the letter of the Danbury Baptist Association of Connecticut to then President Thomas Jefferson dated October 7, 1801. Letter from the Danbury Baptist Association to Thomas Jefferson (Oct. 7, 1801), available at http://www.stephenjaygould.org/ctrl/dba_jefferson.html. The association wrote to congratulate Jefferson on his election. Jefferson’s reply to the Danbury Baptists is the now famous letter wherein Jefferson unveiled his view of the First Amendment as “building a wall of separation between Church & State.” Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802), available at http://www.stephenjaygould.org/ctrl/jefferson_db.html. In the letter, however, the Danbury Baptists complained bitterly about how they were subject to violations of their religious liberty by government and religious officials who during the late campaign had the temerity to accuse Jefferson of being “an enemy of religion Law & good order.” Letter from the Danbury Baptist Association to Thomas Jefferson, supra. From the perspective of the small group of dissenting Baptists, they were put upon because in Connecticut, “[r]eligion is considered as
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.\(^{409}\)

Feldman’s innovation is problematic at multiple levels. First, we examined earlier the amendments proposed by New Hampshire, Virginia, and New York during the ratification of the Constitution—and North Carolina and Rhode Island later copied Virginia’s proposal. We also considered a constitutional amendment debated in Maryland, although it did not pass. Each of these amendments addressed conscience and no-establishment separately. Accordingly, these state-proposed amendments assumed an understanding of religious freedom that went beyond just liberty of conscience.\(^{410}\)

Indeed, one could begin a few years earlier 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 1786.\(^{411}\) Second, the adoption of a Bill of Rights (including the First Amendment) was possible only because the First Congress confined the purpose of the amendments to agreeing on those powers that were not delegated to the national government. As historian Thomas Curry explained: while Americans sharply disagreed 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.\(^{412}\) Feldman is thus answering the wrong question. The question before the First Congress was not what substantive rule the

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\(^{409}\) Feldman, The Intellectual Origins, supra note 407, at 398, 411. The Supreme Court rejected Feldman’s position as early as Engel v. Vitale. 370 U.S. 421, 430–31 (1962) (“The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. . . . When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that.”).

\(^{410}\) See supra notes 103, 107, 114, 133, 140, 156 and accompanying text (proposed amendments from these six states).

\(^{411}\) Esbeck, Virginia Disestablishment, supra note 5, at 65–70 (adoption of the Virginia Declaration of Rights in 1776); id. at 86, 88 (defeat of Patrick Henry’s Assessment Bill in 1784–1785 and passage of Jefferson’s Religious Freedom Bill in early 1786).

\(^{412}\) See CURRY, supra note 7, at 193–94.
Congress of 1789 agreed to with respect to religious freedom, but what the Congress agreed were the powers not held by the new central 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 the Senate, and finally the Conference Committee. For example, on June 8, 1779, James 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 national government which involved both the concepts of conscience and no-establishment.413 This not only shows a clear distinction between conscience and no-establishment, but it shows that Madison accepted from the very start that the no-establishment principle would be binding on the national government but not the states.414 The distinction was maintained a week later in the report to the House by the Select Committee of Eleven.415 The distinction remained through the several August drafts in the House416 and through the several September drafts in the Senate, albeit the Senate reduced freedom of conscience along the way to the “free exercise of religion.”417 Finally, the House/Senate Conference Committee maintained the distinction when it proposed two independent participial phrases (“respecting an establishment” and “prohibiting the free exercise”), clearly maintaining two independent legal concepts. Thus, not only Madison but also the House and Senate members active in the debate faithfully maintained the distinction between conscience and no-establishment that eventually came to be the Free Exercise and Establishment Clauses.

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 funding going to religious organizations.418 To argue that the Establishment Clause prevents government funding to religious

413 See supra note 183 and accompanying text. Compare Madison’s amendment directed at the national government numbered “Fourthly,” with his amendment directed at the states numbered “Fifthly.”

414 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. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 221, 223 (1963); Engel v. Vitale, 370 U.S. 421, 430–31 (1962).

415 See supra notes 198, 200 and accompanying text.

416 See supra notes 202–273 and accompanying text.

417 See supra notes 279–289 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. In contrast, a claim that one’s conscience is unconstitutionally coerced by the government over a religious matter does not necessarily require that the claimant first adhere to a religion.

418 FELDMAN, DIVIDED BY GOD, supra note 407, at 237–39 (stating that his solution, inter alia, is to prohibit government money and similar aid from going to religious organizations).
organizations, Feldman must claim that such funding constitutes coercion of conscience.\textsuperscript{419} But this is rather fanciful when the source of government funding is taxes paid into the general treasury. The logical conclusion of Feldman’s argument is that every taxpayer suffers coercion, even though many of these taxpayers would support (or at least feel indifferent to) a law that, inter alia, aided religious schools or charities.\textsuperscript{420}

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 may later be appropriated to religious organizations.\textsuperscript{421} It thereby becomes coercive, not


\textsuperscript{420} The lack of logic to Feldman’s notion is laid bare in Steven D. Smith, Taxes, Conscience, and the Constitution, 23 CONST. COMMENT. 365 (2006). Historically, coercion with respect to taxpayers was present only when there was a special or earmarked tax traceable to a religious use and no other. See Esbeck, Virginia Disestablishment, supra note 5, at 89–90 (recognizing the religious assessment proposed by Patrick Henry and defeated by Madison and Protestant dissenters in Virginia in 1785 was a special tax earmarked for religious purposes, and thus truly coercive because it compelled what was essentially a tithe; accordingly, the defeat of Henry’s bill is not evidence that the use of tax monies collected for general purposes and paid into the general treasury are coercive of conscience when tax money is later appropriated to religious organizations for public purposes).

\textsuperscript{421} It is not hard to surmise where Feldman derives this definition of coercion. In Flast v. Cohen the Court said that one of the abuses with which the Establishment Clause was concerned is the spending of tax funds to support religion. 392 U.S. 83, 103–04 (1968). However, there are problems with Feldman’s reliance on this passage in Flast. First, Flast says that taxpayer conscience is only one of the abuses addressed by the Establishment Clause. Id. at 103. Unlike Feldman, whose thesis limits the scope of the clause solely to a claim of conscience, the Court recognized many additional abuses corrected by the Establishment Clause. Second, Flast only grants standing to sue, so the holding was limited. The Court then remanded for proceedings on the merits. Id. at 106. The actual rules on when a legislative appropriation from general tax funds does or does not violate the Establishment Clause are far narrower than Flast’s conception of taxpayer conscience. In Zelman v. Simmons-Harris, the modern Court set the parameters for when “indirect” funding that reaches religious organizations is permitted under the Establishment Clause. 536 U.S. 639 (2002). If beneficiaries of a secular program have a genuine choice with respect to where they take their benefit to claim their government-funded services, then the program is constitutional. In Mitchell v. Helms, the modern Court set the parameters for when “direct” funding that reaches religious organizations is permitted under the Establishment Clause. 530 U.S. 793 (2000) (plurality opinion). If the purpose of the funding program is secular, the service providers eligible to administer the aid are selected without regard to religion, and the government monitors to prevent diversion of any funds from being used for explicitly religious activities, then the program is constitutional. Written by Justice Thomas, the plurality opinion in Mitchell was joined by four justices. The controlling law in Mitchell turns on the separate concurring opinion by Justice O’Connor, joined by Justice Breyer. Id. at 836. See Marks v. United States, 430 U.S. 188, 193 (1977) (explaining that when the Supreme Court fails to issue a majority opinion, the opinion of the members who concurred in the judgment on the narrowest grounds is controlling). Accordingly, there is complete disharmony between Feldman’s argument that
when the taxes are initially paid, but only when (and if) the money is later appropriated by the legislature to organizations some of whom are religious. Feldman does not explain why the moment of coercion is delayed until the actual moment of the appropriation—a moment likely not even known to the taxpayer, unlike the moment in time when the taxpayer initially pays his taxes.422 One can go on and press Feldman concerning why is it not also 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 countermand the taxpayer’s sincere religious beliefs? Given Feldman’s logic, it should also be actionable coercion to force a religious pacifist (e.g., a Quaker) to pay federal income taxes of which a significant percent 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 in Feldman’s analysis, then why is the Quaker’s more palpable coercion of religiously informed conscience not recognized as coercion actionable under the First Amendment? Yet the Court will not give the Quaker standing to sue as a taxpayer because there is no coercion.423 When Feldman insists a taxpayer suffers religious coercion, the inconsistency in how he summarily brushes off the pacifistic Quaker makes no sense.

Sixth, Feldman would make actionable taxpayer coercion only when the money paid into the general treasury eventually makes its way into the hands of a religious organization. However, many other taxpayers are conscientious objectors a taxpayer’s Establishment Clause claim is limited to liberty of conscience such as conceived in Flast and the modern Court’s application of the Establishment Clause to aid for religious organizations in Zelman and Mitchell.

422 Flast’s principle of taxpayer coercion misreads the history of Madison’s “not even three pence” argument in his Memorial and Remonstrance to defeat Patrick Henry’s religious assessment bill in Virginia. See supra note 420. The Court’s recent decision in Arizona Christian School Tuition Organization v. Winn, continued Flast’s historical mistake. 131 S. Ct. 1436, 1448 (2011) (“What matters under Flast is whether sectarian [institutions] receive government funds drawn from general tax revenues, so that moneys have been extracted from a citizen and handed to a religious institution in violation of the citizen’s conscience.”). In the Virginia struggle, Madison argued that even “three pence” of tax monies paid under Henry’s proposed bill would violate conscience because it was an ear-marked tax, that is, the tax monies would have been collected by the state and paid directly over to Christian clergy. Thus, Henry’s proposed tax was like a compelled tithe, truly coercive and directly traceable to the coerced taxpayer. Feldman’s claim is not so constrained. He would find coercion of conscience where a taxpayer pays his taxes into the general treasury. Feldman, The Intellectual Origins, supra note 407, at 416–17 (tepidly defending his claim of taxpayer coercion as “debatable,” while failing to respond to arguments to the contrary). As noted in the text, logic cannot support such an extension of the concept of coercion, and neither Flast nor Winn can change Virginia’s disestablishment history to suit Feldman’s thesis.

to nonreligious uses of their taxes. For example, they are deeply disturbed at corporate bailouts, issuance of off-shore drilling leases, or the enforcement of drug laws covering the use of cannabis for medical purposes. But such objections of conscience have a secular basis, not religious. So by Feldman’s logic such objections do not count as denials of liberty of conscience. However, interpreting the First Amendment to protect liberty of conscience should make these deeply felt secular objections actionable by taxpayers as well, and Feldman offers no rationale for why they do not. Feldman’s privileging of a taxpayer’s claim when challenging governmental appropriations only when the 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.424 That means, of course, abandoning Feldman’s claim that the no-establishment principle protects only conscience. And, indeed, since Everson, the Court has applied the Establishment Clause to protect interests other than 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;425 conducting voluntary devotional Bible reading;426 resolving creedal disputes;427 or involving the judiciary in explicitly religious events, beliefs, and practices.428

Seventh, if only coercion of conscience is prohibited by the First Amendment, as Feldman claims, then government may favor one or some religions over others. Indeed, as in England today, government may have a full-fledged church establishment and still avoid coercing the faiths of others who choose not to be a member of the Church of England.429 Feldman does not explain how his premise avoids that logical consequence.

425 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).
426 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).
427 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, 709–10 (1976) (holding that civil courts may not probe into church polity or the process of removal of clerics in a hierarchical church).
428 See Widmar v. Vincent, 454 U.S. 263, 269 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 nonworship religious speech).
429 Cf. Tilton v. Richardson, 403 U.S. 672, 689 (1971) (dismissing a Free Exercise Clause claim challenging a program to fund institutions of higher education, including religious colleges, because taxpayer plaintiffs were unable to show religious coercion); Bd. of Ed. v. Allen, 392 U.S. 236, 248–49 (1968) (dismissing a Free Exercise claim challenging a program that lent secular textbooks to K-12 schools, including religious schools, because taxpayer plaintiffs were unable to show religious coercion).
Finally, shrinking the religion clauses to merely protect individual conscience is altogether inconsistent with the Western legal tradition. The two participial phrases up to the first semicolon of the First Amendment indicate two distinct components of religious freedom. One component addresses the relationship between government, the individual, and religion (i.e., free exercise). The second component addresses the relationship between government and organized religion (i.e., no-establishment or separation of church and government). For over a millennium, Western civilization has envisioned religious freedom to be about not just the liberty of the individual but also the separation of government and church.

It is not happenstance that Feldman’s version of the historical developments leading to the adoption of the Establishment Clause bends the record toward his preference for liberalism’s claim that ultimately only the nation-state and individuals matter, denying any autonomy for organized religious societies not reducible to the aggregate rights of their individual members. From the perspective of the West, Feldman’s position fails to account for the dual-authority relationship of church and state that has deeply marked Western civilization and led to its highest form of religious freedom in the American states, a freedom which rejects a state’s power to use organized religion 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 institutional separation of church and civil government.

C. The Establishment Clause’s Negation of Power Is Limited and Permits Regulatory Exemptions

Consider again just the text, “Congress shall make no law respecting an establishment of religion.” The text does not deny Congress power to “make . . . law” about religion. Rather, it more narrowly denies Congress the power to “make . . . law” about “an establishment” of religion.

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430 The religion clauses provide: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. 1.

431 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. 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 are disordered. See Esbeck, Establishment Clause as Structural, supra note 404, at 40–42.


433 U.S. CONST. amend. 1.
Thus, for example, assume that soon after 1791 Congress passed a comprehensive law regulating conscription into the Army and Navy. In exercising its express constitutional power to oversee the armed forces, Congress provided an exemption from the draft for religious pacifists. 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 it is not to more narrowly make a law about “an establishment” of religion. The draft exemption is designed to merely allow pacifists to follow certain practices born of their religious conscience, not to permit the government to affirmatively advance religion. That is, the object of the exemption is not to advance religion but to advance religious freedom.

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 requiring large employers to provide unemployment compensation to their employees, but then 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 they are already so inclined.

The foregoing raises a larger issue regarding the constitutionality of religious exemptions from regulatory and tax burdens. It is a categorical mistake to presume that a statutory religious exemption is a form of religious “favoritism” or “preference.” 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 grants Congress the authority “[t]o make Rules for the Government and Regulation of the land and naval Forces.” Id. art. I, § 8, cl. 14. The Constitution grants Congress the power “[t]o regulate Commerce . . . among the several States.” Id. 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.” Id. art. I, § 8, cl. 1.

See, e.g., Rojas v. Fitch, 127 F.3d 184 (1st Cir. 1997) (holding that a statutory exemption for religious organizations from an unemployment compensation tax did not violate the Establishment Clause). In a similar vein, although the Free Exercise Clause by its terms does not allow for a law “prohibiting” religious exercise, the government retains authority to pass a law allowing those wishing to independently pursue their religious interests to do so without regulatory interference. For example, a public school in the District of Columbia 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 accommodates the teacher’s religious liberty, the power to do so 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 national power). But neither does the Establishment Clause negate a use of national power, power delegated elsewhere in the Constitution, to expand religious liberty.
Establishment 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 and other small sects. The First Amendment would not make any sense if the Establishment Clause contradicted the Free Exercise Clause, or if the Establishment Clause overrode or nullified these two other explicit accommodations of religious exercise.

While a plain reading of the text is reason enough, the logic of this plain reading is straightforward. For example, 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. 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. Although 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.

Another way of stating the matter is: government avoids establishing religion by leaving its private exercise alone, which is exactly what a legislative religious exemption does. Religious exemptions not only allow for private acts of religious freedom, but they also 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. The Court’s specific rationale in these

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437 See supra text accompanying notes 16–17, 54–61.
438 See supra text accompanying notes 12–13.
439 Some are helped with a visual. The religion clauses do not read “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” If the three struck-out words had in fact been omitted, then the two phrases would render religious exemption in contradiction. But the presence of the text “an establishment of,” renders the two clauses in harmony and both supportive of religious freedom.
441 Id. at 387–95 (setting forth five rules concerning errors to avoid in drafting a religious exemption in legislation).
442 See 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); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987) (holding that a nondiscrimination statute could exempt religious organizations from the prohibition on religious discrimination in employment consistent with the Establishment Clause); Gillette v. United States, 401 U.S. 437 (1971) (holding that a religious pacifist opposed to all war
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.443

VI. 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 Federalist 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 first took note in his concurring opinion in Zelman v. Simmons-Harris.444 The essence of the puzzle is that if the Establishment Clause is structural rather than rights based, then it makes no sense 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.445 Aware of that reality, Justice Thomas has taken the less ambitious tack of arguing that the Establishment Clause should be applied to the states with reduced rigor.446

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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 an important difference between a federalist Establishment Clause and a jurisdictional Establishment Clause. A federalist clause tied to the last-minute introduction of “respecting” into the text by the Conference Committee—which this Article calls “specific federalism”—is not supported by the record in the First Federal Congress.\textsuperscript{447} 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.\textsuperscript{448} A jurisdictional Establishment Clause has not only separated organized religion and the national government since 1789–91, but beginning with its incorporation by \textit{Eversen} the clause has separated organized religion from government in general (national, state, and local). In summary, a “specific federalist” Establishment Clause is about national/state structure 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.

The theory of specific federalism is embraced by, for example, Professor Kurt Lash.\textsuperscript{449} He believes that the original Establishment Clause 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 had come to regard the clause as the grant of an individual right.\textsuperscript{450} He therefore argues that the Thirty-Ninth Congress must have intended to incorporate the Establishment Clause as one of the rights in the first eight amendments of the Bill of Rights, making it binding on the states.\textsuperscript{451} Lash’s argument that the Thirty-Ninth Congress regarded the Establishment Clause as rights based has its detractors.\textsuperscript{452} Nonetheless, if one assumes \textit{arguendo}

\textsuperscript{447} See supra Part IV.H.2–3.
\textsuperscript{448} See supra Part IV.H.1–2, as well as notes 394–404 and accompanying text.
\textsuperscript{449} See Lash, supra note 321, at 1090–92.
\textsuperscript{450} \textit{Id.} at 1089, 1105–17.
\textsuperscript{451} \textit{Id.} at 1088, 1099, 1141–45. This would lead to two meanings for the Establishment Clause: one meaning binding on the national government and a different meaning binding on state and local governments. That would be messy but manageable.
\textsuperscript{452} 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 Thirty-Ninth Congress gave thought to the meaning of the Establishment Clause when the Fourteenth Amendment was debated in 1866–1867. \textit{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); \textit{see also} AMAR, supra note 321, at 253, 385 n.91 (noting that the historical evidence is sparse and that members of the Reconstruction Congress did not list no-establishment among their catalog of individual rights); Jonathan P. Brose, \textit{In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause}, 24 \textit{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–
that Lash is correct insofar as he believes that a federalist Establishment Clause existed at one time because of the work of the House-Senate Conference of September 22–23, 1789, but had 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 highly probable that the Establishment Clause retained its jurisdictional character as separating church and government. Indeed, many of the sources that Lash cites as evidence that the public forgot the federalist character of the Establishment Clause are also evidence that the public increasingly began to consider the clause as guaranteeing the separation of church and government.\textsuperscript{453} *Everson* incorporated the Establishment Clause in 1947. In Lash's view, incorporation is not a problem because the clause had become a 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, it continues to set a jurisdictional limit on governmental interference with organized religion—incorporation is still awkward because it treats church/government separation as a "liberty" interest. The latter makes little sense because separation is about policing a boundary between two entities.

Lash is not the only one to fail to keep the national/state divide distinct 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 collected those state constitutions which had adopted a clause similar to the federal Establishment Clause.\textsuperscript{454} Calabresi then reasons that if by 1868 a state had adopted such a clause in its own constitution, the state must not have believed that the Establishment Clause was federalist.\textsuperscript{455} 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.\textsuperscript{456} 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.

\textsuperscript{453} Lash quotes from various state court cases holding that Sunday closing laws violated the principle of church-state separation. It was common for courts to say that all civil power had been denied as to spiritual matters. Lash, *supra* note 321, at 1105–10. Additionally, with respect to doctrinal disputes which cause two factions to claim ownership of the real estate of a church, Lash quotes several state rulings based on common law that once again church-state separation disempowered the civil courts to resolve disputes over doctrine. *Id.* at 1111–17. These cases are about lacking civil jurisdiction over religious matters more than they are about individual rights.


\textsuperscript{455} *Id.* at 32.

\textsuperscript{456} *Id.*
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.\footnote{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 v. Bd. of Educ., 330 U.S. 1, 14-15 (1947). 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 does not set forth a right but rather sets a structural boundary between organized religion and government. See supra notes 328-329, 397-404, 413-417, 424-428, 432 and accompanying text. Therefore, the argument that incorporation of the Establishment Clause was a mistake is that the clause is incapable of being incorporated as a fundamental right because no-establishment is not a right but is instead 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 the argument 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 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 404, at 25-32.} That said, even if the Supreme Court had never incorporated the Establishment Clause in Everson, the clause still would separate organized religion and government. A failure to incorporate would only mean that the national government alone would be separated from organized religion. In that event, the clause's denial of national power with respect to establishmentarianism still would have substantive consequences in the nature of limiting the national government's jurisdiction. From 1791 forward, an assumption of non-incorporation would mean that at the national level Congress alone would have had no power to "make . . . law respecting an establishment of religion." However, Congress would remain free to draw on powers enumerated in the 1787 Constitution with respect to enacting a law that may have touched on religion. For example, using its enumerated power to regulate the armed forces,\footnote{U.S. CONST. art. I, § 8, cl. 12-14.} 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 law about "an establishment" of religion. As discussed above, the First Amendment
text necessarily makes this distinction as to the scope of the Establishment Clause. 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. The exemption 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 national government had jurisdiction to pass general legislation on a matter that merely touched on religion and those occasions when it lacked jurisdiction to pass legislation because its subject was about "an establishment" of religion. Whether one calls it a jurisdictional boundary, a substantive rule, or a structural restraint, this case-by-case line drawing would have required Congress over time to systematically work out relations between the national government and organized religion. This is another way of saying that the no-establishment text necessarily operated to police the boundary between organized religion and the national government.

It is almost certainly true that the Federalists in control of the House and Senate in September 1789 did not have a fully developed rule of church-government relations. To that limited extent, I agree with Professor Steven Smith that the search for a fully developed substantive rule of church-government relations in the congressional debates of 1789 will fail. But from the plain text it cannot be doubted that the amendment prohibited as a matter of substance a national establishment. That Federalists and Antifederalists agreed that Congress should have no power with respect to matters of "an establishment" is revealing—not in the sense of federalism, but in the important sense of limiting national jurisdiction.

A substantive rule defining the line between church and government should have developed 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, promote an establishment of religion. Additionally, because the national government was at first small and for the most part did not focus on day-to-day domestic matters, the occasion for national laws about religion were few. Further, congressional members often regarded the pervasive Protestant ethic that was reflected in their legislation as part of general culture, morals, ceremony, or public virtue as opposed to advancing Protestant beliefs. It was not until after the Civil War that the Establishment Clause was called on to do actual work in the federal courts. And it was not until the Court decided Everson that it drew more

459 See supra Part V.C.
460 See STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 22–27, 45–48 (1995) (arguing that in its original meaning, the Establishment Clause had no substantive theory of religious freedom); cf. HAMBURGER, supra note 6, at 106 n.40 (rejecting Smith's claim that the Establishment Clause was without substantive meaning, and noting that for historical reasons its operation was likely acknowledging the jurisdictional nature of church and government). We can, of course, still say much about what the Congress of 1789 did not mean by an establishment. Indeed, much of this Article endeavors to do just that.
intensely from the lessons learned during the disestablishment in Virginia and other states to reconstruct a substantive meaning for the Establishment Clause.

B. The Impossibility of Tension between the Religion Clauses

The Free Exercise Clause is rightly acknowledged as protecting religious liberty. However, there is a widely held misconception that the Establishment Clause is to hold religion in check. If the latter were true, then when the two clauses overlapped they would at times conflict or be in tension. That is not the case. The clauses are complementary, each in their own way protecting religious freedom.\(^{461}\) As we have seen, eleven states had ratified the Constitution by the end of July 1788.\(^{462}\) As directed by the Confederation Congress, national elections of presidential electors and representatives in the House followed in the fall and winter of 1788.\(^{463}\) The implementation of the new government was set to begin in March and April of 1789 as Congress and President Washington’s administration congregated at a temporary capital in New York City.\(^{464}\) 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 ratified over two years later by three-quarters of the states in 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 national government; it did just the opposite.\(^{465}\) Most provisions in the first eight amendments comprising the Bill of Rights\(^{466}\) were designed to negate an assumption of power by the national 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.”\(^{467}\) They tell the national government what it

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\(^{461}\) See Engel v. Vitale, 370 U.S. 421, 430 (1962) (“Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom.”).

\(^{462}\) See supra table accompanying notes 349–358.

\(^{463}\) See 1 ELLIOT’S DEBATES, supra note 12, at 332–33.

\(^{464}\) See LABUNSKI, supra note 178, at 180, 183–84.

\(^{465}\) See LEVY, supra note 17, at 141–42; WALDMAN, supra note 26, at 153.

\(^{466}\) The Ninth Amendment is a rule on how to construe the 1787 Constitution and its first eight amendments. It reads: “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. The Tenth Amendment is likewise a rule on how to construe the 1787 Constitution. It 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.” U.S. CONST. amend. X. The Tenth Amendment thereby makes explicit what James Wilson and other Federalists argued repeatedly during the ratification period, namely that the national government was one of enumerated powers.

\(^{467}\) 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.”).
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 certain power-granting clauses to the proposed government. For many Americans—not just Antifederalists—James Wilson’s argument that the new government was one of limited, enumerated powers was reassuring but not sufficient. They wanted it in writing. For example, these Americans worried that the wording of the Necessary and Proper Clause was so open-ended that it could be a vehicle for implying unlimited national power. If Wilson was correct, they argued, then why would Article I, section 9 of the Constitution be necessary to deny the grant of certain rights and powers? Similarly, Baptists in Virginia worried that the Religious Test Clause, while prohibiting the imposition of religious qualifications on those holding national 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 national tax to support a national church.

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468 See supra notes 86, 181 and accompanying text.
469 See supra notes 87–88 and accompanying text.
470 See supra note 282 and accompanying text; 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.”).
471 For example, in defending the need for a bill of rights to protect religious freedom in the face of Federalists’ complaints that the amendments were unnecessary, James Madison specially mentioned complaints about 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, 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 OF CONG. 758 (Aug. 15, 1789) (Joseph Gales ed., 1834). To be sure, a church may not capture the state or an office thereof and put the civil power to the service of the church. In such an event, there is state action. The state action is in the state permitting itself to be captured by the church and pressed into her service. See, e.g., Larkin v. Grendel’s Den, Inc., 459 U.S. 116, 116 (1982) (holding that an ordinance granting local churches veto power over issuance of a liquor license to a nearby tavern violates the Establishment Clause).
472 See supra text accompanying notes 87–92. Article 1, Section 9 expressly denies certain powers to the national government, as well as vests certain rights in the people against the national government. See U.S. CONST. amend. IX, § 9.
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.\textsuperscript{474} 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.\textsuperscript{475}

James Madison worked assiduously to ratify the 1787 Constitution by joining with other Federalists in arguing that the Constitution did not need a bill of rights.\textsuperscript{476} He argued that the powers delegated to the new central 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 did indeed have such implied powers in the original document.\textsuperscript{477} Further, he was concerned that compiling a list of fundamental rights risked omitting others that would later be claimed to be unprotected because they were not among those explicitly listed.\textsuperscript{478} 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.\textsuperscript{479} Finally, Madison thought a bill of rights would be ineffective or a "parchment barrier" to legislative excesses, whereas the surer way to safeguard liberties was to widely diffuse governmental power and to enable factions to check power with power.\textsuperscript{480}

Over the course of 1788–1789, Madison became of a different mind.\textsuperscript{481} Several state ratifying conventions expressed dismay at the absence of a bill of

\textsuperscript{474} See STORING, supra note 60, at 64.
\textsuperscript{475} See LABUNSKI, supra note 178, at 65; 1 ELLIOT'S DEBATES, supra note 12, at 494–96.
\textsuperscript{476} See Labunski, supra note 178, at 61–63.
\textsuperscript{477} See Esbeck, Virginia Disestablishment, supra note 5, at 66–70.
\textsuperscript{478} See LAUBUNSKI, supra note 178, at 61–63.
\textsuperscript{479} Alexander Hamilton warned of such a danger in the Federalist Papers. See THE FEDERALIST No. 84, reprinted in 1 FOUNDER'S CONSTITUTION, supra note 39, at 468.
\textsuperscript{478} Labunski, supra note 178, 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.
\textsuperscript{479} WALDMAN, supra note 26, at 139. In a prior letter, Madison had been urged by Thomas Jefferson to reconsider his opposition to a bill of rights. Madison wrote back revealing some of his concerns including "that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of Conscience in particular, if submitted to public definition would be narrowed . . . ." 11 THE PAPERS OF JAMES MADISON, supra note 186, at 295, 297.
\textsuperscript{480} Id. at 135–36, 138–39.
\textsuperscript{481} See ESTEP, supra note 473, at 164–71; LABUNSKI, supra note 178, at 62–63.
rights, and five of the eleven states to ratify did so only after adopting a nonbinding resolution that certain amendments be added to the Constitution. 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 Reverend George Eve, a leader of the Baptists in Madison’s congressional district, that if Madison was elected he would introduce a bill of rights. Baptists had fought hard for religious freedom in Virginia, and they were keen on securing similar safeguards for religious freedom from potential national abuses. Finally, there was a serious effort underway by Patrick Henry and other hard-shell Antifederalists to call for a second constitutional convention. At a second convention, the likely result would have been to increase the powers of the states and thereby decrease those of 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 have been neutralized if the First Congress were to promptly introduce 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. On June 8th, Madison submitted a list of nineteen amendments to the 1787 Constitution. Remarking generally 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 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.”

The First 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:

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482 LABUNSKI, supra note 178, at 58–59, 113–14. The five states were Massachusetts, South Carolina, New Hampshire, Virginia, and New York. See supra Part III. 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, supra note 22, at 252–53.

483 ESTEP, supra note 473, at 167–68; see also MILLER, supra note 22, at 248–49; WALDMAN, supra note 26, at 142–44.

484 See supra notes 99, 494 and accompanying text. Indeed, Virginia Baptists wrote President Washington in the spring of 1789 expressing concern that the national government become the object of “religious oppression, should any religious society predominate over the rest.” EDWARD FRANK HUMPHREY, NATIONALISM AND RELIGION IN AMERICA, 1774–1789, at 507 (1924) (reissued 1966).

485 LABUNSKI, supra note 178, at 187–95; WALDMAN, supra note 26, at 142–44.

486 See supra note 165–166 and accompanying text.

487 See supra notes 182–183 and accompanying text. Madison also submitted changes to the Preamble suggestive of popular sovereignty as a basis for the nation’s founding.

488 1 ANNALS OF CONG. 454 (June 8, 1789) (Joseph Gales ed., 1834).
The Conventions 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. 489

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 national government the ability to later claim certain powers implied from the original 1787 Constitution. 490 By passing the amendments, Congress sought to calm the fears of concerned Americans, blunt the force of Henry’s call for a second constitutional convention, and instill citizen 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 and that 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. 491 That was still the view of many Federalists assembled in Congress, and Federalists now held substantial majorities in both the House and Senate. 492

Madison’s position had shifted ever so subtly. He still did not argue that a bill of rights was needed to thwart potential abuses by the national government. On the other hand, he now urged the adoption of a bill of rights to assuage the fears of common Americans, 493 to blunt the Antifederalist’s call for a second convention, to fulfill the demands of those five states that ratified the Constitution because amendments were promised including a bill of rights, to entice North Carolina and Rhode Island to ratify and thus join the Union, and to fulfill his campaign promise to Baptists in his congressional district. 494

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 national power are cataloged. 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 vested”) by the 1787 Constitution in the new central government. 495

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

489 S. JOURNAL, 1st Cong., 1st Sess. 163 (Sept. 25, 1789).
490 See LABUNSKJ, supra note 178, at 178–255.
491 See supra notes 87–88 and accompanying text.
493 See MILLER, supra note 22, at 252–53.
494 See supra notes 87–88, 135–182, 493 and accompanying text.
495 See CURRY, supra note 7, at 193–94.
delegated to the national government, but must be regarded as a further limitation on such power. Or, as the Federalists saw the matter, a bill of rights would serve as a harmless denial of national powers that were never conferred in the first place by the 1787 Constitution. For many nonpartisan Americans, the amendments were a prudent hedge against possible future abuses.

This has direct implications for correcting a present-day misunderstanding that is alarmingly widespread. It is common to find individuals who believe that the Establishment and Free Exercise Clauses are in unavoidable “tension” and often in “conflict,” as if the Free Exercise Clause is proreligion and the Establishment Clause holds religion in check. This reading of 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 proreligion nor too hostile to the free exercise of religion. Not only is this contrary to the text and logic, but it concedes too much power to the judiciary.

A conceptual framework in which 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. It is undisputed that each provision in the first eight amendments comprising 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. 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.

Consider the Free Speech and Free Press Clauses. These two clauses negating federal power over speech and press, respectively, overlap and thus reinforce one another, but they cannot conflict. Simply put, while the government can

496 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 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.


497 See supra note 440 and accompanying text.

498 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.”).
simultaneously violate both clauses, it is logically impossible for these two overlapping negatives on the government's power to be in conflict. Similarly, the Free Exercise Clause and the Establishment Clause overlap and thereby doubly restrict the field of permissible action by the national government concerning religion, but they cannot conflict. Again, it is impossible for two overlapping negatives on the government's power to conflict. 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 that our Muslim fourth-grader may now opt out of the prayer while her classmates continue the daily recitation. 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. Both clauses are violated by the required prayer. So, the two clauses complement each other; they do not conflict.

Finally, assume that a third lawsuit is filed invoking the Free Exercise Clause. 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. There is no right under the Free Exercise Clause to capture the levers of government and put

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499 The proposition that the Federal Congress of 1789 intentionally placed side by side two constitutional clauses that contradict and work against one another is too implausible to take seriously.

500 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 based on a challenge by a group of Jehovah's Witnesses, who regard the flag salute and pledge as worship of a graven image. Id. at 628–29, 642. The basis of the ruling was the Free Speech Clause, and that clause protects, inter alia, freedom of religious belief. Id. at 634–36, 640–42. The remedy permitted the Jehovah's Witnesses was to remain quietly seated at their desks while the remainder of the students continued the exercise. Id. at 628–30, 642.

501 Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 224–27 (1962) (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 v. Vitale, 370 U.S. 421, 421–24 (1962) (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).
its machinery behind the advancement of Christianity. If the Christian faith is to be advanced, it must rely on the voluntary acts of Christians. In this third lawsuit there is once again no conflict in the clauses. Only the Establishment Clause is applicable.

To be sure, it is possible to transgress both the Establishment and Free Exercise Clause. When 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 the addition of a bill of rights to the 1787 Constitution.

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

The Constitution sets forth a governmental structure which delegates certain enumerated powers and diffuses these powers among the three federal branches. All powers not delegated are presumed to be denied. For clarity, however, the framers expressly disclaim national power with respect to limited subject matters. Article I, Section 9 has a list of such disclaimers. The vesting of rights in individuals (including groups of individuals) also works to deny government power. That is, the government has no legitimate power to violate a person’s rights. But the 1787 Constitution and the 1789–91 Bill of Rights were designed to restrain only the national government, not the private sector. We call this the “government action” doctrine.

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. However, there is frequently 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.504

502 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 its beliefs.”).

503 To be sure, a church may not capture the state or an office thereof and put the civil power to the service of the church. In such an event, there is state action. The state action is in the government permitting itself to be captured by the church and pressed into her service. See, e.g., Larkin v. Grendel’s Den, Inc., 459 U.S. 116, 116 (1982) (holding that an ordinance granting local churches veto power over issuance of a liquor license to a nearby tavern violates the Establishment Clause).

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 careless thinking usually issues from the Enlightenment concern with the manner by which religion can divide political debates along religious lines and have other disabling effects on republican 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 restraints 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 official sponsorship of speech with explicitly religious content is in many instances prohibited by the Establishment Clause. The Free Speech Clause does not, of course, protect speech attributable to the government. The government has no constitutional rights; it only has constitutional powers and duties. Rights are to protect people from the government, not the other way around. Depending on the

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506 See, e.g., BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980) (maintaining that citizens and officials in a liberal democracy should avoid religious arguments to undergird policy judgments and limit themselves to methods of factual determination accessible to the general public); see also JOHN RAWLS, A THEORY OF JUSTICE (1971). The acceptance of Rawls' theory necessarily would exclude religious percepts from consideration within the public sphere of debate. A proposition that public discourse in which citizens refrained from bringing particular religious beliefs into the marketplace of ideas is a world that would have been rejected by the Americans of 1787–1791.

507 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 v. Summum, 555 U.S. 460 (2009).

508 One also has to be mindful of the difference between the government's sponsorship of religion qua religion and the government's sponsorship of religious freedom. See supra Part V.C.

facts, however, 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*, 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.

The Supreme Court took a wrong turn, however, with the “government action” doctrine in *Widmar v. Vincent*. *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 as well as the state constitution. The Court, relying on a long line of precedent that prohibited the government from discriminating in providing 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.

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 exclusion of 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. Once again, this is logically impossible: two overlapping denials of government power—speech and no-establishment—can complement each other but they cannot conflict. What the *Widmar* Court should

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51 Id. at 315–17.
512 454 U.S. 263 (1981). One could attribute this slip to an earlier case in which 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.
514 Id. at 265–67, 275–76.
515 Id. at 276–77.
516 Id. at 270–75. The Court explained: “Neither do we reach the questions 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.” Id. at 273 n.13.
517 To further illustrate the folly in the Supreme Court’s thinking, one might crowd the Court with this line of inquiry: When two First Amendment provisions conflict, why do the justices choose no-establishment to override free speech and free exercise rather than vice
have said—had it been attentive to the “government action” doctrine—is that 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.\(^{518}\) 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.

Failing 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*,\(^{519}\) 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.\(^{520}\) As the majority pointed out, the same elementary school students might get the distinct impression that school authorities were hostile to Christianity (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.\(^{521}\) It makes no sense to hold that one private speaker loses 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 is a private speaker (a matter agreed to by all parties), then the Establishment Clause simply cannot apply to limit 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,\(^{522}\) but the justices have made the cases seem far more

\(^{518}\) See id. at 273.
\(^{519}\) 533 U.S. 98 (2001).
\(^{520}\) Id. at 141–44 (Souter, J., dissenting).
\(^{521}\) Id. at 118–19.
\(^{522}\) 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 a state university denying to a student religious newspaper equal access to a limited forum.
difficult than was 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.

VII. EARLY APPLICATIONS OF THE ESTABLISHMENT CLAUSE
BY FEDERAL OFFICIALS

This Part briefly examines how the first generation of federal officials who were bound by the Establishment Clause applied its strictures. In cases where the text is ambiguous, their behavior may be of some guidance with respect to the clause's original meaning. We have previously looked at the plain text of the Establishment Clause, as well as 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 national government. We have noted how the text of the clause does not prohibit making a law about religion but, more narrowly, prohibits making a law about "an establishment" of religion. The search for original meaning still leaves us with a major question: What was meant by "establishment" when drafting the constitution in 1789-1791?

At a minimum, "establishment" meant that the new national government could not establish a single national church or combination of churches. But it almost certainly meant more than this 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

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523 See supra Part IV (drafts in Congress) and Part V (plain text).
524 See supra notes 238–239, 305–306 and accompanying text.
together comprise a fully developed establishment of religion, such as the Church of England well known to the founders.\textsuperscript{525}

To learn more about what was meant by "establishment," we examine here how the actions of the first generation of national officials, including presidents and Congresses of the early republic, applied the restraints of the Establishment Clause. 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 because the actions of early presidents and Congresses are inconsistent. Whatever the definition of "establishment," reliance on the contradictory actions of these early officials ends up proving too much or too little. Indeed, some of these actions appear to unabashedly confuse the role of the nation-state with the role of the church. When trying to manage a story as large as the new American republic, it is well to remember that the disciplined scholar will not go floating in the eddies and tributaries of that which are a part of every big river, winding in unexpected directions, but he will stay to the main channel that inexorably bends to the south and to the sea.

A threshold question is which 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 have no bearing.\textsuperscript{526} Second, it is best to confine

\textsuperscript{525} See supra note 185. 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. See Daniel L. Dreisbach, George Mason’s Pursuit of Religious Liberty in Revolutionary Virginia, 108 VA. MAG. HIST. & BIOGRAPHY 5, 19 n.46 (2000) (quoting The Petition of Sundry Inhabitants of Prince Edward County dated October 11, 1776, which was a stronghold of Presbyterian dissenters in Virginia). The petition calls for, inter alia, the repeal of the licensure of dissenting clergy and the state approval of meeting houses for worship by nonconformists. This petition and several other petitions opposing the Anglican establishment in Virginia are reproduced in CHARLES G. JAMES, DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA 68–75 (1900). During the period from late 1776 through 1778, dissenters continued to petition the Virginia General Assembly against various regulations, such as the restriction on clergy able to perform marriages. THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787, at 38–45 (1977); see JAMES, supra, at 225–27 (reproducing such a petition of April 25, 1777, from the Hanover Presbytery). A Baptist petition dated October 16, 1780, complained of various discriminations including that their ministers could not perform marriages. The bar on performing marriages was finally lifted by legislation. JAMES, supra, at 219–21 (reproducing petition and repealing legislation); see also CURRY, supra note 7, at 135, 140.

\textsuperscript{526} 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 quite capable of refraining from using the law
the 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 factions over the clause’s application. When officials were inattentive, their actions are of reduced interpretative value. Third, public remarks of general religious content (whether oral or written) by presidents are best tied to the person and beliefs of the particular president rather than said to be controlled by the stricures of the Establishment Clause. \(^{527}\) 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 refer to God in speeches) without the content being understood as a legal mandate or the speech being attributed to the government. \(^{528}\) 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.

Another threshold query is into the basis for agreement by the disestablishmentarians in the states on which the *Everson* Court relied. Certainly the religious disestablishmentarians believed that government aid to a church was corrupting organized religion and thus bad for religious freedom. \(^{529}\) They argued for any formal relationship to be severed and for all churches to become

to impose their religion because to do so is contrary to their belief in the protection of conscience. Moreover, officials who are not religious are quite capable of seeking to advance religion because to do so will advance some secular goal. Further, the reality is that many prominent figures such as James Madison, Thomas Jefferson, George Washington, and John Adams, and many in the early Congresses disagreed in material respects when it came to church-government relations, and none of these individuals were consistent during his own public life on religious freedom questions. See *Vincent Phillip Muñoz, God and the Founders: Madison, Washington, and Jefferson* 4 (2009) (explaining that it 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 influence on their representatives 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 clash settled for less because it was the best he could get under the circumstances.

\(^{527}\) See *Waldman, supra* note 26, at 159–81.

\(^{528}\) “[W]hen public 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, 724 (2005) (Stevens, J., dissenting).

\(^{529}\) See *Esbeck, Dissent and Disestablishment, supra* note 8, at 1448–1540; *Esbeck, Virginia Disestablishment, supra* note 5, at 77–78, 84, 92–96.
But many of these same disestablishmentarians continued to believe that a republic could be sustained only if citizens were self-disciplined and virtuous. And they continued to believe that religion had an indispensable role in forming a virtuous citizen, and indeed that Protestant Christianity was best to unify and maintain the mores of the American political culture. Accordingly, while disestablishment of a church was good for religious freedom, many disestablishmentarians thought it would be disastrous to separate the private religious teaching of those virtues required of “we the people” comprising and governing a popular republic. Finally, looking back over 220 years, it is sometimes difficult to differentiate when an official’s act was seemingly in contradiction to the church-state severance brought about by disestablishment as opposed to an official’s act in support of Protestantism’s unofficial role in the teaching of civic virtues in aid of republican government.

With these threshold parameters in mind, we now take up specific acts of national officials. In September 1789, the House provided for the appointment of chaplains and set an annual salary of $500 paid out of the U.S. treasury. 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, although in the years following

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530 Esbeck, Virginia Disestablishment, supra note 5, at 61, 92–96; see also Esbeck, Dissent and Disestablishment, supra note 8, at 1395–96.
531 Esbeck, Dissent and Disestablishment, supra note 8, at 1431; Esbeck, Virginia Disestablishment, supra note 5, at 59.
532 See Esbeck, Dissent and Disestablishment, supra note 8, at 1431; Esbeck, Virginia Disestablishment, supra note 5, at 59.
533 See Esbeck, Dissent and Disestablishment, supra note 8, at 1396.
535 See U.S. CONST. art. I, §5, cl. 2.
536 A committee appointed for the purpose “brought in a bill for allowing a compensation to the members of both Houses, and to their respective officers.” 1 ANNALS OF CONG. 701 (Aug. 4, 1789) (Joseph Gales ed., 1834); see id. at 701–14 (Aug. 4–7, 1789). While there was disagreement on the amount to be paid to members of Congress and certain officers, there was no debate or objection to the compensation of chaplains. Id. at 701–14. On September 11, 1789, without objection, an act passed “allowing Compensation to the Members of the Senate and House of Representatives of the United States, and to the Officers of both Houses.” Id. at 926. This act included a salary for the chaplains.
his presidency James Madison wrote in an unpublished document that he thought the practice unconstitutional.\(^{537}\)

President Washington issued a Thanksgiving Day Proclamation.\(^{538}\) The House had passed a resolution urging Washington to issue the proclamation on September 25, 1789. This was one day after the House adopted the final draft of what became the Bill of Rights for ratification by the states.\(^{539}\) While the Establishment Clause was not yet law, one Antifederalist did object to the proclamation as being religious and thus not within the authority of Congress.\(^{540}\) Madison was a member of the House committee that reported out the resolution but he remained silent.\(^{541}\) President Adams also issued similar proclamations.\(^{542}\) President Jefferson thought such proclamations unconstitutional and refused to issue them.\(^{543}\) President Madison sought to follow Jefferson’s example, but during the War of 1812, Congress requested that Madison issue such proclamations. He issued four proclamations, but Madison was careful to note he was only complying with Congress’ requests and he phrased the documents as recommendatory only with respect to any actual religious observance by citizens.\(^{544}\) Once again, in his later years Madison wrote that he thought the practice unconstitutional.\(^{545}\)

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 Tenth Amendments.\(^{546}\) Jefferson took pains to note that fasting and prayer, being religious observances, were practices within the province of each church and thus was not to be the object of intermeddling by the government. Jefferson thus couched his abstinence in terms of safeguarding the autonomy of churches.

\(^{537}\) Notes and Documents: Madison’s “Detached Memoranda,” 3 WM. & MARY Q. 534, 559 (1946) [hereinafter Detached Memoranda]. Madison went on to say he also opposed 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.

\(^{538}\) CORD, supra note 534, at 51.

\(^{539}\) 1 ANNALS OF CONG. 948 (Sept. 24, 1789).

\(^{540}\) Id. at 950 (Thomas Tudor Tucker of South Carolina objecting).

\(^{541}\) From Madison’s perspective, the final no-establishment text was better than the language he had started with in June 1789. Perhaps Madison maintained his silence so as to not undo this favorable development, but we simply do not know.

\(^{542}\) HUTSON, supra note 35, at 81–82.

\(^{543}\) A treatise author and contemporary of these events during the Jefferson presidency agreed with Jefferson that the Proclamations issued by Washington and Adams were contrary to the Establishment Clause. See 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES app. at 347 n.* (The Lawbook Exchange Ltd., 1996) (1803). Some contemporaries sought to explain away the conflict by arguing the proclamations were merely advisory, but Tucker notes that the proclamations were issued under the seal of the United States and attested to by the Secretary of State. Id.

\(^{544}\) CORD, supra note 534, at 31.

\(^{545}\) Detached Memoranda, supra note 537, at 560–62.

\(^{546}\) CORD, supra note 534, at 40.
In February 1811, President Madison vetoed a bill incorporating the Protestant Episcopal Church of Alexandria, then in the District of Columbia. In the absence of the now common statutory acts under which corporations are formed by administrative action, 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 was a part. The details of this bill, however, would require a congressional amendment to permit compliance with the instructions of the central denomination of the local 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 thus sensitive to church autonomy and also careful 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. Madison’s veto message said that transfer of a parcel of land with no apparent 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 should be by the payment of fair consideration that turned 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. 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. Extensions of the act were passed during the Jefferson Administration. In October 1803, President Jefferson asked the Senate to ratify a treaty with the Kaskaskia tribe. In return for a transfer

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547 Id. at 33.
548 Id. at 34.
549 Id. at 58.
550 Act of June 1, 1796, ch. 46, 1 Stat. 490.
551 CORD, supra note 534, at 42–43.
552 Id. at 44–45.
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.\textsuperscript{553} The Senate ratified the treaty in December 1803.\textsuperscript{554} In January 1819, President Monroe negotiated a treaty with the Wyandot Indian tribe which included a transfer of federal land for the erection of a Catholic church.\textsuperscript{555} Later presidents provided federal funds to build churches on Native American land, as well as to provide aid to educate Native American children through Christian mission societies.\textsuperscript{556} None of these treaties and other dealings with Indian tribes was 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 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 interpretation.

There are various scholarly attempts to explain the uneven and inconsistent actions by early national officials.\textsuperscript{557} 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 generally.\textsuperscript{558} Often this distinction will match 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 a church building or funding a Catholic priest in performing his priestly duties in a church.\textsuperscript{559} Professor Douglas Laycock suggests explaining these official actions by drawing a line at financial support for religion.\textsuperscript{560} In his view the

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\item \textsuperscript{553} Id. at 38.
\item \textsuperscript{554} Id. at 38–39.
\item \textsuperscript{555} Id. at 59.
\item \textsuperscript{556} Id. at 59–60, 63–73.
\item \textsuperscript{557} See Esbeck, Establishment Clause as Structural, supra note 404, at 18–21 (collecting scholarly authorities).
\item \textsuperscript{558} Steven D. Smith, The Establishment Clause and the “Problem of the Church” 13–14 (Univ. of San Diego Sch. of Law, Legal Studies Research Paper Series, Research Paper No. 09-024, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1444606. Smith uses this distinction to permit government speech that has historically acknowledged God and endorsed religion in general. Id. at 17–18. However, his distinction would also allow such official actions as public school prayer or blasphemy laws.
\item \textsuperscript{559} These actions cannot be explained away as government funding for a religious organization that is not a church to provide education or a social service. On the other hand, these are not actions that 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.
\item \textsuperscript{560} Laycock, supra note 224, at 913–19.
\end{itemize}
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 using a religious means (inculcating Christian morality) to achieving a secular end ("civilizing" the tribes). But the overt use of religion as an instrument of civic policy has never been thought to circumvent the no-establishment principle.\(^{561}\)

Context can be helpful. Disestablishment in the South came much earlier than in Puritan New England, and New England establishments were still strong in the 1790s and beyond.\(^{562}\) Accordingly, nonconformity was a live controversy in New England in the late eighteenth and early nineteenth centuries and Congregational Church establishments were a cause of major agitation, whereas churches in the middle and southern states had moved beyond the question of disestablishment to focus on events that later came to be called the Second Great Awakening.\(^{563}\) Additionally, Federalists were strongest in New England whereas Republicans had their base in the South.\(^{565}\) Thus, some of the variance between an original understanding of the Establishment Clause and early actions by national officials can be explained by looking to see if the clause was being applied by an official sympathetic to the Federalist or the Republican Party.\(^{566}\) Republicans had a greater sensitivity to church-government separation than did New England Federalists.

Also helpful—at least when it comes to the government's adoption of certain religious expression—is to acknowledge that the founding generation was steeped in a pervasive culture of Protestant Christianity, and that officials in the new republic were sometimes indiscriminate in mixing their Protestant mores with the need for civic unity.\(^{567}\) As Professor Philip Hamburger has pointed out, Christian disestablishmentarians initially avoided terminology like "separation of church and state" because they feared the term might be misunderstood as preventing religion from informally instilling the civic virtues needed to sustain a republic.\(^{568}\) This explains the government's adoption of religious events, symbols, and other expressions such as Thanksgiving Day, but it does not satisfactorily explain monetary support for Protestant missionary activities to Native Americans. Moreover, some of this missionary support was for Catholic missions as well.

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\(^{561}\) 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.

\(^{562}\) Esbeck, Dissent and Disestablishment, supra note 8, at 1501–55.

\(^{563}\) Id. at 1457–1501.

\(^{564}\) Id. at 1454–56, 1540–55.

\(^{565}\) LARSON, supra note 158, at 31 (showing that in the 1796 election Adams and the Federalists held New England, whereas Jefferson and the Republicans held the South and West).

\(^{566}\) 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.

\(^{567}\) See Laycock, supra note 224, at 918.

\(^{568}\) See HAMBURGER, supra note 6, at 107, 110, 193.
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 power to regulate territorial affairs and to oversee Indian tribes. In the new republic, national officials generally took more care to not interfere with the states and how each state dealt with its church-state affairs. That same federalist tendency would not apply out in the territories or in dealing with tribal Native Americans. Professor Akhil Amar suggests 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. However, once the Bill of Rights was ratified the national government’s enumerated powers, whether expressed or implied, were subject to the full restraint of the Establishment Clause. The plain text makes that conclusion inescapable. So any assertion that national action involving the territories or Indian tribes was less subject to the clause is illusory.

In the final analysis, the record concerning official acts in the early republic fails to clarify the original meaning of “establishment” in the First Amendment. Most difficult to reconcile with our present understanding of the clause are the missionary 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 by the two political branches teaches us about original meaning is not at all conclusive.

With respect to official actions bearing on church-government relations by the judicial branch, we have little information. In the early republic, the judiciary was a nonplayer with respect to giving meaning to the Establishment Clause. Indeed, for over a century the Supreme Court ignored the clause. It was not that cases involving religious freedom did not come before the Court in the nation’s first 110 years. Rather, the Court, for reasons of its own, resolved those cases under other provisions of the Constitution or by resort to federal common law.

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569 “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.” U.S. CONST. art. IV, § 3, cl. 2.
570 “The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes . . . .” Id. art. I, § 8, cl. 1, 3.
571 See AMAR, supra note 321, at 247–49.
572 See supra notes 458–460, and accompanying text.
573 The first Supreme Court case to explicitly apply the Establishment Clause (rather than merely 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 also 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).
VIII. Conclusion

The record of the debate by the First Federal Congress, along with the final text of the clause, demonstrate that neither the House nor the Senate had in mind either nonpreferentialism or specific federalism, nor did the First Congress limit the Establishment Clause to instances where liberty of conscience alone is violated. Careful attention to the text and original understanding cannot answer all contemporary questions with respect to the correct application of the Establishment Clause, but the discipline does eliminate all three of these false paths. While the text and original understanding may not reveal clearly the meaning of “establishment,” they do much to discredit misguided theories concerning what the religion clauses supposedly mean. Avoiding these wrong turns will go far to remedy the uneven character of the much maligned Establishment Clause jurisprudence in our federal courts.

The focus in the First Federal Congress was on the scope of the power to deny Congress with respect to “an establishment” of religion. The plain text of the clause permits congressional legislation to touch on religion generally, provided that the government does not legislate more narrowly on a matter about “an establishment” of religion. One clear implication of this 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. Further, the drafters wrote the amendment that became the Bill of Rights to clarify those powers the national government was being denied. Accordingly, the Free Exercise and Establishment Clauses are negatives on government power. Both thereby expand religious freedom. 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. Such balancing leaves in the

Supreme Court’s religious freedom cases up to World War II); 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 (2001).

It is possible that the Supreme Court’s early avoidance of the Establishment Clause was partly due to the Federalist Party leanings of Chief Justice John Marshall.

See generally HAMBURGER, supra note 6 (describing political action in the executive and legislative branches in the nineteenth century rather than the deployment of disestablishmentarian principles by the judicial branch).

See supra notes 171, 184–185, 224, 275, 279–283, 297–300 and accompanying text.

See supra notes 173, 275, 297–300, 309–331 and accompanying text; supra Part IV.H.

See supra Part V.B.

See supra Part V.C.

Id.


Id.
judiciary far too much unguided discretion that was never conferred. When the text and its intent are so clear, the Court is without authority to arrogate the power to balance. Balancing the clauses also fails to recognize that the Establishment Clause is a restraint only on the government, not the private sector.584 Both clauses, each in their own way, are protective of voluntary religious observance.

Finally, the text demonstrates that the Free Exercise Clause sought to acknowledge a pre-existing right, whereas the Establishment Clause imposed an original structural limit on the federal government’s power.585 This understanding not only harmonizes the clauses, but also confirms that the Establishment Clause was intended to define the jurisdictional limits between government and organized religion. And, in the main, that is how it has been applied by the post-Everson Supreme Court.586

As a structural or power-limiting clause, the modern Establishment Clause polices the boundary between church and government. The scope of the limitations this clause imposes is broader than just a ban on establishing a national church or combination of churches.587 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 1789.588 It is, after all, “a constitution we are expounding.”589

The behavior of the legislative and executive branches in the period shortly after ratification of the First Amendment was mixed and inconsistent.590 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 the historical record by looking only at those actions in which national officials actually considered the Establishment Clause as limiting national power. 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

584 See supra Part VI.C.
585 See supra Part V.A.
586 See generally Esbeck, Establishment Clause as Structural; supra note 404.
587 See supra notes 238–239, 305–306 and accompanying text.
588 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 v. Bd. of Educ., 330 U.S. 1, 14–15)); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 236 (1963) (Brennan, J., concurring) (stating that it was proper to inquire “whether the practices . . . challenged threaten those consequences which the Framers deeply feared”).
589 McCulloch v. Maryland, 17 U.S. 316, 407 (1819). By way of example, the “sorts of evils” which brought down the Virginia establishment are systematically cataloged in Esbeck, Virginia Disestablishment, supra note 5, at 92–98.
590 See supra Part VII.
Federalists, where local church establishments remained well into the nineteenth century.

In popular vernacular, the Establishment Clause is now about the separation of church and state. Unlike revolutionary France, in America that separation has never meant a separation of religion from public life and political debate. Rather, the principle has its roots in the Western legal tradition dating back to the fourth century. 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 has shifted through the centuries, the existence of this line has not been a subject of doubt. This separation has proven to be good for both the body politic and for organized religion. It liberates the civil polity to practice religion (or not) as citizens see fit and it secures the integrity of religious organizations by preventing government interference in the internal matters of organized religion. Accordingly, citizen support for religion is a voluntary act.

In America, disestablishment took place from 1776 to 1833 at the state level, not at the national level. So the modern Supreme Court in *Everson* looked to the dual-authority pattern as it developed during Virginia’s disestablishment and that of other states to give substantive meaning to “an establishment” of religion. *Everson*, of course, also extended the Establishment Clause to apply to and bind the states and no longer just the national government. Whether that discrete act of “selective incorporation” was properly within the authority of the Supreme Court, I leave for the reader to decide. 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. While *Everson* used the rhetoric of the Jeffersonian “wall of separation,” the metaphor was too vague to really guide the Court in arriving at its decisions. Accordingly, given that there never was a national disestablishment experience, the post-*Everson* Court acted properly when it looked to the states’ experiences to inform its knowledge of the sorts of evils disestablishment was meant to remedy.

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591 See Esbeck, *Dissent and Disestablishment*, supra note 8, at 1391–1448; see also supra note 432 (collecting authorities).
592 Esbeck, *Dissent and Disestablishment*, supra note 8, at 1448–1540.
593 See supra notes 4–5 and accompanying text.
594 See supra note 457 and accompanying text.