THE ORIGINAL MEANING OF THE ESTABLISHMENT CLAUSE

Robert G. Natelson*

"I appeal to the gentlemen who have heard the voice of their country."

James Madison,
pleading for congressional adoption of the Bill of Rights[1]

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* Professor of Law, University of Montana; Senior Fellow, the Goldwater Institute; Senior Fellow in Constitutional Jurisprudence, the Independence Institute; President, Montana Citizens for the Rule of Law.

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[1] 1 ANNALS OF CONG. 775 (Joseph Gales ed., 1834).

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[2]REPEATEDLY REFERENCED WORKS: For convenience, this note collects alphabetically the secondary sources cited more than once in this Article. The editions and short form citations used are as follows:

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CHESTER JAMES ANTIEAU ET. AL., FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES (1964) [hereinafter ANTIEAU];

ERWIN CHEMERINKSY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (1997) [hereinafter CHEMERINSKY];

ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1988) [hereinafter CORD];

CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS];

DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2002) [hereinafter DREISBACH];

JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (5 vols; 1941 ed. inserted in 2 vols.) (2d ed. 1836) [hereinafter ELLIOT'S DEBATES];

MAX FARRAND (ED.), THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1937) (4 vols.) [hereinafter FARRAND];

Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002) [hereinafter Feldman];

THE FEDERALIST (George W. Carey & James McClellan eds., 2001) [hereinafter THE FEDERALIST];

PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2004) [hereinafter HAMBURGER];

WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN (1716);

MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965) [hereinafter HOWE];

ISAAC KRAMNICK & R. LAWRENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS (1996) [hereinafter KRAMNICK & MOORE];

Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839 (1986) [hereinafter Kurland];

Kurt L. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1996) [hereinafter Lash];

INTRODUCTION

On January 3, 2005, atheist Michael Newdow filed a complaint in the United States District Court for the Eastern District of California asking that the court enforce the Establishment Clause of the First Amendment[3] by ordering Congress to remove the words "under God" from the Pledge of Allegiance.[4] Various plaintiffs joined Newdow in an effort to cure standing problems that had induced the Supreme Court to deny his claim in an earlier action.[5]

LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1994) [hereinafter LEVY];

Leonard W. Levy, *Bill of Rights*, *in* ESSAYS ON THE MAKING OF THE CONSTITUTION (Leonard W. Levy ed., 1987) [hereinafter Levy, *Bill of Rights*];

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen et al. eds., 1976) (multiple vols. projected; not all completed) [hereinafter DOCUMENTARY HISTORY];

Michael W. McConnell, *The Origins and Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) [hereinafter McConnell];

FORREST MCDONALD, NOVUS ORDO SECLORUM (1985) [hereinafter MCDONALD];

Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 IDAHO L. REV. 489, (2003) [hereinafter Natelson, *Statutory Retroactivity*];

Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KANS. L. REV. 1 (2003) [hereinafter Natelson, *General Welfare*];

Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243 (2004) [hereinafter Natelson, *Necessary and Proper*];

Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004) [hereinafter Natelson, *Public Trust*];

JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (7th ed. 2004) [hereinafter NOWAK & ROTUNDA];

STEPHEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995) [hereinafter SMITH, FOREORDAINED FAILURE];

THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY (Merrill D. Peterson & Robert C. Vaughn eds., 1988) [hereinafter VIRGINIA STATUTE].

[3]U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

[4]*See* Original Complaint at 33, Newdow v. United States Cong., No. 2:05-CV-00017-LKK-DAD (E.D. Cal. Jan. 3, 2005), *available at* http://www.restorethepledge.com/litigation/ pledge/docs/2005-01-03%20Original%20Complaint.pdf (last visited Sept. 17, 2005).

[5]Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004), *reh'g denied*, 125 S. Ct. 21 (2004).

The advance announcement of Newdow's lawsuit was one more event in a contentious 2004–2005 holiday season marked by charges that secularists were trying to push Christmas out of public life and by countercharges that Christians were trying to push God down dissenters' throats.[6] Within three months, the Supreme Court was hearing oral arguments over the question of whether copies of the Ten Commandments should be removed from state buildings in Kentucky[7] and Texas,[8] a point on which the Court's justices found themselves severely divided.[9]

Controversy can be stoked by the absence of clear rules,[10] and one thing everyone agrees on is that much of the controversy over the Establishment Clause arises because the Supreme Court's interpretation of the Clause has not been clear.[11] Professor A.E. Dick Howard has called the Court's course of decision a "serpentine wall."[12] There are, for example, at least three separate approaches to Establishment Clause adjudication in active use on the Court —

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[6]*See, e.g.*, Stephen Bainbridge, Christmas in the Public Square, http://www.professorbainbridge.com/2004/12/christmas_in_th.html (Dec. 17, 2004) (last visited Aug. 24, 2005) ("It is Christmastime, and what would Christmas be without the usual platoon of annoying pettifoggers rising annually to strip Christmas of any Christian content?") (quoting Charles Krauthammer, *Just Leave Christmas Alone*, WASH. POST., Dec. 17, 2004, at A33). The 2005–2006 holiday season proved contentious as well, and for similar reasons. *See, e.g.*, *Falwell fighting for holy holiday: He'll sue, boycott groups he sees as muzzling Christmas*, SAN FRAN. CHRON., Nov. 20, 2005, at A1.

[7]ACLU of Ky. v. McCreary County, 354 F.3d 438 (6th Cir. 2003), *reh'g denied*, 361 F.3d 938 (6th Cir.), *aff'd*, 125 S. Ct. 2722 (2005).

[8]Van Orden v. Perry, 351 F.3d 373 (5th Cir. 2003), *aff'd*, 125 S. Ct. 2854 (2005).

[9]This is evidenced by the Supreme Court split in *McCreary County v. American Civil Liberties Union of Kentucky*, and *Van Orden v. Perry*. In *Van Orden v. Perry*, the Court upheld a display on the state capitol grounds in Texas, while the Court in *McCreary County* struck down the display of the Commandments on the walls of the two courthouses. In both cases, Chief Justice Rehnquist along with Justices Scalia, Kennedy, and Thomas voted to uphold the displays, while Justices O'Connor, Souter, and Ginsberg voted against the displays. Justice Breyer supplied the swing vote, upholding the Texas display, while disallowing the Kentucky display.

[10]*See* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 578 (1988) (repeating the [not invariably true] observation that "[W]e establish a system of clear entitlements so that we can barter and trade for what we want instead of fighting.").

[11]*See* SMITH, FOREORDAINED FAILURE, *supra* note 2, at 3–5 (describing commentators' dismay at the course of adjudication on the subject); *see also* JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 1–6 (1995) (detailing the difficulties with history in the Religion Clauses).

[12]A. E. Dick Howard, *The Supreme Court and the Serpentine Wall*, in VIRGINIA STATUTE, *supra* note 2, at 313.

"strict separation," "neutrality," and "accommodation" — and any or all of these approaches can appear in the same case.[13]

Quite properly, those seeking the meaning of the Establishment Clause have looked to history for answers.[14] Yet several have pronounced the historical record hopelessly confused.[15] For example, the debate over the Bill of Rights in the First Congress appears, when not read in context, inconclusive.[16] The records of state ratification of the Bill of Rights are scanty.[17] Therefore, both commentators[18] and the Supreme Court[19] have turned to the church-state

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[13]*See* CHEMERINSKY, *supra* note 2, at 977–84 (summarizing the views and illustrating them with three different opinions in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989)). Based on the Establishment Clause's "original meaning" as threshed out by the findings of this Article, none of these approaches is correct!

[14]The tendency of all sides to do so, in this more than in some other constitutional areas, is noted in Robert P. George, *Protecting Religious Liberty in the Next Millennium: Should We Amend the Religion Clauses of the Constitution?*, 32 LOY. L.A. L. REV. 27, 28 (1998); *see also* CHEMERINSKY, *supra* note 2, at 969–71; NOWAK & ROTUNDA, *supra* note 2, at 1411.

[15]*E.g.*, NOWAK & ROTUNDA, *supra* note 2, at 1411.

[16]Wallace v. Jaffree, 472 U.S. 38, 95 (1985) (Rehnquist, J., dissenting) ("The entire debate on the Religion Clauses is contained in two full columns of the 'Annals,' and does not seem particularly illuminating.").

[17]The records are summarized in ANTIEAU, *supra* note 2, at 143–58.

[18]*See, e.g.*, Thomas E. Buckley, S.J., *The Political Theology of Thomas Jefferson*, *in* VIRGINIA STATUTE, *supra* note 2, at 75; Lance Banning, *James Madison, the Statute for Religious Freedom, and the Crisis of Republican Convictions*, *in* VIRGINIA STATUTE, *supra* note 2 at 109; KRAMNICK & MOORE, *supra* note 2, at 88–130 (discussing Jefferson's views at length); Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 43, 61 (2004) (discussing Madison's and Jefferson's personal notions of the relationship between religion and state). Historian Leonard W. Levy discusses Madison's views at length — and then admits, correctly, that the First Amendment does not embody Madison's personal views. LEVY, *supra* note 2, at 119–33. *Cf. infra* notes 67, 73–75, and 287 and accompanying text.

[19]*See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968):

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. *Id.* at 103–04 (internal citation omitted). *See also* Valley

philosophies of Thomas Jefferson and James Madison. The premise here is that the philosophies of these two men are key to interpreting the religion clauses, particularly because of their role in the Virginia disestablishment battle.[20] But the premise is wildly inaccurate.[21] There were hundreds of actors from all over the country involved in the crafting and adoption of the First Amendment. It is safe to say that most did not draw their inspiration from either the personal opinions of Jefferson and Madison, nor from a Virginia disestablishment fight most probably had never heard of.

Indeed, Jefferson's immediate role in the adoption of the First Amendment was rather insignificant. He had served as minister to France since 1785 and did not return to America until November 23, 1789, after the Bill of Rights had been approved by Congress and sent to the states for ratification.[22] Even if he had played a more active part, Jefferson's freethinking outlook on religion (whether classified as deist or Unitarian)[23] was hardly representative of those who debated and ratified that Amendment. Madison, more mainstream than Jefferson and

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Forge Christian Coll. v. Ams. United for Separation of Church and State Inc., 454 U.S. 464, 503 (1982) (Brennan, J., dissenting) (stating that "Madison and Jefferson played such leading roles in the events leading to the adoption of the First Amendment"); Everson v. Bd. of Educ., 330 U.S. 1, 11–13 (1947), *reh'g denied*, 330 U.S. 855 (1947); Reynolds v. United States, 98 U.S. 145, 162–64 (1876) (discussing Jefferson, Madison, the Virginia disestablishment battle, and quoting the "wall of separation" language).

[20]*See, e.g.*, Merrill D. Peterson & Robert C. Vaughn, Editor's Preface to VIRGINIA STATUTE, *supra* note 2, at vii–xi.

[21]*See* James J. Knicely, *"First Principles" and the Misplacement of the "Wall of Separation": Too Late in the Day for a Cure?*, 52 DRAKE L. REV. 171 (2004):

> Everson's solemn invocation of Jefferson and Madison, and its commanding pronouncements from the Virginia disestablishment battle — portrayed as the view subscribed to by most early Americans — established a powerful doctrinal engine for a completely new regime of law in all of the states. The slow but progressive revelation of its incomplete and distorted rendition of that history has produced, however, not only a doctrine in need of justification, but a body of law with underpinnings that cannot long withstand the absence of a legitimate rationale for decision. *Id.* at 205 (internal citations omitted).

[22]*See* B.L. RAYNER, LIFE OF THOMAS JEFFERSON 213, 265 (1834). Justice Rehnquist also made this point in his dissent in *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

[23]Jefferson "denied the divinity of Christ and the authority of scripture" and expressed strong support for Unitarianism. McConnell, *supra* note 2, at 1449–50. *But see* Thomas E. Buckley, S.J., *The Political Theology of Thomas Jefferson*, *in* VIRGINIA STATUTE, *supra* note 2, at 77 (claiming that Jefferson's ideas were not so far out of the mainstream).

therefore more sympathetic to religion,[24] was a far more central figure for our purposes. He introduced the first draft of the Bill of Rights in Congress and shepherded it to approval there. Yet Madison plainly implied on the floor of Congress that the Establishment Clause embodied views other than his own.[25]

All this has sent commentators looking for clues to meaning from developments occurring after — often long after — the Constitution and the Bill of Rights were ratified.[26] After-the-fact evidence is usually fairly weak, however, and the later the evidence, the less its probative value.[27]

Getting the right answer — if it exists — requires that you look in the right place.[28] For all these reasons, I submit that courts and commentators have not, by and large, been looking in the right place.

Let's start with a very basic question: Why was the First Amendment adopted? Answer: Because political realities demanded it. The crucial political reality of the time was that to secure ratification of the Constitution, the document's proponents, the federalists, had to make a deal, a Gentlemen's Agreement.[29] They cut the deal with moderate antifederalists and fence-sitters in

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[24]McConnell, *supra* note 2, at 1453.

[25]*See infra* notes 67, 73–75, and 287 and accompanying text. The problems with relying on the opinions of Madison and Jefferson are pointed out by a writer whose predictability on such a point does not alter the fact that his analysis is accurate. *See* M.G. "Pat" Robertson, *Squeezing Religion Out of the Public Square — The Supreme Court,* Lemon, *and the Myth of the Secular Society*, 4 WM. & MARY BILL RTS. J. 223, 261–62 (1995).

[26]For example, most of the content in CORD, *supra* note 2, involves nineteenth-century history decades after ratification, *id.* at 59–239. *See also* Leo Pfeffer, *Madison's "Detached Memoranda": Then and Now*, *in* VIRGINIA STATUTE, *supra* note 2, at 283–312 (discussing material written by Madison on church-state relations in old age, at least twenty-eight years after the First Amendment was drafted); Stuart Buck, *The Nineteenth-Century Understanding of the Establishment Clause*, 6 TEX. REV. L. & POL. 399 (2002).

[27]Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitutions' Secret Drafting History*, 91 GEO. L.J. 1113, 1167 (2003) ("Precedents that are removed from the Founding era are less likely to reflect original meaning, especially given intervening events, and some precedents are so far removed as to not reflect original meaning at all, and are therefore inadmissible."). Kesavan and Paulsen argue that precedents up to fifty years after the founding ought to be received. *Id.* at 1168. I'm a little more skeptical.

[28]*Cf.* Kurland, *supra* note 2, at 839 ("The right answer depends on the right question; . . . if I could not find the right answer through my research, I was not supposed to make it up.").

[29]This term for the bargain has been used before, as by the former Chief Justice of the United States. *See* Warren E. Burger, Address Before the Fifth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 119 F.R.D. 45, 80 (1987); *see also* Rachael E. Schwartz, *"Everything Depends on How You Draw the*

order to get the votes they needed at state ratifying conventions. Without this political bargain, the Constitution probably would not have been adopted. Under the terms of the bargain, the federalists committed themselves to addressing, after ratification, certain concerns expressed by antifederalists, several of which involved religion. Specifically, the federalists had to acquiesce to a constitutional amendment to ensure that the federal government would neither "establish" religion nor interfere with free exercise.

The historical record pertaining to the Gentlemen's Agreement is copious. It is comprised of newspaper articles, pamphlets, personal letters, and complete or partial transcripts of most of the state ratifying conventions. These materials document the roles of hundreds of actors (not just Jefferson and Madison) and rather clearly illuminate the final bargain. It should be obvious to legal commentators that if the meaning of a writing (here, the Establishment Clause) is uncertain, one way to resolve the uncertainty may be to examine the transactions that produced the writing.[30] Yet in the case of the Gentlemen's Agreement leading to the Establishment Clause, commentators have tended not to do so.[31]

Lines": An Alternative Interpretation of the Seventh Amendment, 6 SETON HALL CONST. L.J. 599, 628 (1996) (using the term and following an earlier source in doing so).

[30]*E.g.*, E. ALLAN FARNSWORTH, CONTRACTS § 7.10 at 492 (1982) ("The overarching principle of contract interpretation is that the court is free to look to all the relevant circumstances surrounding the transaction. This includes . . . any prior negotiations between them.").

[31]Among the many Establishment Clause commentators — on all sides of the debate over the meaning of the Clause — who omit serious discussion of the 1787–1788 ratification debates are: CORD, *supra* note 2; DREISBACH, *supra* note 2; HOWE, *supra* note 2; KRAMNICK & MOORE, *supra* note 2; LEVY, *supra* note 2; SMITH, FOREORDAINED FAILURE, *supra* note 2; JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 63–64 (2000) (devoting less than a page and a half to the ratification struggle); Veronica C. Abreu, *Muddled Original Understandings of the Establishment Clause: A Comparative Critique of Philip Hamburger's and Noah Feldman's Historical Arguments*, 23 QUINNIPIAC L. REV. 615 (2005); Patrick M. Garry, *Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1 (2005); Douglas Laycock, *"Non-Preferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. (SPECIAL ISSUE) 875 (1986); Gregory C. Sisk, *Stating the Obvious: Protecting Religion for Religion's Sake*, 47 DRAKE L. REV. 45 (1998); Rodney K. Smith, *Getting Off on the Wrong Foot and Back on Again*, 20 WAKE FOREST L. REV. 569 (1984); Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955 (1989); *see also* NOWAK & ROTUNDA, *supra* note 2, at 1411–12 (mentioning several influences on the religion clauses, but not the Constitution's ratification history). Some authors have discussed the ratification debates in an abbreviated way. *See, e.g.*, Kurland, *supra* note 2; Lash, *supra* note 2, at 1089–91 (whose article really is concerned with later history); Henry T. Miller,

One reason may be that some writers are afraid of what they might find there.[32] Or perhaps the allure of the ever-popular Jefferson and Madison has been too strong.[33] An explanation I long thought was sufficient was that most investigators have not had full access to the ratification record until recently. Today, however, even those of us living out in the boonies (I write from Montana) have access to the Internet and its valuable constitutional history web sites.[34] Additionally, we are now blessed with the continuing, although not yet complete, publication of the University of Wisconsin's *Documentary History of the Ratification of the Constitution*.[35] On the other hand, Professor Chester Antieau and his coauthors were able to resort extensively to the constitutional ratification record, and they wrote over forty years ago.[36]

Whatever the reason for the underutilization of ratification material, it appears things may be changing. The last three years have witnessed publication of two impressive Establishment Clause studies making better use of that material. Professor Noah Feldman[37] employs some of it, along with earlier records, to explain the founding generation's free exercise ideology and the emergence of the Establishment Clause from that ideology. Professor Philip Hamburger[38] exploits ratification material to dispute the "Wall of Separation" interpretation of the Establishment Clause. This Article builds on both the Feldman and Hamburger studies.

Comment, *Constitutional Fiction: An Analysis of the Supreme Court's Interpretation Of the Religion Clauses*, 47 LA. L. REV. 169 (1986). In his examination of the Free Exercise Clause, Professor (now Judge) Michael McConnell largely omitted ratification history on the ground that existing "state constitutions provide the most direct evidence of the original understanding" of the Free Exercise Clause. McConnell, *supra* note 2, at 1456. The problem with this assertion, of course, is that the existing state constitutions had been adopted years before and often by other people. Two recent works devote more satisfactory attention to the ratification battle. They are Feldman, *supra* note 2, and HAMBURGER, *supra* note 2, discussed *infra* at various points.

[32]Kurland, *supra* note 2, at 840 ("I dare say that most of the so-called literature in the field of first amendment law — my own included — reflects the advocate with a cause rather than disinterested scholarship.").

[33]There are, of course, innumerable treatments of both men.

[34]Sites maintained by the Constitution Society, http://www.constitution.org, The Avalon Project at Yale Law School, http://www.yale.edu/lawweb/avalon/avalon.htm, and the American Memory site of the Library of Congress, http://memory.loc.gov/ammem/amlaw/lawhome. html, have proven particularly useful.

[35]DOCUMENTARY HISTORY, *supra* note 2.

[36]ANTIEAU, *supra* note 2, at 100–07, 111–22.

[37]Feldman, *supra* note 2.

[38]*See* HAMBURGER, *supra* note 2.

In these pages, I demonstrate how the "religion terms" of the Gentlemen's Agreement clarify the meaning of the Establishment Clause so that persistent interpretive difficulties largely disappear. There is one caveat, however: My deductions of original meaning do not necessarily reflect my personal views of what constitutional rules should be.[39]

I. THE FOUNDERS' GENTLEMEN'S AGREEMENT: WHAT IT WAS AND WHAT IT DID

A. Formation of the Agreement During the Ratification Debates

The federal constitutional convention met in Philadelphia from May until September, 1787. Upon adjourning, the convention sent its proposed Constitution to Congress for transmittal to state legislatures and, ultimately, to popularly-elected state ratifying conventions.[40]

In an early propaganda victory, proponents of the Constitution convinced the public to label them "federalists" and their adversaries "antifederalists."[41] By early January, 1788, federalists had convinced conventions in five states — Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut — to ratify by substantial margins.[42] Thereafter, the opposition stiffened. Antifederalists interposed many objections, of which most derived ultimately from the belief that the Constitution would give far too much power to the central government. Antifederalists predicted that the central government would abuse that power and effectively obliterate the states and oppress the people. They argued against approval of the Constitution until after a new national convention met and adopted substantial changes. Federalists recognized that such a course involved great practical difficulties for the Constitution.[43] Faced with the unpleasant

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[39]For example, I believe that atheists and agnostics should enjoy full civil rights. This, apparently, was not the opinion of many of those who crafted the Gentlemen's Agreement. *See, e.g.*, *infra* Part II.D.

[40]13 DOCUMENTARY HISTORY, *supra* note 2, at xl–xli.

[41]Naturally, antifederalists were piqued at this labeling. *See, e.g.*, ANNALS, *supra* note 2, at 759 (quoting Rep. Elbridge Gerry, a former antifederalist, who complained of this labeling and stated that "[t]heir names then ought not to have been distinguished by federalists and antifederalists, but rats and antirats").

[42]*See* 13 DOCUMENTARY HISTORY, *supra* note 2, at xli (providing the chronology and votes).

[43]*See, e.g.*, 3 ELLIOT'S DEBATES, *supra* note 2, at 618 (recording Madison's comments at the Virginia ratifying convention).

alternatives of quick defeat or protracted defeat, they made a pact with political moderates — the fence-straddlers and tepid antifederalists.

Under the terms of this pact, the federalists made important concessions, and in exchange, the moderates agreed to support the Constitution. These concessions were of three principal kinds.

First, the federalists offered authoritative and reassuring interpretations of worrisome parts of the document. For example, the antifederalists were contending that the Constitution's Ex Post Facto Clauses[44] might invalidate civil legislation, such as that necessary to restructure the public debt. Federalists represented that the Ex Post Facto clauses would apply only to criminal laws.[45] Similarly, antifederalists argued that the General Welfare Clause[46] might be construed as an independent and indefinite grant of national power. Federalists represented — and this seems quaint today[47] — that the General Welfare Clause was a limitation rather than a grant of power.[48]

Second, the federalists reassured moderates that the states would retain wide jurisdiction exclusive of the central government. Antifederalists had been arguing that the Constitution would sweep all but the most trivial concerns into the national sphere. Federalist speakers and authors, therefore, issued lists enumerating specific functions that would remain the exclusive province of state governments. These functions included, *inter alia*, the regulation of real estate

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> Suppose eight states only should ratify, and Virginia should propose certain alterations, as the previous condition of her accession. If they [i.e., other states] should be disposed to accede to her proposition, which is the most favorable conclusion, the difficulty attending it will be immense. Every state which has decided it, must take up the subject again. They must not only have the mortification of acknowledging that they had done wrong, but the difficulty of having a reconsideration of it among the people, and appointing new conventions to deliberate upon it. *Id.*

[44]*See* U.S. CONST. art. I, § 9, cl. 3 ("No ex post facto Law shall be passed."); *id.* § 10, cl. 1 ("No State shall pass any ex post facto Law . . . .").

[45]*See* Natelson, *Statutory Retroactivity*, *supra* note 2, at 493–94.

[46]U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

[47]The General Welfare Clause or so-called "Spending Clause" is, of course, the constitutional justification for much of the modern federal welfare state. *See* South Dakota v. Dole, 483 U.S. 203 (1987) (upholding conditions on grants to states for unenumerated congressional purposes); Helvering v. Davis, 301 U.S. 619 (1937) (upholding the Social Security Act); United States v. Butler, 297 U.S. 1 (1936) (expounding a broad interpretation of the clause).

[48]*See generally* Natelson, *General Welfare*, *supra* note 2.

within state boundaries, governance of agriculture and manufacturing, adjudication of matters between citizens of the same state, and care of the poor.[49]

Third, insofar as the foregoing representations were deemed insufficient, the parties agreed that the Constitution, once ratified, would be amended. At ratifying conventions in Massachusetts, South Carolina, New Hampshire, Virginia, and New York, moderates voted for ratification, and federalists voted to recommend amendments. After ratification, both sides were to work together to secure the needed changes. Moreover, two states — North Carolina and Rhode Island — actually postponed ratification until Congress had approved amendments.[50]

Without this political pact, the Constitution probably would not have come into effect.[51] Even with it, the convention majorities for ratification in Massachusetts, Virginia, New Hampshire, and New York were quite narrow;[52] and without it, North Carolina and Rhode Island would not have ratified either.[53]

In adhering to this bargain, the moderates took a risk. They had no legally enforceable guarantee that, once nine states had ratified and the new government had come into operation, the federalists would fulfill their promise. For that reason, Chief Justice Warren Burger and others have characterized the pact as a "Gentlemen's Agreement,"[54] an agreement enforceable only by the honor of the participants.[55] Fortunately for the country, honor was no small security among statesmen of the founding generation. Its value was expressed in Joseph Addison's *Cato*, the most beloved drama of the age:[56]

> Honour's a sacred tie, the law of kings,
> The noble mind's distinguishing perfection,
> That aids and strengthens virtue where it meets her,

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[49]*See* Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469, 481–88 (2003).

[50]13 DOCUMENTARY HISTORY, *supra* note 2, at xlii.

[51]*See supra* notes 43–50 and *infra* note 60 and accompanying text.

[52]The Constitution was approved in Massachusetts by a vote of 187–168, in Virginia by 89–79, in New York by 30–27, and in New Hampshire by 57–47. 13 DOCUMENTARY HISTORY, *supra* note 2, at xli–xlii.

[53]*See supra* note 50 and accompanying text.

[54]*See supra* note 29.

[55]MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 486 (10th ed. 1999) (defining "gentlemen's agreement" as "an agreement secured only by the honor of the participants").

[56]*See* Forrest McDonald, *Foreward* to ADDISON, CATO *supra* note 2, at viii–x (describing the contemporaneous role of honor and the influence of Addison's *Cato*); *see also* Joseph Addison, *Guardian, No. 161*, *in* ADDISON, CATO, *supra* note 2, at 194–97; MCDONALD, *supra* note 2, at 196–99.

And imitates her actions, where she is not . . . .[57]

B. Execution of the Agreement in Congress

During the public debate over ratification, Madison had opposed a bill of rights.[58] Once the new government was instituted, he found that in order to secure election to Congress, he had to promise he would support one.[59] So on June 8, 1789, he took the floor in the House of Representatives to announce that, despite his earlier opposition to amendments, he was now "bound in honor and in duty"[60] to advocate some. As he proceeded to do so, he found that his most uncompromising opponents were federalists who had no such debt of honor, for they hailed from states like Delaware[61] and Georgia,[62] where adoption of the Constitution had been early, unanimous, and had not required any gentleman to pledge his word. Madison also ran into more qualified foot-dragging from Congressmen representing Connecticut[63] and Maryland,[64] where opposition had not been strong enough to force the federalists to pledge their honor in exchange for victory.

Other authors have provided blow-by-blow descriptions of the congressional debate over the bill of rights.[65] There is no need to do so here. Suffice to say that a fair reading of the congressional proceedings supports the following conclusions.

First, Madison proposed some amendments because he personally thought they would improve the Constitution and others because they were demanded by the Gentlemen's Agreement.[66] However, as contemporaneous sources attest,[67] only a few of his proposals fell into the first category. These included:

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[57]ADDISON, CATO, *supra* note 2, at 50.

[58]*See, e.g.*, 3 ELLIOT'S DEBATES, *supra* note 2, at 330 (speaking at the Virginia ratifying convention). This opposition was noted by Justice Rehnquist in *Wallace v. Jaffree*, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting).

[59]The story is told in McConnell, *supra* note 2, at 1476–79.

[60]ANNALS, *supra* note 2, at 441. *See also* Levy, *Bill of Rights*, *supra* note 2, at 284 (stating that Madison "felt honor-bound to redeem a campaign pledge to his constituents, mindful that the Constitution 'would have been *certainly* rejected' by Virginia without assurances from its supporters to seek subsequent amendments") (emphasis in original).

[61]*Id.* at 446–48, 466–67 (Rep. John Vining).

[62]*Id.* at 441–42, 459–62 (Rep. James Jackson).

[63]*See id.* at 444–45 (Rep. Roger Sherman).

[64]*See id.* at 441 (Rep. William Smith). The vote for ratification in Maryland was lopsided: 63–11. *See* 13 DOCUMENTARY HISTORY, *supra* note 2, at xli.

[65]*See, e.g.*, ANTIEAU, *supra* note 2, at 123–42; LEVY, *supra* note 2, at 88–105.

[66]ANNALS, *supra* note 2, at 450 ("I will not propose a single alteration which I do not wish to see take place, as intrinsically proper in itself, or proper because it is wished for by a respectable number of my fellow-citizens . . . ."); *see also id.* at 459, 775.

[67]Madison clearly found most of the amendment project distasteful and justified only by the requirements of the Gentlemen's Agreement. Thus, on August 19, 1789, he privately

- his favorite (but ultimately unratified) recommendation to limit state infringements on individual liberties,[68] an item for which there had been no public demand;
- an ultimately unratified amendment pertaining to congressional representation;[69] and
- the proposal that became the Takings Clause.[70] Madison introduced this, in conjunction with the Due Process Clause,[71] in an effort to plug a hole left by the ratification-era understanding of the federal Ex Post Facto Clause.[72]

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referred to the "nauseous project of amendments." Levy, *Bill of Rights*, *supra* note 2, at 258. Only eight days earlier, Senator Pierce Butler had written to James Iredell as follows:

> A few *milk-and-water* amendments have been proposed by Mr. M[*adison*]., such as liberty of conscience, a free press, and one or two general things already well secured. I suppose it was done to keep his promise with his constituents, to move for alterations; but, if I am not greatly mistaken, he is not hearty in the cause of amendments. Letter from Pierce Butler to James Iredell (Aug. 11, 1789), *in* CREATING THE BILL OF RIGHTS, *supra* note 2, at 274 (emphasis in original). *See also* Levy, *Bill of Rights*, *supra* note 2, at 284 (quoting Madison as acknowledging that without the promise that a bill of rights would be added to the Constitution, the document "would have been '*certainly* rejected' in Virginia") (emphasis in original).

That Madison was representing views other than his own was recognized by Justice Rehnquist in *Wallace v. Jaffrey*, 472 U.S. 38 (1985):

> Madison's subsequent remarks in urging the House to adopt his drafts of the proposed amendments were less those of a dedicated advocate of the wisdom of such measures than those of a prudent statesman seeking the enactment of measures sought by a number of his fellow citizens which could surely do no harm and might do a great deal of good. *Id.* at 93–94 (Rehnquist, J., dissenting). *See also id.* at 98 ("[I]t was James Madison speaking as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution.").

[68]ANNALS, *supra* note 2, at 458 ("I think there is more danger of those powers being abused by the State Governments than by the Government of the United States . . . I should therefore wish to extend this interdiction."); *id.* at 784 ("Mr. MADISON conceived this to be the most valuable amendment in the whole list.").

[69]*Id.* at 457.

[70]U.S. CONST. amend. V ("[n]or shall private property be taken for public use without just compensation"). Madison's original proposal is reported in ANNALS, *supra* note 2, at 451–52 ("No person [shall be] obliged to relinquish his property, where it may be necessary for public use, without a just compensation.").

[71]U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."). Madison's original proposal was identical. ANNALS, *supra* note 2, at 451–52.

[72]*See* Natelson, *Statutory Retroactivity*, *supra* note 2, at 522–27 (2003).

All or most of Madison's other amendments, including those on religion, reflected his understanding of the demands of the terms of the Gentlemen's Agreement.[73] This is shown by his care in distancing his personal views from those proposals, even while defending them.[74] When drafting amendments for the sake of the public bargain, rather than for himself, Madison tried to change as little as the bargain would allow.[75]

Second, Madison repeatedly reminded his colleagues of his — and their[76] — obligation to abide by the Gentlemen's Agreement. He recounted the circumstances and expectations under which the Constitution had been ratified and the terms necessary to make it fully acceptable.[77] "I appeal to the gentlemen who have heard the voice of their country," he declaimed, "to those who have attended the debates of the State conventions . . . ."[78]

Sometimes Madison lapsed into the explicit language of bargain:

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[73]Tench Coxe, a Philadelphia businessman, associate of Hamilton, and leading federalist essayist, told Madison that the latter had succeeded in his purpose very well:

> I observe you have brought forward the amendments you proposed to the federal Constitution. I have given them a very careful perusal, and have attended particularly to their reception by the public . . . . In short the most ardent & irritable among our friends are well pleased with them. On the part of the opposition, I do not observe any unfavorable animadversion. Those who are honest are well pleased at the footing on which the press, liberty of conscience, original right & power, trial by jury &ca. are rested. . . . I feel very great satisfaction in being able to assure you generally that the proposed amendments will greatly tend to promote harmony among the late contending parties and a general confidence in the patriotism of Congress.

Letter from Tench Coxe to James Madison (June 18, 1789), *in* CREATING THE BILL OF RIGHTS, *supra* note 2, at 252.

[74]*See, e.g.*, ANNALS, *supra* note 2, at 449 (describing constituents' "jealousy" for their liberty as "though mistaken in its object, is laudable in its motive"); *id.* at 757 (noting that "as it was desired by a great number of the people of America, [Madison] would consent to it, though he was not convinced it was absolutely necessary"); *id.* at 758 (regarding his draft of the Establishment Clause, "Whether the words are necessary or not, [Madison] did not mean to say, but they had been required by some of the State Conventions . . . .").

[75]*See, e.g.*, *id.* at 450 ("[W]e must feel for the constitution itself, and make that revisal a moderate one."); *id.* at 800 ("Mr. MADISON was willing to make every amendment that was required by the States, which did not tend to destroy the principles and the efficacy of the constitution . . . .").

[76]*See, e.g.*, *id.* at 441 ("I considered myself bound in honor and in duty to do what I have done . . . ."). *See also id.* at 448 (imploring Congress to spend time on the matter in fulfillment of the people's wishes).

[77]*See, e.g.*, *id.* at 444, 448–49, 450, 457, 458, 749; *see also id.* at 753 ("[T]hough as several States had proposed the number of two hundred, he thought some substantial reason should be offered to induce the House to reject it."); *id.* at 789 ("Mr. MADISON supposed the people would be gratified with the amendment . . . .").

[78]*Id.* at 775.

> The acquiescence which our fellow-citizens show under the Government, calls upon us for a like return of moderation. . . . It is to provide those securities for liberty which are required by a part of the community; I allude in a particular manner to those two States that have not thought fit to throw themselves into the bosom of the Confederacy.[79]

Third, other Congressmen backed Madison by reminding their comrades of the exigencies of the Gentlemen's Agreement. They described the state of public opinion[80] and the resolutions of the ratifying conventions.[81] Aedanus Burke of South Carolina, for example, said "the people knew, and were sensible, that in ratifying the present constitution, they parted with their liberties; but it was under a hope that they would get them back again."[82] As time went on, even anti-amendment diehards like John Vining of Delaware began to enter into the spirit and seek to satisfy public opinion.[83] More contract terminology crept into the debate.[84]

Fourth, as deliberation proceeded, Madison and other members of Congress reminded the rest of the consequences of failing to approve changes desired by the people.[85] Such consequences could include widespread dissatisfaction with, and suspicion of, the new government.[86] The words of Congressman (and later Vice-President) Elbridge Gerry must have stung: "[U]nless Congress shall candidly consider the amendments which have been proposed in confidence by the State conventions, federal faith will not be considered very different from the *punica fides* of Carthage."[87] In that classically-trained era, of course, everyone knew the treacherous reputation of "Punic faith." Several other Congressmen warned that the state legislatures might seize the initiative by forcing Congress to call a new national convention under the alternative amendment procedures of

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[79]*Id.* at 449 (referring to North Carolina and Rhode Island). On the desirability of satisfying those two states, see *id.* at 463 (Rep. Elbridge Gerry); *see also supra* note 50.
[80]*Id.* at 445 (Rep. Alexander White); *id.* at 466 (Rep. Thomas Sumter).
[81]*Id.* at 464 (Rep. Elbridge Gerry); *id.* at 466 (Rep. Thomas Sumter); *id.* at 757–58 (Rep. Daniel Carroll); *id.* at 760 (Rep. Thomas Tudor Tucker); *id.* at 760 (Rep. Thomas Hartley); *id.* at 805 (Rep. Thomas Sumter).
[82]*Id.* at 777.
[83]*Id.* at 760 ("Mr. VINING said, if the thing was harmless, and it would tend to gratify the States that had proposed amendments, he should agree to it.").
[84]*E.g.*, *id.* at 788 (Rep. Thomas Tudor Tucker) (referring to "expectations" of the citizenry).
[85]*See, e.g.*, *id.* at 444 (Rep. Madison); *id.* at 786 (Rep. Thomas Tudor Tucker).
[86]*Id.*
[87]*Id.* at 462, 464.

Article V.[88] The ensuing reforms might be more radical than anyone present desired.[89]

Fifth, as members of Congress debated and altered Madison's proposals, they often referred to what they perceived to be the needs of the Gentlemen's Agreement.[90] In other words, they justified alterations, or opposed alterations, in Madison's draft by arguing that the outcome they sought better met the terms of the public bargain.

II. THE RELIGION TERMS IN THE GENTLEMEN'S AGREEMENT: FREE EXERCISE

A. Introduction

The Establishment Clause arose out of what might be called the "religion terms" of the Gentlemen's Agreement. By examining the other religion terms of that Agreement, we can get a better sense of the meaning of the ban on establishments. These terms included the guarantee of free exercise, the requirement that officeholders take oaths, and the ban on religious tests.

B. Reliance of the Policy Against Establishment on the Policy of Free Exercise

Professor Feldman has concluded that those who opposed establishment did so because they saw establishment as a threat to free exercise — in other words, that the purpose of the "no establishment" policy was to protect free exercise.[91] The ratification record amply supports this conclusion. That record contains many instances in which the policy against establishments is seen as flowing naturally from the protection of free exercise.

For example, at the North Carolina ratifying convention, Delegate Samuel Spencer said he "advocate[d] for . . . [the right] of worshipping [*sic*] God according to the dictates of conscience in particular. *He therefore thought* that no one particular religion should be established."[92] At the New York ratifying

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[88]U.S. CONST. art. V ("[O]n the Application of the Legislatures of two thirds of the several States, [Congress] shall call a Convention for proposing Amendments . . . .").

[89]*See, e.g.*, ANNALS, *supra* note 2, at 450 (Rep. James Madison); *id.* at 446 (Rep. John Page); *id.* at 462 (Rep. Elbridge Gerry); *id.* at 466 (Rep. Thomas Sumter); and *id.* at 787 (Rep. Thomas Tudor Tucker).

[90]*See, e.g.*, *id.* at 748 (Rep. Fisher Ames) (giving his interpretation of public opinion); *id.* at 749 (Rep. James Madison) (disagreeing with Ames); *id.* at 768 (Rep. Elbridge Gerry) (discussing state convention results as reflecting popular opinion); *id.* at 799 (Rep. William L. Smith) (advocating an amendment Madison had not proposed as conforming to majority sentiment as reflected in the ratifying conventions).

[91]Feldman, *supra* note 2, at 381, 382–84, 398–402, 424; *see also* ANTIEAU, *supra* note 2, at 30–31.

[92]4 ELLIOT'S DEBATES, *supra* note 2, at 200 (emphasis added).

convention, antifederalist Thomas Tredwell criticized the Constitution, stating, "I could have wished also that sufficient caution had been used to secure to us our religious liberties, and to have prevented the general government from tyrannizing over our consciences by a religious establishment . . . ."[93] Advocates of amendments in Maryland urged "[t]hat there be no national religion established by law; *but that all persons be equally entitled to protection* in their religious liberty."[94] At antifederalist insistence, the Virginia ratifying convention included among its proposed amendments a statement "[t]hat religion . . . can be directed only by reason and conviction, not by force or violence; *and therefore* . . . no particular religious sect or society ought to be favored or established, by law, in preference to others."[95]

Professor Feldman's insight is significant for a couple of reasons. First, it tends to show that the celebrated tension[96] between the Establishment Clause and the Free Exercise Clause[97] may be overblown. If the Establishment Clause exists to serve the Free Exercise Clause, then in the event of conflict, the former must yield. More importantly for our purposes, the scope of the Free Exercise Clause would tend to define the scope of the Establishment Clause. In particular, if the Free Exercise Clause permits a particular government activity, that fact tends to demonstrate that the Establishment Clause also allows it.

C. Why A Free Exercise Clause Was Deemed Necessary

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[93]*See, e.g.*, 2 ELLIOTT'S DEBATES, *supra* note 2, at 399.

[94]*Id.* at 553 (emphasis added). *See also Amendments Proposed by William Paca in the Maryland Convention*, *Md. J.*, Apr. 29, 1788, *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 2, at 240–41.

[95]3 ELLIOT'S DEBATES, *supra* note 2, at 659 (emphasis added). For similar statements basing disestablishmentarianism on free exercise, see *id.* at 645 (reporting Zachariah Johnson as saying at the Virginia ratifying convention, "If tests were required, and if the Church of England, or any other, were established, I might be excluded from any office under the government, because my conscience might not permit me to take the test required."); Manasseh Cutler, *Sermon* (Aug. 24, 1788), *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 2, at 342 ("By the Constitution now established in the United States, religious as well as civil liberty is secured. Full toleration is granted for free inquiry, and the exercise of the rights of conscience. No one kind of religion, or sect of religion, is established as the national religion, nor made, by national laws, the test of truth."); William Penn II, INDEP. GAZETTEER, Jan. 3, 1788, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 2, at 1426, 1434–35 (Microform Supp.) (complaining of test laws and state-established creeds as inconsistent with free government).

[96]CHEMERINSKY, *supra* note 2, at 1140–41; *see also* John E. Joiner, Note, *A Page of History or a Volume of Logic?: Reassessing the Supreme Court's Establishment Clause Jurisprudence*, 73 DENV. U.L. REV. 507, 507 (1996) ("Engaged in an inherent (and necessary) conflict with the Establishment Clause is the Free Exercise Clause . . . .").

[97]The Free Exercise Clause reads, "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." U.S. CONST. amend. I.

Antifederalists charged that the Constitution would give the federal government enough power to interfere with free exercise of religion.[98] Although one federalist response was to grumble that the charge seemed inconsistent with antifederalist complaints about the lack of a religious test,[99] their chief defense was that Congress would have no authority to regulate religion.[100] This latter

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[98]Henry Abbot stated at the North Carolina ratifying convention:

> Some are afraid, Mr. Chairman, that, should the Constitution be received, they would be deprived of the privilege of worshipping [*sic*] God according to their consciences, which would be taking from them a benefit they enjoy under the present constitution. They wish to know if their religious and civil liberties be secured under this system, or whether the general government may not make laws infringing their religious liberties.

4 ELLIOT'S DEBATES, *supra* note 2, at 191. *See also A Baptist*, FREEMAN'S J., Jan. 23, 1788, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 2, at 1557–58 (Microform Supp.).

> What alarms me most than any thing in the proposed Constitution, is, that we have no security for our religious tenets; our future rulers may, if they please, order the Mahometan religion, or any other, to be universal on this continent. . . .
>
> . . . [i]t appears to have been an old and deep-laid scheme to make the Episcopal Church the only established and lawful one in the United States; and oblige us to maintain it.

Id.

[99]*See, e.g.*, 3 ELLIOT'S DEBATES, *supra* note 2, at 635–36 (reporting James Innes speaking at the Virginia ratifying convention).

> [Antifederalists] inform you that Turks, Jews, Infidels, Christians, and all other sects, may be Presidents, and command the fleet and army, there being no test to be required; and yet the tyrannical and inquisitorial Congress will ask me, as a private citizen, what is my opinion on religion, and punish me if it does not conform to theirs. I cannot think the gentleman could be serious when he made these repugnant and incompatible objections.

Id. See also AM. MERCURY, Jan. 21, 1788, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 2, at 312 (Microform Supp.) (suggesting that antifederalist claims were incompatible).

[100]*E.g.*, 4 ELLIOT'S DEBATES, *supra* note 2, at 208 (quoting Richard D. Spaight, at the North Carolina ratifying convention as stating, "No power is given to the general government to interfere with it at all. Any act of Congress on this subject would be a usurpation."); *id.* at 300 (Rep. Charles Cotesworth Pinckney) (stating at the South Carolina ratifying convention that Congress had "no power at all" to interfere in religion); *id.* at 194 (James Iredell raising the same argument at the North Carolina ratifying convention); 3 ELLIOT'S DEBATES, *supra* note 2, at 93 (Rep. James Madison) (reiterating the point at the Virginia ratifying convention); *id.* at 330 (same); Tench Coxe, "A Freeman," PA. GAZETTE, Jan. 30, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 2, at 508 ("Every regulation relating to religion, or the property of religious bodies, must be made by the state governments, since no powers affecting those points are contained in the constitution."); *see also id.* at 510; Oliver Ellsworth, *Landholder IV*, CONN. COURANT, Dec. 10, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 398, 401 ("*There is no declaration of any kind to preserve the liberty of the press*, &c.

defense has resurfaced in modern times because advocates of "strict separation" sometimes rely on it. Since, the argument goes, the federal government was to have no authority over religion and the First Amendment restricted rather than expanded federal power, the federal government cannot now have any authority to support or recognize religion.[101]

The problem with that defense — both for the founding generation and for our own — was, and is, the natural construction of the Constitution itself. At the Virginia ratifying convention, Governor Edmund Randolph let the feline slip from the sack: in stating that "no power is given *expressly* to Congress over religion,"[102] he implicitly admitted that Congress would enjoy *implied* powers on the subject. Those implied powers were, of course, recognized by the Necessary and Proper Clause,[103] a provision Randolph himself had helped draft.[104] By

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Nor is liberty of conscience, or of matrimony, or of burial of the dead; it is enough that congress have no power to prohibit either.") (emphasis in original).

[101]*See, e.g.*, LEVY, *supra* note 2, at 83, 93; *see also id.* at 115 ("The fundamental defect of the nonpreferential interpretation is that it results in the unhistorical contention that the First Amendment augmented a nonexistent congressional power to legislate in the field of religion."). One critic of "strict separation" who adopts the same line is Daniel Dreisbach. DREISBACH, *supra* note 2, at 60 (stating that "matters not explicitly entrusted to the federal government were assumed to be reserved by the individual or by the states," thereby overlooking the grant of implied powers to the federal government and inaccurately paraphrasing the Tenth Amendment, which was drafted without the words "explicitly" or "expressly"); *see* U.S. CONST. amend. X; *see also* ANNALS, *supra* note 2, at 454 (Rep. Madison, discussing in the first Congress the purpose of the Bill of Rights as restricting the power of government).

[102]3 ELLIOT'S DEBATES, *supra* note 2, at 204 (Gov. Randolph, speaking at the Virginia ratifying convention; he is reported as having left out the word "expressly" later in the convention) (emphasis added); *see also id.* at 469 (stating that the Constitution does not allow the government to "take away or impair the freedom of religion").

[103]This was discussed in the satirical antifederalist letter written by James Bowdoin. *James Bowdoin to James de Caledonia*, PHILA. INDEP. GAZETTEER, Feb. 27, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 2, at 240 (referring to "powers to make all laws which we may think *necessary* and *proper*" and "omission of declarations in favor of liberty of conscience . . . ."); *see also The Cumberland County Petition to the Pennsylvania Convention*, Dec. 5, 1788, *in* 2 DOCUMENTARY HISTORY, *supra* note 2, at 310–11 (referring to danger in the Necessary and Proper Clause to religious freedom and advocating a bill of rights, including freedom of religion). Madison took note of this analysis when introducing and supporting the Bill of Rights. *See* ANNALS, *supra* note 2, at 455–56, 758; McConnell, *supra* note 2, at 1478 (stating that the Necessary and Proper Clause in conjunction with other powers was seen as a way for the new government to influence religion).

[104]*See* Natelson, *Necessary and Proper*, *supra* note 2, at 267–73 (providing a history of this provision).

virtue of the Supremacy Clause,[105] laws adopted pursuant to this implied authority would override state religious guarantees.

And, indeed, by any reasonable construction, the unamended Constitution would give the federal government significant power over religion. Congress would have plenary jurisdiction over the national capital, the antifederalists' hated "Ten Miles Square,"[106] and thus full power to suppress free exercise there.[107] Congress would enjoy plenary jurisdiction over other federal enclaves,[108] and considerable authority over the "Property" and "Territory" of the United States.[109] Congress might employ its taxing power[110] to introduce into religion.[111] In the course of regulating the militia,[112] the army,[113] and the navy,[114]

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[105]2 DOCUMENTARY HISTORY, *supra* note 2, at 392 (John Smilie, speaking at the Pennsylvania ratifying convention).

> At present there is no security, even for the rights of conscience, and under the sweeping force of the sixth Article [i.e., the Supremacy Clause] every principle of a bill of rights, every stipulation for the most sacred and invaluable privileges of man, are left at the mercy of government.

Id. See also Philadelphiensis, PHILA. FREEMAN'S J., Nov. 28, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 253 (referring to danger in the Supremacy Clause to religious freedom).

[106]*See* U.S. CONST. art. I, § 8, cl. 17.

[107]*See, e.g.*, Letter from Samuel Osgood to Samuel Adams (Jan. 5, 1788), *in* 15 DOCUMENTARY HISTORY, *supra* note 2, at 267 ("I wish the Legislature of the united [*sic*] States to have Ten Miles Square — But let the People settled there, have a Bill of Rights. Let them know that they are Freemen — Let them have the Liberty of Speech, of the Press, of Religion . . . ."); *cf.* 2 FARRAND, *supra* note 2, at 616 (describing proceedings at the constitutional convention).

> Mr. Madison & Mr. Pinkney then moved to insert in the list of powers vested in Congress a power — "to establish an University, in which no preferences or distinctions should be allowed on account of religion."
> Mr Wilson supported the motion
> Mr Govr Morris. It is not necessary. The exclusive power at the Seat of Government, will reach the object.
> On the question
> N. H. no — Mas. no. Cont. divd. Dr. Johnson ay — Mr. Sherman no. N. J — no. Pa ay. Del. no. Md. no. Va. ay. N — C— ay — S — C — ay. Geo — no. [Ayes–4; noes–6; divided–1.]

Id.

[108]U.S. CONST. art. I, § 8, cl. 17.

[109]*Id.* art. IV, § 3, cl. 2.

[110]*Id.* art. I, § 8, cl. 1.

[111]*An Old Whig*, PHILA. INDEP. GAZETTEER, Nov. 1, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 540 (positing use of taxation power to affect religion); ANTIEAU, *supra* note 2, at 145 (reporting that some in the Virginia legislature thought the First Amendment was not sufficiently broad to prevent the federal government from using the taxation and spending powers to favor certain religions); *see also* HOWE, *supra* note 2, at 21 (stating that Congress could use the tax power to affect religion). Otherwise, however, Howe seems to understate Congress's potential power

Congress and the President could require Quakers and other conscientious objectors to bear arms[115] — a potential threat to free exercise.[116] Congress had the power to deal with Indian tribes[117] and might use that power to impact

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over religion, stating, "Furthermore, none of the powers conferred explicitly on Congress could, conceivably, justify a statute making Christianity, or any special variety thereof, the religion of the nation." *Id.* Perhaps this is technically correct, but a full knowledge of the ratification record shows legitimate fears that the new government could pass such a statute for the District of Columbia and powerfully direct the property, military, Indian relations, and treaty powers to the same end.

[112]U.S. CONST. art. I, § 8, cl. 16.

[113]*Id.* cl. 14.

[114]*Id.*

[115]Such a possibility was cause for concern in Pennsylvania. *See An Old Whig*, PHILA. INDEP. GAZETTEER, Nov. 1, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 540; 2 DOCUMENTARY HISTORY, *supra* note 2, at 532 (reporting on a speech by William Findley at the Pennsylvania ratifying convention); *Centinel III*, PHILA. INDEP. GAZETTEER, Nov. 8, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 60 (warning that "as militia you may be made the unwilling instruments of oppression, under the direction of government; there is no exemption upon account of conscientious scruples of bearing arms"); *Algernon Sidney II*, INDEP. GAZETTEER, Feb. 13, 1788, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 2, at 1721, 1725 (Microform Supp.) (claiming that under the Constitution, Quakers, "Menonists," and others could be forced to bear arms); *see also Philadelphiensis*, PHILA. FREEMAN'S J., Nov. 28, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 252.

> In regard to religious liberty, the cruelty of the new government will probably be felt sooner in Pennsylvania than in any state in the union. The number of religious denominations in this state, who are principled against *fighting* or *bearing arms*, will be greatly distressed indeed. In the new constitution there is no declaration in their favour; but on the contrary, the Congress and President are to have an absolute power over the *standing army, navy, and militia*; and the *president*, or rather *emperor*, is to be commander in chief. Now, I think, that it will appear plain, that no exemption whatever from militia duty, shall be allowed to any set of men, however conscientiously scrupulous they may be *against bearing arms*. *Id.* (emphasis in original).

The issue also showed up outside the Quaker stronghold of Pennsylvania. Several states adopted or considered proposed amendments exempting men from serving as soldiers if religious principles forbade. *See, e.g.*, 2 ELLIOT'S DEBATES, *supra* note 2, at 553 (quoting an unsuccessful amendment at the Maryland ratifying convention that provided, "[t]hat no person conscientiously scrupulous of bearing arms, in any case, shall be compelled personally to serve as a soldier."); 4 ELLIOTT'S DEBATES, *supra* note 2, at 244 (quoting an adopted amendment at the North Carolina ratifying convention that provided "[T]hat any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.").

[116]For legal exemptions for dissenters as an aspect of free exercise, *see* McConnell, *supra* note 2, at 1466–73.

[117]U.S. CONST. art. I, § 8, cl. 3.

religion, as later happened.[118] The President and Senate enjoyed an independent treaty power[119] and might agree with a foreign nation that particular denominations were to be favored within the United States.[120] As antifederalists pointed out, international agreements had been used that way before.[121]

In sum, the federalist representation that the new government would have no power over religion was inherently less credible than some of their other representations as to limits on federal authority. One could admit that congressional powers could not be stretched to govern land titles, agriculture, or civil justice within existing states,[122] while still recognizing a realistic possibility that Congress might suppress free exercise in the "Ten Miles Square," draft Quakers, or impose discriminatory taxation.

Accordingly, antifederalists mocked the federalist claim that by not granting Congress express power over religion, the Constitution left the matter exclusively to the states. Reflect back to the Virginia ratifying convention, when the stupendous Patrick Henry, orator extraordinaire and scourge of the proposed Constitution, held the floor:

> Wherefore is religious liberty not secured? . . . There is many a religious man who knows nothing of argumentative reasoning, there are many of our most worthy citizens who cannot go through all the labyrinths of syllogistic, argumentative deductions, when they think that the rights of conscience are invaded. This sacred right ought not to depend on constructive, logical reasoning.[123]

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[118]CORD, *supra* note 2, at 38–39, 45, 59, 63–70 (discussing various measures for promoting Christianity among the Indians).

[119]U.S. CONST. art. II, § 2, cl. 2.

[120]*E.g.*, 4 ELLIOT'S DEBATES, *supra* note 2, at 191–92 (quoting Henry Abbott at the North Carolina ratifying convention, as stating that "[i]t is feared, by some people, that, by the power of making treaties, they might make a treaty engaging with foreign powers to adopt the Roman Catholic religion in the United States, which would prevent the people from worshipping God according to their own consciences"); *see also* 2 DOCUMENTARY HISTORY, *supra* note 2, at 514 (quoting Robert Whitehill) (warning at the Pennsylvania ratifying convention that "[t]reaties may be so made as to absorb the liberty of conscience, trial by jury, and all our liberties").

[121]*Hampden*, PITTSBURGH GAZETTE, Feb. 16, 1788, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 2, at 666 ("Treaties may be extended to almost every legislative object of the general government. Who is it that doth not know that by treaties in Europe the succession and constitution of many sovereign states hath been regulated."). Charles II who reigned from 1660 to 1685 was in the pay of the king of France and was more obliging to English Catholics for that reason.

[122]*See supra* note 46 and accompanying text.

[123]3 ELLIOT'S DEBATES, *supra* note 2, at 317 (quoting Patrick Henry); *see also* 2 DOCUMENTARY HISTORY, *supra* note 2, at 592 (quoting John Smilie at the Pennsylvania ratifying convention as similarly arguing "Powers undefined are extremely favorable for

And again:

> That sacred and lovely thing, religion, ought not to rest on the ingenuity of logical deduction. Holy religion, sir, will be prostituted to the lowest purposes of human policy. What has been more productive of mischief among mankind than religious disputes? Then here, sir, is a foundation for such disputes, when it requires learning and logical deduction to perceive that religious liberty is secure.[124]

Yet again:

> I trust that gentlemen, on this occasion, will see the great objects of religion, liberty of the press, trial by jury, interdiction of cruel punishments, and every other sacred right, secured, before they agree to that paper [the Constitution]. These most important human rights are not protected by [Article I, Section 9],[125] which is the only safeguard in the Constitution. My mind will not be quieted till I see something substantial come forth in the shape of a bill of rights.[126]

Henry was only one of many to demand a shield for free exercise. Similar demands came from all throughout the country[127] — and even from outside, for

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the increase of power."); *Cincinnatus III: To James Wilson, Esquire*, N.Y. J., Nov. 15, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 125.

In equal insecurity, or rather equally at mercy, are we left as to — liberty of conscience. We find nothing that regards it, except the following; — "but no religious test shall ever be required as a qualification to any office or public trust under the United States." This exception implies, and necessarily implies, that in all other cases whatever liberty of conscience may be regulated. For, though no such power is expressly given, yet it is plainly meant to be included in the general powers, or else this exception would have been totally unnecessary — For why should it be said, that no religious test should be required as a qualification for office, if no power was given or intended to be given to impose a religious test of any kind? *Id. See also Philadelphiensis*, PHILA. FREEMAN'S J., Nov. 28, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 253 ("Since, in the new constitution no provision is made for securing to these peaceable citizens their religious liberties, it follows then by implication, that no such provision was intended.").

[124]3 ELLIOT'S DEBATES, *supra* note 2, at 318 (remarks of Patrick Henry).

[125]U.S. CONST. art. I, § 9 (limiting the powers of the federal government).

[126]3 ELLIOT'S DEBATES, *supra* note 2, at 462 (remarks of Patrick Henry).

[127]This was one of the most common demands for amendment — so common that exhaustive citation would be as tedious as impossible. Thus, a newspaper article

Thomas Jefferson, who had not otherwise been involved in the debate, wrote from France to urge amendment as well.[128] Madison and a few other hard-

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satirizing antifederalist arguments was entitled "Receipt [Recipe] for an Antifederalist Essay," and included the following ingredients, among others: "WELL-BORN, nine times — *Aristocracy*, eighteen times — *Liberty of the Press*, thirteen times repeated — Liberty of Conscience once . . . ." *A Receipt for an Antifederalist Essay*, PENN. GAZETTE, Nov. 14, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 103.

The following are a few serious examples, categorized by state:

MASSACHUSETTS: "*Z*," BOSTON INDEP. CHRON., Dec. 6, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 358, 359 (demanding reservation of "rights of conscience" to avoid establishment of a national church); Mercy Warren, *A Columbian Patriot*, *Observations on the Constitution* (Feb. 1788), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 2, at 279 (criticizing the Constitution because "[t]here is no security in the profered [*sic*] system . . . for . . . the rights of conscience").

NEW YORK: *see Brutus II*, N.Y. J., Nov. 1, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 525 (arguing that the right of conscience is an inalienable right).

PENNSYLVANIA: *see The Dissent of the Minority of the Pennsylvania Convention*, PENN. PACKET (Dec. 18, 1787), *in* 15 DOCUMENTARY HISTORY, *supra* note 2, at 18 (proposing as an amendment that "[t]he right of conscience shall be held inviolable; and neither the legislative, executive nor judicial powers of the United States shall have authority to alter, abrogate, or infringe any part of the constitution of the several states, which provide for the preservation of liberty in matters of religion."); *see also* 2 DOCUMENTARY HISTORY, *supra* note 2, at 399, 459, 592 (quoting various remarks of John Smilie); *id.* at 400 (quoting remarks of Robert Whitehill) ("Have we a right to give away the rights of conscience?"); *id.* at 597 (setting forth the text of Whitehill's proposed amendment protecting freedom of conscience); *Centinel II*, PHILA. FREEMAN'S J., Oct. 24, 1787, *reprinted in* 13 DOCUMENTARY HISTORY 457, *supra* note 2, at 466; *An Old Whig*, PHILA. INDEP. GAZETTEER, Nov. 1, 1787, *reprinted in* 13 DOCUMENTARY HISTORY 538, *supra* note 2 at 539–41; *A Baptist*, FREEMAN'S J., Jan. 23, 1788, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 2, at 1557, 1558 (Microform Supp.) (calling for alteration in the Constitution to protect free exercise and against an established church).

VIRGINIA: *see* 13 DOCUMENTARY HISTORY, *supra* note 2, at 239 (quoting Richard Henry Lee's proposal "[T]hat "'the new Constitution proposed for the Government of the U. States be bottomed upon a declaration, or Bill of Rights, clearly and precisely stating the principles upon which this Social Compact is founded, to wit; That the rights of Conscience in matters of Religion shall not be violated . . . .'""); *see also Richard Henry Lee to Governor Edmund Randolph*, PETERSBURG VA. GAZETTE, Oct. 16, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 368; *Richard Henry Lee to Samuel Adams* (Oct. 27, 1787), *in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 485 ("But they have no reservation in favor of the Press, Rights of Conscience . . . .").

[128]Thomas Jefferson to James Madison, Dec. 20, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 482–83:

> I will now add what I do not like, first the omission of a bill of rights providing clearly & without the aid of sophisms for freedom of religion. . . to say, as mr Wilson does that a bill of rights was not necessary because all is reserved in the

pressed federalists at the Virginia convention asserted that explicit protection for religion was unnecessary because America's variety of sects would prevent any of them from becoming too strong. But this religious adaption of Madison's famous theory of factions[129] carried no weight outside his immediate sphere of influence. So the federalists were left with no choice but one: assent to a term in the Gentlemen's Agreement for an amendment to protect free exercise.

D. What Did the Founding Generation Mean by "Free Exercise"?

By the phrase "free exercise," the founding generation appears to have meant freedom of religion for all theists, not just Christians; but not the freedom from religion sought by atheists and agnostics. To demonstrate the point, let us begin with Oliver Ellsworth — a man little known today, but among the most significant of the founders. Ellsworth was a lawyer and a judge, and he enjoyed the largest private practice in Connecticut.[130] He served as a delegate to the federal convention, where he was one of only five members on the Committee of Detail — the committee that produced the first draft of the final document.[131] In 1796, President Washington appointed him Chief Justice of the United States Supreme Court.[132]

Ellsworth supported ratification through his influential "Landholder" essays, written for Connecticut but published more widely.[133] In one of those essays, he addressed complaints about the lack of a religious test.[134] In the course of a

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case of the general government which is not given, while in the particular ones all is given which is not reserved, might do for the Audience to whom it was addressed, but is surely a gratis dictum, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation which had declared that in express terms. *Id.* (citation omitted). *See also* Letter from Thomas Jefferson to William Stephens Smith (Feb. 2, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 500 (advocating a bill of rights with protection for religion).

[129]3 ELLIOTT'S DEBATES, *supra* note 2, at 93, 330 (James Madison, speaking at the Virginia ratifying convention); *id.* at 204 (Edmund Randolph, speaking at the same convention); *id.* at 645 (Zachariah Johnson, speaking at the same convention); *see also* Letter from James Madison to Thomas Jefferson (Oct. 24 & Nov. 1, 1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 442, 448–49 (elaborating on the same theory). For relevant passages in THE FEDERALIST PAPERS, see THE FEDERALIST NO. 10 (James Madison), *supra* note 2, at 45–46. *See also* THE FEDERALIST No. 51, *supra* note 2, at 270–71.

[130]For a short biography of Oliver Ellsworth, *see* Biographical Directory of the United States Congress, *available at* http://bioguide.congress.gov/scripts/biodisplay.pl?index=E000147 (last visited Aug. 28, 2005) [hereinafter Biographical Directory].

[131]*See* Natelson, *Necessary and Proper*, *supra* note 2, at 270–73.

[132]*See* Biographical Directory, *supra* note 130.

[133]*See* 14 DOCUMENTARY HISTORY, *supra* note 2.

[134]*Id.* at 450.

declamation on the futility of religious tests and the risk that they might be used for religious persecution, he wrote:

> If any test-act were to be made, perhaps the least exceptionable would be one, requiring all persons appointed to office, to declare, at the time of their admission, their belief in the being of a God, and in the divine authority of the scriptures. In favour of such a test, it may be said, that one who believes these great truths, will not be so likely to violate his obligations to his country, as one who disbelieves them; we may have greater confidence in his integrity.[135]

Ellsworth then discussed the limits of government:

> But to come to the true principle, by which this question ought to be determined: The business of civil government is to protect the citizen in his rights, to defend the community from hostile powers, and to promote the general welfare. *Civil government has no business to meddle with the private opinions of the people.* If I demean myself as a good citizen, I am accountable, not to man, but to God, for the religious opinions which I embrace, and the manner in which I worship the supreme being.[136]

The italicized language makes Ellsworth sounds like a strict separationist, although that sits oddly (to modern minds) with the reference to God. Here is additional context:

> But while I assert the right of religious liberty; I would not deny that the civil power has a right, in some cases, to interfere in matters of religion. It has a right to prohibit and punish gross immoralities and impieties; because the open practice of these is of evil example and public detriment. For this reason, *I heartily approve of our laws against drunkenness, profane swearing, blasphemy, and professed atheism*.[137]

Thus, in Ellsworth's view, government should not meddle with religion, but should not tolerate atheism.

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[135] 14 DOCUMENTARY HISTORY, *supra* note 2, at 450.
[136] *Id.* at 451 (emphasis added).
[137] *Id.*

Ellsworth's outlook was entirely typical. In 1986, Professor Philip Kurland, one of the nation's most distinguished constitutional historians, summarized the evidence as follows:

> [C]ontemporary thinkers relied on God's will to justify nondiscrimination among any who worshiped a single god. Deists, Jews, and Mahometans came with the announced protection of religious freedom, but I am hard put to find any evidence in the development of legal protection for religious freedom that indicates any intention to protect atheists.[138]

More recently, Professor Noah Feldman elaborated: the contemporary justification of "free exercise" or "freedom of conscience" depended on religious belief. Developed over the years by John Locke and many others, the justification was that the conscience belonged to God, and that it was an act of impiety for civil government to impede upon the judgment of conscience as to how to worship God.[139] Because, however, this justification presupposed a desire

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[138]Kurland, *supra* note 2, at 856.

[139]Feldman, *supra* note 2, at 355–79, 390; *see also* 2 ELLIOT'S DEBATES, *supra* note 2, at 120 (Rev. Phillip Payson speaking at the Massachusetts ratifying convention).

> The great object of religion being God supreme, and the seat of religion in man being the heart or conscience, *i. e.*, the reason God has given us, employed on our moral actions, in their most important consequences, as related to the tribunal of God, hence I infer that God alone is the God of the conscience, and, consequently, attempts to erect human tribunals for the consciences of men are impious encroachments upon the prerogatives of God. Upon these principles, had there been a religious test as a qualification for office, it would, in my opinion, have been a great blemish upon the instrument. *Id. See also* PENN. PACKET, Jun. 3, 1788, *in* 18 DOCUMENTARY HISTORY, *supra* note 2, at 150.

> The freedom of its religion, which permits every man to worship his God in the manner most agreeable to his conscience — That tolerating spirit of religious freedom, which tramples upon fanaticism and persecution, and renders mankind friends to Heaven and earth — to God, as their universal father — to man, as their brother . . . . *Id. See also Centinel II*, PHILA. FREEMAN'S J., Oct. 24, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 466 (complaining that "there is no declaration, that all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding"); *An Old Whig*, PHILA. INDEP. GAZETTEER, Nov. 1, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 540 (referring to "the sacred rights of conscience"); *Timothy Meanwell*, PHILA. INDEP. GAZETTEER, Oct. 29, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 511 ("I should have liked the constitution much better if our friends of the Convention had inserted the 2d article of the Bill of Rights prefixed to the Constitution of Pennsylvania. — 'That all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own conscience and understanding . . . .'"); 9 DOCUMENTARY HISTORY, *supra* note

to worship God, the immunity did not extend to one who denied God. It most certainly did not contemplate protection for atheism nor, by implication, agnosticism.[140]

In their book, *The Godless Constitution*, Professors Isaac Kramnick and R. Lawrence Moore[141] rely on Locke's *Letter Concerning Toleration* to support their argument that the Constitution creates no preference for religion.[142] For their argument Locke was an unfortunate choice. In fact, Locke flatly refused to extend toleration to atheists:

> Lastly, those are not at all to be tolerated who deny the being of a God. Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all; besides also, those that by their atheism undermine and destroy all religion, can have no pretence [*sic*]

2, at 772 (quoting the "Society of Western Gentlemen" as stating "[t]hat the duty of worshipping [*sic*] Almighty God, of enquiring after, and possessing the truth, according to the dictates of conscience, is equally incumbent on all mankind"). Apparently, Jefferson was one of the few who dissented from this justification for free exercise, basing it on libertarian grounds instead. McConnell, *supra* note 2, at 1451.

[140]Feldman, *supra* note 2, at 376, 425. Even the very few who favored complete toleration did so in an atmosphere of contempt for atheism. *See Alihu*, AM. MERCURY, Feb. 18, 1788, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 2, at 591–92.

> Should any body of men, whose characters were unknown to me, form a plan of government, and prologue it with a long pharisaical harangue about God and religion, I should suspect a design to cheat and circumvent us . . . . There must be (tis objected) some proof, some evidence that we the people acknowledge the being of a God. Is this a thing that wants proof? Is this a thing that wants constitutional establishment in the United States? It is almost the only thing that all universally are agreed in; everybody believes there is a God; not a man of common sense in the United States denies or disbelieves it. *The fool hath said in his heart there is no God*, but was there ever a wise man said such a thing? No, not in any age or in any country. Besides, if it was not so, if there were unbelievers, as it is a matter of faith, it might as well be admitted; for we are not to bind the consciences of men by laws or constitutions. . . . Such an acknowledgment is moreover useless *as a religious test* — it is calculated to exclude from office *fools* only, who believe there is no God; and the people of America are now become so enlightened that no fool hereafter (it is hoped) will ever be promoted to any office or high station. *Id.* (internal quotation marks omitted).

[141]KRAMNICK & MOORE, *supra* note 2.

[142]*Id.* at 74–78.

> of religion whereupon to challenge the privilege of a toleration.[143]

Thus, no matter how unsettling it may be to modern sensibilities (including my own), the historical record is free from reasonable doubt: The founding generation saw freedom of religion as dependent on faith in God and would have viewed freedom of religion for atheists or agnostics as a contradiction in terms. The idea of free exercise was freedom OF religion not freedom FROM religion. If, as concluded above, the Establishment Clause rested on contemporary notions of free exercise, then the Establishment Clause must not have prevented governmental sponsorship of religion in general.

III. THE RELIGION TERMS IN THE GENTLEMEN'S AGREEMENT: THE CONSTITUTION'S OATHS AND THE BAN ON RELIGIOUS TESTS

The Constitution's ban on religious tests[144] — which bears an obvious subject-matter relationship to the First Amendment's ban on religious establishments — and its requirement for the oath-taking[145] were not amended by the Bill of Rights. Both, however, were among the "religion terms" of the Gentlemen's Agreement.

The ban on religious tests provoked considerable discussion during the ratification debates. Most of the participants in those debates believed that free government worked best when those holding positions of public trust were committed to moral principles.[146] Because devotion to one specific religion — Christianity — was seen as a particularly good assurance of moral conduct,[147] the

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[143]JOHN LOCKE, TREATISE ON CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION (Charles L. Sherman ed., 1965) (1689).

[144]This was proposed at the national convention by Charles Pinckney of South Carolina. *See* 2 FARRAND, *supra* note 2, at 335 ("No religious test or qualification shall ever be annexed to any oath of office under the authority of the United States . . . ."); *see also id.* at 461, 468.

[145]*See* U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives . . . 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 . . . ."); *see also id.* art. I, § 3, cl. 6; *id.* art. II, § 1, cl. 9.

[146]*See, e.g.*, 2 ELLIOT'S DEBATES, *supra* note 2, at 171–72 (quoting Charles Turner as stating at the Massachusetts ratifying convention, "The world of mankind have [*sic*] always, in general, been enslaved and miserable, and always will be, until there is a greater prevalence of Christian moral principles . . . ."). The point is developed at greater length in HAMBURGER, *supra* note 2, at 66–73.

[147]4 ELLIOT'S DEBATES, *supra* note 2, at 199 (quoting David Caldwell as claiming at the North Carolina ratifying convention that "even those who do not regard religion,

states limited participation in public life to Christians.[148] Thus, the ban on religious tests became an issue because it arguably broke the connection between government service and religion and morality. Antifederalists emphasized that the Constitution would permit non-Christians (or Catholics[149]) to serve in federal office, a development they claimed could undermine public virtue and lead to official corruption.[150]

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acknowledge that the Christian religion is best calculated, of all religions, to make good members of society, on account of its morality.").

[148]*See, e.g.*, DEL. CONST. of 1776, art. 22.

> Every person who shall be chosen a member of either house, or appointed to any office or place of trust, before taking his seat, or entering upon the execution of his office, shall take the following oath, or affirmation, if conscientiously scrupulous of taking an oath, to wit:
>
> . . . .
>
> . . . "I, A B. do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration." *Id.*

Pennsylvania required the following oath: "I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration." PA. CONST. of 1776 § 10.

[149]*See, e.g.*, 2 ELLIOT'S DEBATES, *supra* note 2, at 148 (noting that Major T. Lusk argued at the Massachusetts ratifying convention against the Constitution because it sanctioned slavery and because "he shuddered at the idea that Roman Catholics, Papists, and Pagans might be introduced into office, and that Popery and the Inquisition may be established in America.").

[150]For example, see the following comments:

CONNECTICUT: AM. MERCURY, Jan. 21, 1788, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 2, at 312, 313 (Microform Supp.) ("The fears of many good and worthy men, men of principle and honor, are alarmed, *lest soon the high departments of the nation should be filled with men of loose principles or no principles at all, as to religion.*") (emphasis in original).

MASSACHUSETTS: 2 ELLIOT'S DEBATES, *supra* note 2, at 118 (reporting that at the Massachusetts ratifying convention:

> [S]everal gentlemen urged that it [the lack of a religious test] was a departure from the principles of our forefathers, who came here for the preservation of their religion; and that it would admit deists, atheists, &c.,into the general government; and, people being apt to imitate the examples of the court, these principles would be disseminated, and, of course [i.e., necessarily], a corruption of morals ensue.). *See also id.* at 119:
>
> Col. [William] JONES (of Bristol) thought, that the rulers ought to believe in God or Christ, and that, however a test may be prostituted in England, yet he thought, if our public men were to be of those who had a good standing in the church, it would be happy for the United States, and that a person could not be a good man without being a good Christian. *See also id.* at 44 (noting that Amos

Federalists responded in various ways. Part of their defense was that religious tests were impious for the same reason as government interference with free exercise was impious — they intruded on the conscience, God's domain.[151]

Singletary at the Massachusetts ratifying convention "thought we were giving up all our privileges, as there was no provision that men in power should have any *religion*; and though he hoped to see Christians, yet, by the Constitution, a Papist, or an Infidel, was as eligible as they.").

MARYLAND: Luther Martin, *Genuine Information XII*, BALT. MD. GAZETTE, Feb. 8, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 2, at 89:

> The part of the system, which provides that *no religious test* shall ever be required . . . was adopted by a very great majority of the convention, and without much debate, — however, there were some members *so unfashionable* as to think that a *belief of the existence of a Deity*, and of a *state of future rewards and punishments* would be some security for the good conduct of our rulers, and that in a Christian country it would be at *least decent* to hold out some distinction between the professors of Christianity and downright infidelity or paganism. *Id.* (footnote omitted).

NORTH CAROLINA: At the North Carolina ratifying convention, William Lancaster supported a religious test and cautioned his fellow delegates:

> But let us remember that we form a government for millions not yet in existence. I have not the art of divination. In the course of four or five hundred years, I do not know how it will work. This is most certain, that Papists may occupy that chair, and Mahometans may take it. I see nothing against it. There is a disqualification, I believe, in every state in the Union — it ought to be so in this system. 4 ELLIOTT'S DEBATES, *supra* note 2, at 215. *See also id.* at 192 (quoting Henry Abbot as pointing out at the North Carolina ratifying convention that "[t]he exclusion of religious tests is by many thought dangerous and impolitic. They suppose that 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."); *id.* at 198–99 (Gov. Samuel Johnson) (summarizing, as a federalist, the antifederalist arguments at the North Carolina ratifying convention); *id.* at 199 (Rev. David Caldwell, also speaking at the North Carolina ratifying convention).

VIRGINIA: *Letter XII*, Jan. 12, 1788, *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 2, at 310–11. Writing in opposition to the Constitution, the author pointed out, that under it,

> it can be no objection to the elected, that they are Christians, Pagans, Mahometans, or Jews; that they are of any colour, rich or poor, convict or not: Hence many men may be elected, who cannot be electors. Gentlemen who have commented so largely upon the wisdom of the constitution, for excluding from being elected young men under a certain age, would have done well to have recollected, that it positively makes pagans, convicts, &c. eligible. *Id.*

On the perceived connection between state support of religion and morality, see Feldman, *supra* note 2, at 394–95.

[151]2 ELLIOT'S DEBATES, *supra* note 2, at 148 (Rev. Isaac Backus, stating at the Massachusetts ratifying convention, "[R]eligion is ever a matter between God and individuals; and, therefore, no man or men can impose any religious test, without

Additionally, they pointed out that religious tests were largely ineffective or counterproductive. Illustrating this response was a speech delivered at the Massachusetts ratifying convention by the celebrated Reverend Theophilus Parsons:

> It has been objected that the Constitution provides no religious test by oath, and we may have in power unprincipled men, atheists and pagans. No man can wish more ardently than I do that all our public offices may be filled by men who fear God and hate wickedness; but it must remain with the electors to give the government this security. An oath will not do it. Will an unprincipled man be entangled by an oath? Will an atheist or a pagan dread the vengeance of the Christian's God, a being, in his opinion, the creature of fancy and credulity? It is a solecism in expression. No man is so illiberal as to wish the confining places of honor or profit to any one sect of Christians; but what security is it to government, that every public officer shall swear that he is a Christian? For what will then be called Christianity? One man will declare that the Christian religion is only an illumination of natural religion, and that he is a Christian; another Christian will assert that all men must be happy hereafter in spite of themselves; a third Christian reverses the image, and declares that, let a man do all he can, he will certainly be punished in another world; and a fourth will tell us that, if a man use any force for the common defence [sic], he violates every principle of Christianity. Sir, the only evidence we can have of the sincerity of a man's religion is a good life; and I trust that such evidence will be required of every candidate by every

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invading the essential prerogatives of our Lord Jesus Christ."); 2 DOCUMENTARY HISTORY, *supra* note 2, at 457 (reporting the comment of Benjamin Rush at the Pennsylvania ratifying convention that "[i]n marking the advantages which are secured to us by the new government, the Doctor principally enforced the following: . . . that religious tests would be abolished . . . . The Doctor concluded an animated speech by holding out the new Constitution as pregnant with an increase of freedom, knowledge, and religion."); Tench Coxe, *An American Citizen IV: On the Federal Government*, Oct. 21, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 432.

> No *religious* test is ever to be required of any officer or servant of the United States. . . . No such *impious* deprivation of the rights of men can take place under the new foederal [*sic*] constitution. The convention has the honor of proposing *the first public act*, by which any nation has ever *divested itself* of a power, every exercise of which is *a trespass on the Majesty of Heaven*. *Id.* (emphasis in original).

> elector. That man who acts an honest part to his neighbor, will, most probably, conduct honorably towards the public.[152]

The possible variations on the term "Christian" listed in this quotation suggest a third line of response: that theism in general was an adequate predictor of virtue, especially theism of the sort involving a just God (or gods) and a future state of rewards and punishments. It followed that a more exacting test was unnecessary, and being unnecessary, interfered with free exercise.[153] Of course, atheists were not protected from a test of theism for the same reason they were not protected by provisions guaranteeing free exercise. An atheist was seen as entitled to no freedom of conscience because he had expelled God from that conscience.[154]

Supporting a broadly theistic view was the fact that most educated members of the founding generation had read Cicero,[155] and thus knew that the good moral character necessary for free government could come from religious sources that

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[152]2 ELLIOT'S DEBATES, *supra* note 2, at 90. In Massachusetts, ministers took the lead in arguing against religious tests. *See also id.* at 118–19 (remarks of Rev. Daniel Shute, speaking at the Massachusetts ratifying convention); *id.* at 120 (Rev. Phillips Payson) (same convention). For other discussions of the impracticality of religious tests, see 4 ELLIOTT'S DEBATES, *supra* note 2, at 192–93 (James Iredell, speaking at the North Carolina ratifying convention); *id.* at 200 (Samuel Spencer) (same); *Alihu*, AM. MERCURY, Feb. 18, 1788, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 2, at 592 ("Such an acknowledgment [of theism] is moreover useless *as a religious test* — it is calculated to exclude from office *fools* only, who believe there is no God; and the people of America are now become so enlightened that no fool hereafter (it is hoped) will ever be promoted to any office or high station."); Oliver Ellsworth, *The Landholder*, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 451 ("In short, test-laws are utterly ineffectual; they are no security at all; because men of loose principles will, by an external compliance, evade them. If they exclude any persons, it will be honest men, men of principle, who will rather suffer an injury, than act contrary to the dictates of their consciences."); Letter from James Madison to Edmund Pendleton (Oct. 28, 1787), *in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 504 ("If the person in question be an unbeliever in these points and would notwithstanding take the oath, a previous test could have no effect. He would subscribe it as he would take the oath, without any principle that could be affected by either.").

[153]15 DOCUMENTARY HISTORY, *supra* note 2, at 316 (Dep.-Gov. Oliver Wolcott, reported as stating that a religious test would "be exceedingly injurious to the rights of free citizens . . . ."); *Dentatus*, INDEP. GAZETTEER, Jan. 8, 1788, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 2, at 1441–42 (Microform Supp.) (complaining of test laws as inconsistent with free exercise).

[154]*See supra* Part II.D.

[155]*See* CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT 19 (1994).

were neither Christian nor even monotheist.[156] As stated by Daniel Shute, another minister at the Massachusetts ratifying convention:

> Far from limiting my charity and confidence to men of my own denomination in religion, I suppose, and I believe, sir, that there are worthy characters among men of every denomination — among the Quakers, the Baptists, the Church of England, the Papists; and even among those who have no other guide, in the way to virtue and heaven, than the dictates of natural religion.[157]

Thus, the key to moral conduct was not belief in a particular religion, but belief in divinity. Reverend Shute's concession to adherents of "natural religion" (deism) shows that in his view the divinity need not even be a personal God responsible for a future state of rewards and punishments. Other advocates of the theistic view did not go quite so far. Chancellor Edmund Pendleton, a key Virginia federalist and president of his state's ratifying convention, thought at least a belief in future judgment was necessary.[158] James Iredell, the federalist

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[156]*See* Marcus Tullius Cicero, *De Natura Deorum*, *in* DE NATURA DEORUM ACADEMICA, 6 (H. Rackham trans., G.P. Putnam's Sons 1933) Book 1, Title 1, Chaps. 3–4 (stating that if religion and holiness are taken out of public life, "*perturbatio vitae sequitur et magna confusio, atque haut scio an pietate adversus deos sublata fides etiam et societas generis humani et una excellentissima virtus iustitia tollatur*," which I have translated as "a great upset of life follows and great confusion; and I don't quite know that if piety toward the gods is taken away whether faith and comradeship among the human race and one great moral quality, justice, wouldn't be lost"). In *Omichund v. Barker*, Willes 538, 125 Eng. Rep. 1310 (1744), a famous case referenced by James Iredell at the North Carolina ratifying convention, *see infra* note 175 and accompanying text, the court had referred generally and extensively to non-Christian sources, and particularly to Cicero, to illustrate the binding effect of an oath among all theists. *Id.*, Willes at 545–47, 125 Eng. Rep. at 1314.

[157]2 ELLIOT'S DEBATES, *supra* note 2, at 119. *See also* 4 ELLIOT'S DEBATES, *supra* note 2, at 197 (quoting James Iredell, as stating at the North Carolina ratifying convention that "[m]en at length considered that there were many virtuous men in the world who had not had an opportunity of being instructed either in the Old or New Testament, who yet very sincerely believed in a Supreme Being and in a future state of rewards and punishments."); Tench Coxe, *An American Citizen IV*: *On the Federal Government*, Oct. 21, 1787, *in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 432 ("No *religious* test is ever to be required of any officer or servant of the United States. The people may employ *any wise and good citizen* in the execution of the various duties of the government.") (emphasis in original).

[158]*See* Letter from Edmund Pendleton to James Madison (Oct. 8, 1787), *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 2, at 1774.

My last Criticism you will probably laugh at, tho' it is really a Serious one wth. me. why require an Oath From Public Officers, and yet interdict all Religious

floor leader at the North Carolina convention, held a similar view.[159] But the general idea was that theism, and not specifically Christianity, was sufficient. One federalist wag satirized antifederalist religious parochialism in this way:

> [The Constitution] admits to legislation, 1st. Quakers, who will make the blacks saucy, and at the same time deprive us of the mean of defence [sic] — 2dly. Mahometans, who ridicule the doctrine of the trinity — 3dly. Deists, abominable wretches 4thly. Negroes, the seed of Cain — 5thly. Beggars, who when set on horseback will ride to the devil — 6thly. Jews, &c. &c.
>
> It gives the command of the whole militia to the President — should he hereafter be a Jew, our dear posterity may be ordered to rebuilt Jerusalem.[160]

Tests, their only Sanction? Those hitherto adopted have been narrow & illiberal, because designed to preserve Established modes of Worship; But since a belief of a Future State of Rewards & Punishments, can alone give consciensious [*sic*] Obligation to Observe an Oath, It would seem that Test should be required or Oaths Abolished. *Id.*

[159]4 ELLIOT'S DEBATES, *supra* note 2, at 197–98.

[160]*Curtiopolis*, N.Y. DAILY ADVERTISER, Jan. 18, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 2, at 401.

In Pennsylvania, an anonymous federalist author attacked named antifederalists for supporting test laws that excluded even some Christians from government. *See A Citizen of Philadelphia*, PENN. GAZETTE, Jan. 23, 1787, *reprinted* in 2 DOCUMENTARY HISTORY, *supra* note 2, at 658.

> In the list of the signers of the protest of the minority of the Convention against the Federal Constitution, we find six (and three of them the only speakers against it in the Convention) whose names are upon record as the friends of *paper money*, and the advocates for the late unjust *test law* of Pennsylvania, which for near *ten* years excluded the *Quakers, Mennonists, Moravians*, and several other sects scrupulous against war, from a representation in our government.
>
> . . . The persons are *William Findley, John Smilie, Robert Whitehill, Adam Orth, Nicholas Lutz, Abraham Lincoln*.
>
> In the 302d page of the same book, we find a report declaring the Quakers, Moravians, etc. who, from conscientious scruples, decline taking part in the war, to be "enemies to liberty and the rights of mankind. . ." which report is agreed to, as appears in the list of the yeas, by the same *William Findley, John Smilie, Robert Whitehill, Adam Orth, Nicholas Lutz, Abraham Lincoln*.
>
> These men certainly are not in earnest when they talk and write of *liberty* and of the sacred rights of *conscience*. *Id.* (footnote omitted) (emphasis in original).

Finally, federalists responded that if one believed religious tests to be effective, then one should be comforted because the Constitution already contained a test of theism in its requirement that officeholders take oaths.[161] Early in the ratification process, Madison made this point in a letter to Virginia's Chancellor Edmund Pendleton: "Is not a religious test as far as it is necessary, or would operate, involved in the oath itself?"[162] Deputy-Governor Oliver Wolcott relied on the same argument in support of the Constitution at the Connecticut ratifying convention.[163] The South Carolina convention even proposed an amendment to codify this understanding,[164] as did Virginia's Society of Western Gentlemen:

> [F]or the more general diffusion of benevolence, hospitality, and undissembled honesty, among all ranks of people, the free exercise and enjoyment of religious profession, and worship without *preference*, shall forever hereafter be allowed within the United States.

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[161]The requirement for oaths to support the Constitution came from the Virginia Plan. *See* 1 FARRAND, *supra* note 2, at 22 (May 29, 1787) ("Resd. that the Legislative Executive & Judiciary powers within the several States ought to be bound by oath to support the articles of Union[.]"). Among federal convention debates, see also *id.* at 122, 203–04; 2 FARRAND, *supra* note 2, at 84; *id.* at 87 ("Mr. Wilson said he was never fond of oaths, considering them as a left handed security only. A good Govt. did not need them. and a bad one could not or ought not to be supported.").

[162]Letter from James Madison to Edmund Pendleton (Oct. 28, 1787), *reprinted in*, 13 DOCUMENTARY HISTORY, *supra* note 2, at 504.

[163]Oliver Wolcott, Speech in the Connecticut Convention (Jan. 9, 1788), *in* 15 DOCUMENTARY HISTORY, *supra* note 2, at 316 ("I do not see the necessity of such a Test as some gentlemen wish for. The constitution enjoins an oath upon all the Officers of the United States. This is a direct appeal to that God who is the avenger of perjury. Such an appeal to him is a full acknowledgment of his being and providence. An acknowledgment of these great truths is all that the gentlemen contend for.") (footnote omitted).

[164]*See* 18 DOCUMENTARY HISTORY, *supra* note 2, at 72 ("*Resolved*, That the 3d section of the 6th article ought to be amended, by inserting the word *other* between the words *no* and *religious*.") (emphasis in original). That the South Carolina resolution was a codification rather than a substantive change was publicized at the time. Roger Sherman, *A Citizen of New Haven*, N.Y. PACKET, Mar. 24, 1789, *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 2, at 222 ("The amendment proposed by the Convention of South-Carolina, respecting religious tests, is an ingenious one, but not very important, because the Constitution as it now stands, will have the same effect, as it would have with that amendment."); *see also* ANTIEAU, *supra* note 2, at 106, 117 (discussing the reason for this proposed amendment).

> . . . . [B]ut no *other* religious Test shall ever be required . . . *than a belief in the one only true God, who is the rewarder of the good, and the punishment of the evil.*[165]

The view that oaths and theism were necessarily connected was more than merely a view: *It was the law.* The essence of an oath was an appeal to God to witness the truth of what one said. Thus, the oath of an atheist received no recognition. The English courts so ruled prior to American independence,[166] and American courts acknowledged the principle as late as 1823.[167]

The most forceful and elaborate federalist exposition of the tenet that an oath was a sufficient test of theism for official functions came from James Iredell at the North Carolina ratifying convention. His speech is worth examining at

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[165]*The Society of Western Gentlemen Revise the Constitution*, VA. INDEP. CHRON., Apr. 30, May 7, 1788, *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 2, at 772, 779.

[166]*See* Ramskissenseat v. Barker, 1 Atk. 19, 20, 26 Eng. Rep. 13, 14 (Ch. 1739) (holding that "[t]he general rule is, that all persons who believe a God, are capable of an oath; and what is universally understood by an oath, is, *that the person who takes it, imprecates the vengeance of God upon him, if the oath he takes is false*.") (emphasis in original); Omichund v. Barker, Willes 538, 125 Eng. Rep. 1310 (1744) (a later proceeding in the same case, holding that an oath is a call on God as a witness, and that all witnesses who believe in a God who will judge them, but none others, are competent to take oaths); also reported *sub nom.* Omichund v. Barker, 1 Atk. 22, 26 E.R. 15 (Ch. 1744) and Ormichund v. Barker, 1 Wils. K.B. 84, 95 E.R. 506 (Ch. 1745).

The *Ramkissenseat-Omichund-Omychund-Ormichund* decisions rejected the narrower view that the oath-taker had to believe in the holiness of biblical scripture. *See* HAWKINS, *supra* note 2, at 434 ("It seems agreed to be a good Exception [to the competency of a witness] That the witness is an Infidel' that is, as I take it, that he believes neither the Old nor the New Testament to be the Word of God, on one of which our Laws require the Oath should be administered"); *see also* 2 Edward Coke, Institutes at 6b (holding that "infidels" could not take oaths), and the discussion in *Omichund*, *supra* and *Omygund*, *supra*).

[167]Butts v. Swartwood, 2 Cow. 431 (N.Y. Sup. Ct. 1823). *See also* Jackson *ex dem.* Tuttle v. Gridley, 18 Johns. 98 (N.Y. Sup. Ct. 1820).

> By the law of *England,* which has been adopted in this state, it is fully and clearly settled, *that infidels who do not believe in a God, or if they do, do not think that he will either reward or punish them in the world to come, cannot be witnesses in any case, nor under any circumstances; because an oath cannot possibly be any tie or obligation upon them. Mahometans* may be sworn on the *Koran; Jews* on the *Pentateuch,* and *Gentoos* and others, according to the ceremonies of their religion, whatever may be the form. It is appealing to *God* to witness what we say, and invoking punishment, if what we say be false. *Id. at* 103 (emphasis in original).

See also Hunscom v. Hunscom, 15 Mass. (14 Tyng) 184 (1818) (recognizing the common law rule, but applying it only as going to the credibility of a witness); Rutherford v. Moore, 1 D.C. (1 Cranch) 404 (D.C. Cir. 1807) (allowing disbelief in God to go to the competency of the witness).

length. It was delivered late in the ratification process — on July 30, 1788, less than a year before Madison introduced the First Amendment in Congress. The speaker was a source of great reliability and prestige. Iredell was not only the North Carolina federalist floor leader, but a former judge and state attorney general, member of the governor's council, and a future associate justice of the United States Supreme Court. In substance and in nuance Iredell's speech represented part of the fully-developed federalist case on the Constitution and religion.

Iredell began by defining an oath as a "solemn appeal to the Supreme Being, for the truth of what is said, by a person who believes in the existence of a Supreme Being and in a future state of rewards and punishments, according to that form which will bind his conscience most."[168] Thus, the very requirement of an oath implied exclusion of atheists and agnostics. After all, Iredell said, "there are few people so grossly ignorant or barbarous as to have no religion at all."[169]

But could oaths be taken properly only by Christians? No, he said: "It was long held that no oath could be administered but upon the New Testament, except to a Jew, who was allowed to swear upon the Old.[170] According to this notion, none but Jews and Christians could take an oath; and heathens [i.e., pagans] were altogether excluded."[171] However, Anglo-American law had become much more liberal than that:

> At length, by the operation of principles of toleration, these narrow notions were done away. Men at length considered that there were many virtuous men in the world who had not had an opportunity of being instructed either in the Old or New Testament, who yet very sincerely believed in a Supreme Being, and in a future state of rewards and punishments. It is well known that many nations entertain this belief who do not believe either in the Jewish or Christian religion.[172]

"Indeed, if none but Christians or Jews could be examined upon oath, many innocent persons might suffer for want of the testimony of others,"[173] he added.

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[168]4 ELLIOT'S DEBATES, *supra* note 2, at 196.
[169]*Id.* at 197.
[170]Hawkins, *supra* note 2; *see also* Dominus Rex v. Bosworth, 2 Strange 1112, 93 Eng. Rep. 1066, 1067 (K.B. 1739):

> . . . [T]he law does not require the New Testament in all cases, particularly as to evidence given by Jews. But the reason of that is, because all Courts desire to have the best security they can for the truth of the evidence, and therefore as it is known they have a more solemn obligation to speak the truth, when sworn on the Old Testament, it is for that reason allowed.

[171]ELLIOT'S DEBATES, *supra* note 2, at 196–97.
[172]*Id.* at 197.
[173]*Id.*

For this reason, if for no other, the oaths of believers in more exotic religions were freely admissible:

> A very remarkable instance also happened in England, about forty years ago, of a person who was admitted to take an oath according to the rites of his own country, though he was a heathen. He was an East Indian . . . . Not believing either in the Old or New Testament, he could not be sworn in the accustomed manner, but was sworn according to the form of the Gentoo[174] religion, which he professed, by touching the foot of a priest. It appeared that, according to the tenets of this religion, its members believed in a Supreme Being, and in a future state of rewards and punishments. It was accordingly held by the judges, upon great consideration, that the oath ought to be received; they considering that it was probable those of that religion were equally bound in conscience by an oath according to their form of swearing, as they themselves were by one of theirs; and that it would be a reproach to the justice of the country, if a man, merely because he was of a different religion from their own, should be denied redress of an injury he had sustained. Ever since this great case, it has been universally considered that, in administering an oath, it is only necessary to inquire if the person who is to take it, believes in a Supreme Being, and in a future state of rewards and punishments. . . .[175] It is, however, necessary that such a belief should be entertained, because otherwise there would be nothing to bind his conscience that could be relied on; since there are many cases where the terror of punishment in this world for perjury could not be dreaded.[176]

Thus, whatever the drafters' motivation for inserting in the Constitution the requirement of oaths and the ban on religious tests,[177] the ratification-era

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[174]A Telugu or Dravidian Hindu. *Cf.* 1 SHORTER OXFORD ENGLISH DICTIONARY 1086 (5th ed. 2002).

[175]For varying reports on the litigation, see *Ramkissenseat v. Barker*, 1 Atk. 19, 20, 26 Eng. Rep. 13, 14 (Ch. 1739); *Omikund v. Barker*, Willes 538, 125 Eng. Rep. 1310 (1744); *Omichund v. Barker*, 1 Wils. K.B. 84, 95 E.R. 506 (Ch. 1745). *See also* Fachina v. Sabine, 2 Strange 1104, 93 Eng. Rep. 1061 (Council 1738) (approving permission for a Muslim witness to swear on the Koran).

[176]4 ELLIOT'S DEBATES, *supra* note 2, at 197–98.

[177]I am indebted to Professor Jessie Hill for her observation that the federalist ratification-era defensive argument for the ban on religious tests may not have reflected the drafters' reasons for inserting the test.

representation was that the oath requirement served as a theistic test[178] and that theism was an adequate religious requirement for government service.

IV. THE RELIGION TERMS IN THE GENTLEMEN'S AGREEMENT: THE ESTABLISHMENT CLAUSE

We have seen that by the terms of the Gentlemen's Agreement, the policy against establishment was designed to further the policy of free exercise, and that free exercise extended to all theists, but only to theists. We have seen further that government service was to be open to all theists, but only to theists. It is logical to deduce, therefore, that the Establishment Clause was designed to protect all theists, but only theists, and that the Clause permitted government to support all faiths on a non-preferential basis. This deduction is supported by a plethora of historical evidence.

A. Evidence that the Establishment Clause Protected Only Theists

1. Fostering Religion

There is an important background fact tending to show that the Establishment Clause left government free to promote religion: There was a very broad consensus that government *should* foster religion. To be sure, the influence of the Enlightenment had left people less fervid in their faith than those in some prior ages. When federalist Benjamin Rush argued in the Pennsylvania ratifying

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[178]Another way to reach the same result was to argue that an official statement of theism would not contradict the ban on religious tests. This was William Williams's approach. Williams indicated that while he did not favor a religious test, he would have gladly accepted constitutional wording acknowledging the existence and moral judgment of God. For more on this, see the exchange between Ellsworth as the "Landholder" and William Williams in 3 DOCUMENTARY HISTORY, *supra* note 2, at 589–90, 593. In the exchange, Williams expressed support for an amendment to the Preamble to add the following words:

> We the people of the United States, in a firm belief of the being and perfections of the one living and true God . . . He will require of all moral agents an account of their conduct, that all rightful powers among men are ordained of, and mediately derived from God, therefore in a dependence on His blessing and acknowledgment of His efficient protection . . . . *Letter from William Williams to the Printer*, AM. MERCURY, Feb. 11, 1788, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 2, at 589.

convention that the proposed Constitution was the product of divine inspiration and adoption of it a divine command,[179] he was widely mocked for his superstition.[180] Rush later backed down from his claim that the Constitution was

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[179]2 DOCUMENTARY HISTORY, *supra* note 2, at 594–95.

> Here the Doctor showed the connection between the want of justice and fidelity in government to individuals, and of individuals to government, and every branch of moral obligation. From this failure of political obligation arose the want of justice between man and man, the difficulty of borrowing and the danger of lending money, the oppressions of landlords, the frauds of tenants, and the numerous instances of conjugal infelicity and divorces, etc. among the lower classes of people; and lastly, the deficiency in parishes to pay their ministers agreeably to their subscriptions. This last instance of a failure in moral obligation, the Doctor lamented, as having a melancholy influence upon the happiness of our country; for, said he, where public worship is not maintained, it will be difficult to preserve religion; and where there is no religion, there will be no morals. Where there are no morals, there can be no government, and where there is no government, there can be no liberty.
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> . . . .
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> . . . Here the Doctor added, that *he believed* the same voice that thundered on Mount Sinai, "thou shalt not steal," now proclaimed in our ears, by a number of plain and intelligible providences, "thou shalt not reject the new federal government." *Id.* Rush later complained about this report of his speech and claimed that what he actually said was more nuanced.

[180]According to the editors of DOCUMENTARY HISTORY, "Newspaper writers in Pennsylvania, New York, and Massachusetts criticized Rush's assertion that the Constitution was divinely inspired." 15 DOCUMENTARY HISTORY, *supra* note 2, at 48. Competing versions of the speech were reprinted widely. *Id*; *see also* 2 DOCUMENTARY HISTORY, *supra* note 2, at 596 (reporting that Robert Whitehill "regretted that so imperfect a work should have been ascribed to God"); William Findley, *Hampden*, PITT. GAZETTE, Feb. 16, 1788, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 2, at 663–64, stating that "[s]uch characters may also be expected to promise us such extravagantly flattering advantages to arise from it, as if it was accompanied with such miraculous divine energy as divided the Red Sea and spake with thunder on Mount Sinai.") (footnote omitted); *Helvidius Priscus II*, BOSTON INDEP. CHRON., Jan. 10, 1787, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 2, at 333.

> Yet it is not probable the metaphisical [*sic*] disquisitions of a *southern doctor*, will persuade the world that the majority of the late CONVENTION were so much the peculiar favourites of heaven as to receive an immediate inspiration for the model of a government, that should subjugate a country which appears to those who are really religious, and who believe in a providential direction, to have been remarkably under divine protection in the various steps that led to its independence. *Id.* (footnote omitted); *The Minority* unsuccessfully that the Pennsylvania ratifying convention open each session with a prayer. *See* 2 DOCUMENTARY HISTORY, *supra* note 2, at 328.

divinely inspired, but still maintained that the ratification certainly was.[181] That Rush had gone too far is suggested by Gouverneur Morris's observation on varying claims that the Constitution was the fruit of divine or demonic influence. "*Medio tutissimus ibis*," he wrote:[182] you are safest if you go down the middle.[183]

But, then again, Morris was a man of the world, and to return to the main point, the contemporaneous "middle" was quite a bit more religious than it is today. One is reminded of the observation by that proto-Whig whose legal commentaries educated so many of founding generation's lawyers, Sir Edward Coke: "[I]n religion . . . if a man go too much on the right hand, he goes to superstition, if too much on the left, to profaneness and atheism. And take away reverence, you shall never have obedience . . . ."[184]

The ratification record is full of invocations of the deity by people other than Rush[185] — and not mainly, or principally, from religious outliers. Madison, who was relatively skeptical about the claims of religion,[186] was not skeptical enough

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[181]*See* Benjamin Rush, *Observations on the Fourth of July Procession in Philadelphia*, PENN. MERCURY, July 15, 1788, *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 2, at 266.

> I do not believe that the Constitution was the offspring of inspiration, but I am as perfectly satisfied, that the union of the states, in its *form* and *adoption*, is as much the work of a divine providence, as any of the miracles recorded in the old and new testament were the effects of a divine power. *Id.* (footnote omitted) (emphasis in original).

[182]Letter from Gouverneur Morris to James LaCaze (Feb. 21, 1788), *in* 16 DOCUMENTARY HISTORY, *supra* note 2, at 171 ("While some have boasted it as a Work from Heaven others have given it a less righteous origin and charged it to the old great Devil. Medio tutissimus ibis[.]").

[183]Author's translation.

[184]3 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 1198 (Steve Sheppard ed., 2003).

[185]*E.g.*, MASS. CENTINEL, Jan. 9, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 2, at 565 ("And may the guardian God of our 'dear country' inspire the Convention of this Commonwealth with *wisdom, disinterestedness* and *patriotism* equal to the display of those virtues in our sister States who have already erected Three Pillars of the glorious Fabrick [*sic*] of the Federal Republick [*sic*]."') (emphasis added); *Aristides* [Alexander Contee Hanson], REMARKS ON THE PROPOSED PLAN OF A FEDERAL GOVERNMENT (Jan. 31–Mar. 27, 1788), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 2, at 517, 548 ("Should Heaven, in its wrath, inflict blindness on the people of America; should they reject this fair offer of permanent safety and happiness . . . ."); *William Penn II*, INDEP. GAZETTEER, Jan. 3, 1788, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 2, at 1437 (microform supp.) (recommending "waiting with confidence in HIM who constantly watches over his favorite creature *man*") (capitalization and emphasis in original).

[186]He frequently expressed skepticism as to whether organized religion was a force for good. *See, e.g.*, THE FEDERALIST NO. 19 (James Madison), *supra* note 2, at 94–95; s*ee also id.* at 270–71; Letter from James Madison to Thomas Jefferson (Oct. 24 & Nov. 1, 1787), *in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 448.

to refrain from interpreting American successes as the product of divine favor.[187] Many others placed a similar interpretation on events.[188]

Some people remained firm adherents of — and here is an opportunity to use a famous word — antidisestablishmentarianism: They believed in some sort of direct preference or "establishment" for favored kinds of religion, which they justified as necessary to promote public virtue.[189] Religion had, in the words of law and economics, "positive externalities" with "public good" characteristics

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[187]THE FEDERALIST NO. 37 (James Madison), *supra* note 2, at 184–85.

> The real wonder is, that so many difficulties [of drafting the Constitution] should have been surmounted; and surmounted with a unanimity almost as unprecedented, as it must have been unexpected. It is impossible for any man of candour [*sic*] to reflect on this circumstance, without partaking of the astonishment. It is impossible for the man of pious reflection, not to perceive in it a finger of that Almighty Hand, which has been so frequently and signally extended to our relief in the critical stages of the revolution. *Id.*

[188]*See, e.g.*, *Foederal [sic] Constitution*, PENN. GAZETTE, Oct. 10, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 362.

> The philosophers will no longer consider a republic as an impracticable form of government; and pious men of all denominations will thank God for having provided, in our foederal [*sic*] constitution, an Ark, for the preservation of the remains of the justice and liberties of the world. *Id.* at 364. *See also* 15 DOCUMENTARY HISTORY, *supra* note 2, at 249 (remarks of Samuel Johnson) (stating at the Connecticut ratifying convention, "Though no enthusiast, I cannot but impute it to a signal intervention of divine providence, that a convention from States differing in circumstances, interests, and manners, should be so harmonious in adopting one grand system."); MASS. CENTINEL, Jan. 19, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 2, at 569.

> So far as the discussion of the Constitution has proceeded, the defence [*sic*] it has received is astonishing — *divine providence* on this occasion, affords one of those few opportunities which occur in the revolution of human affairs, for the unfolding and displaying the amazing powers of the human mind — and from the progress already made in convincing those who were before unconvinced, and bringing to view the latent perfections of the system . . . . *Id. See also* Letter from Simeon Baldwin to James Kent (Mar. 8, 1788), *in* 16 DOCUMENTARY HISTORY, *supra* note 2, at 350–51.

> I must believe that the supreme being, whose hand is so visible in the settlement of this Country — in its rapid population — the extent of territory over which the People have spread — in the general diffusion of knowledge among them, which is not equalled [*sic*] by the people of any territory on earth — & in, the surprizing [*sic*] union of the whole in the Cause of Liberty — has designed something great, noble, glorious from such a Country — such a people — such a revolution. And I will add from such a change in the Consti[tu]tion as the United Wisdom of the U.S. has proposed, from the most perfect models of Govt. both in Theory & practice which have appeared on earth & been sanctioned by the approbation of the wise politicians who have gone before us[.] *Id.*

[189]*Cf. supra* notes 147 and 149 and accompanying text.

that rendered it worthy of compulsory support.[190] The most commonly-cited illustration was a negative one: "Rogues' Island" (Rhode Island), where immorality and bad faith seemed to have run riot.[191] It was not coincidental, some said, that Rhode Island was the place with the highest wall of separation between church and state.[192] As Connecticut Representative Benjamin Huntington's sarcastic observations in the first Congress were summarized: "By the charter of Rhode Island, no religion could be established by law; [I] could give a history of the effects of such a regulation; indeed the people [are] now enjoying the blessed fruits of it."[193]

One did not have to be an establishmentarian to favor direct government intervention in favor of religion. There was wide support for laws designed to reinforce respect for religion. Among these were penalties — often harsh ones — imposed for blasphemy.[194] Even Thomas Jefferson, the arch-secularist of his time, supported such measures.[195] State government practices during the 1776–

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[190]HAMBURGER, *supra* note 2, at 67. Those who opposed established religions sometimes were accused of wanting a "wall of separation" between church and state — a phrase that, far from being an ideal, was an accusation. *Id.* at 65, 66, 68; *see also* McConnell, *supra* note 2, at 1441 (noting that the Virginia religious assessment proposal was based on moral grounds); HOWE, *supra* note 2, at 26–27 (outlining the externality theory).

[191]*See, e.g.*, 3 ELLIOT'S DEBATES, *supra* note 2, at 28 (remarks of Gov. Edmund Randolph) (stating at the Virginia ratifying convention, "Rhode Island — in rebellion against integrity — Rhode Island plundered all the world by her paper money; and, notorious for her uniform opposition to every federal duty . . . .").

[192]*See, e.g.*, *Foederal [sic] Constitution*, PENN. GAZETTE, Oct. 10, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 365 ("See, in Rhode Island, the bonds of society and the obligations of morality dissolved by paper money and tender laws."); *see also An American: To Richard Henry Lee*, *in* 15 DOCUMENTARY HISTORY, *supra* note 2, at 174.

> Have not the rights of property been violated & religion & morality trampled under foot by instalment [*sic*] & suspension Laws, by a paper legal tender (in case of suit) in six states, by ~~pine barren~~ laws to discharge specific & pecuniary contracts in every species of property however worthless in itself or useless and inconvenient to the creditor. *Id.* (strikeout in original).

This general repudiation of the regime in Rhode Island renders slightly ridiculous the claim that the Establishment Clause was inspired by the thoughts of Roger Williams. *Cf.* HOWE, *supra* note 2, at 5–8 (tracing the phrase "wall of separation" to Williams); HAMBURGER, *supra* note 2, at 38–45, 50–53 (discussing Williams's views and anticlericalism and denying that they were particularly influential at the founding).

[193]ANNALS, *supra* note 2, at 730. Actually, Rhode Island, that reputed refuge of tolerance, barred Jews from citizenship and Catholics from public office. McConnell, *supra* note 2, at 1425–26.

[194]*See* ANTIEAU, *supra* note 2, at 78–80 (describing some existing penalties).

[195]*Cf.* CORD, *supra* note 2, at 140 (citing Jefferson's support for laws banning profane swearing).

1789 period included extensive public assistance to a wide range of religious denominations.[196]

Some denied it was the proper role of government — at least of the federal government — to promote particular doctrines or sects *directly*. Yet even these believed it proper for government to promote morality by fostering faith *indirectly*[197] and to promote faith by fostering morality.[198] The *American Mercury* editorialized that "[t]he advancement of religion, which beyond dispute is of infinitely the greatest moment, is not directly the object of civil government;"[199] but "Happy indeed if civil government might subserve [religion's] interest!"[200] Laws establishing a just order ensured that the vicious could not prey upon the virtuous. As the essayist the "Foreign Spectator" opined in urging that the Constitution be adopted, the

> good of all denominations reflect, that the common interest of religion, and the honest predelection [*sic*] you have for your particular modes of worship, both require the independency, safety, and general welfare of your country [and] shudder at the impieties and outrages on humanity committed by monsters in human form in the scenes of general anarchy.[201]

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[196]*See* ANTIEAU, *supra* note 2, at 62–86 (outlining such practices). *See also id.* at 121–22 (describing the state of public opinion).

[197]*Id.* at 89–91 (collecting contemporaneous comments on the obligation of government to promote religion and virtue).

[198]HAMBURGER, *supra* note 2, at 76–77.

[199]AM. MERCURY, Jan. 21, 1788, *in* 3 DOCUMENTARY HISTORY, *supra* note 2, at 312, 314–15 (Microform Supp.).

[200]*Id.* at 315.

[201]Nicholas Collin, *Foreign Spectator*, PHILA. INDEP. GAZETTEER, Oct. 2, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 292. *See also Meeting of Philadelphia Association of Baptist Churches*, N.Y. PACKET, Oct. 12 1787, *reprinted in id.* at 374–75.

> After finishing the particular business on which they met as a *religious* body, it was agreed to incorporate with their general circular letter, the following recommendation to their people of the proposed plan of the *Foederal* [*sic*] *Government* — which has been handed to the Printers by a correspondent, and redounds much to their honor as a society.
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> . . . [T]is favourable opportunity offered to establish an EFFICIENT government; which, we hope may, under God, secure our invaluable rights, both civil and religious. *Id.* (capitalization and emphasis in original).

See also 2 DOCUMENTARY HISTORY, *supra* note 2, at 186 (reporting a squib from the PENN. GAZETTE, Oct. 17, 1787).

> A minister of the Gospel, through the medium of our paper, begs leave to ask, whether men can be serious in regard to the Christian religion, who object to a government that is calculated to promote the glory of GOD, by establishing peace, order and justice in our country? — and whether it would not be better for such men to renounce the Christian name, and to enter into society with the Shawanese or

Because of the overwhelming consensus that government should foster religion and morality, whether or not the Constitution would do so became a criterion by which people judged the document. The *Poughkeepsie Country Journal* summarized differences between federalists and antifederalists thus:

> [H]ere, a very decided majority think (and with them thy friend) that a union of the American States, as exemplified in the new constitution, is friendly to *property*; consistent with *freedom*; and favorable to *morality* and *religion*. Whereas in thy county I am told many think exactly the reverse.
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> . . . .
>
> I think it [the Constitution] also favorable to the morals of the people. For if jealousies, factions, cabals and war have a tendency to corrupt the manners[,] that political situation which prevents jealousies, factions, cabals and war is desirable on a moral account: and if on a moral, certainly on a *religious*.[202]

As was true of other foundational values, such as liberty and republicanism, the sides disagreed on the application — but not on the basic principle:[203] Government should, directly or indirectly, foster religion. In this climate of public opinion, no Establishment Clause erecting a "wall of separation" between religion and state ever would have been adopted or even seriously proposed.

2. The Faith-Based Ideology of Disestablishment

Two other clues to the theistic orientation of the Establishment Clause are the identity of those who lobbied for disestablishment, and the justifications they advanced. The disestablishment coalition was not composed of atheists, agnostics — or even deists or unitarians. It was comprised of religious enthusiasts who certainly did not favor government neutrality on the subject of religion in general.[204] In other words, they shared the public consensus that

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Mohawk Indians, than to attempt to retain the blessings of religion and civilization, with their licentious ideas of government. *Id.* (footnote omitted) (capitalization in original).

[202]POUGHKEEPSIE COUNTRY J., Mar. 18, 1778, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 2, at 409–10 (emphasis in original).

[203]*See* Robert G. Natelson, *Federal Land Retention and the Constitution's Property Clause: The Original Understanding*, 76 U. COLO. L. REV. 329, 337–39 (2005) (summarizing some common constitutional values held by the founding generation).

[204]ANTIEAU, *supra* note 2, at 52–53 (identifying Presbyterians and Baptists as leaders in the Virginia disestablishment battle); HOWE, *supra* note 2, at 8–9; McConnell, *supra* note 2, at 1438–41 (noting that establishment was opposed by intense religious sects). For an

government should *foster* religion.[205] Moreover, these groups would have perceived any suggestion that they wanted a "wall of separation" between state and faith not as a compliment, nor even as a description, but as an insult.[206] For them, the relationship between good government and religion was interactive and symbiotic, rather than rigid and distant.[207]

It is a curious fact that strict separationists often celebrate Madison's *Memorial and Remonstrance Against Religious Assessments* (1785)[208] and Jefferson's and Madison's Virginia *Statute for Religious Freedom* (1786)[209] as testimony for their views. The premier example of this is the Supreme Court's reliance on those documents in *Everson v. Board of Education*[210] and *Flast v. Cohen*.[211] One reason such reliance is curious is that, as already noted, Jefferson had little to do with adoption of the First Amendment, and Madison intimated that the measure did not express his own views.[212] But the more important reason is both the *Remonstrance* and the *Statute* rest their justification squarely on the demands of religion and of God.

The *Remonstrance* was directed specifically against an "establishment of religion" — taxes imposed to support Christianity. It states in part:

> Because we hold it for a fundamental and undeniable truth, "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." The Religion then of every man must be left to the conviction and conscience of every man . . . . This right is in its nature an unalienable right.

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example of a Baptist tract from the ratification era, see *A Baptist*, FREEMAN'S J., Jan. 23, 1788, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 2, at 1557–58 (Microform Supp.) (expressing fear that under the Constitution the federal government could establish a hostile religion).

[205]*See supra* Part IV.A.1.

[206]HAMBURGER, *supra* note 2, at 65–68.

[207]*Id.*

[208]*See* MCDONALD, *supra* note 2, at 44–45 (discussing the background of the *Remonstrance*).

[209]This reliance no doubt arises from the fact that the *Memorial and Remonstrance* declares that religion is "wholly exempt" from the cognizance of civil society. This was, however, quite an atypical view, and not part of the context of the First Amendment. *See supra* Part II.D.

[210]330 U.S. 1, 12–13 (1947).

[211]392 U.S. 83, 103–04 (1968) (citing the *Remonstrance* for the position that "[t]he concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another *or to aid religion in general.*") (emphasis added).

[212]*See supra* notes 22-23and accompanying text (discussing Jefferson's role); *supra* notes 67, 73-75, and *infra* note 287 and accompanying text (discussing Madison's concessions).

> . . . because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe . . . .[213]

The *Statute* is, as its name suggests, a measure protecting free exercise, but it decries establishments as well:

> Whereas, Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations [*sic*] tend only to beget habits of hypocrisy and meanness, and are *a departure from the plan of the holy author of our religion,* who being Lord, both of body and mind yet chose not to propagate it by coercions on either, as was in his Almighty power to do, that the *impious presumption* of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical . . . .[214]

In both we see precisely the same justification at work for disestablishment that we saw supporting free exercise and the ban on religious tests: mankind's duty to God.[215] *Remove the theism, and you remove the justification.*

During the debate over the Constitution, the parties specifically relied on theism as a basis for proposed constitutional amendments prohibiting a federal establishment. The Virginia ratifying convention, for example, proposed an amendment stating in part:

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[213]James Madison, *Memorial and Remonstrance against Religious Assessments* (1785), *in* 5 THE FOUNDERS' CONSTITUTION 82 (Phillip B. Kurland & Ralph Lerner eds., 1987).

[214]The Virginia Statute for Religious Freedom (Jan. 16, 1786), *available at* http://www.lva. lib.va.us/whatwedo/k12/bor/vsrftext.htm#trans (emphasis added) (last visited Aug. 25, 2005).

[215]*See, e.g.*, *supra* notes 139–43 and accompanying text.

> 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 that *no particular religious sect or society ought to be favored or established, by law, in preference to others.*[216]

The North Carolina ratifying convention adopted very similar language,[217] heeding, among others, the words of James Iredell: "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?"[218]

Shortly after Connecticut ratified the Constitution, one William Williams — who had voted for the Constitution at his state's ratifying convention — publicly challenged Ellsworth, anonymously writing in his "Landholder" identity, to state whether, despite Ellsworth's opposition to religious tests, he would have accepted wording in the Constitution's Preamble acknowledging the existence and moral judgment of God. Ellsworth affirmed that he would support such language.[219] As noted earlier, there was no constitutional protection, in his opinion — or in almost anyone else's — for "professed atheism."[220]

3. An Objection, and a Response, on the Theistic Basis for the Establishment Clause

Advocates of the modern "strict separation" and "neutrality" approaches to the Establishment Clause maintain that the Clause prohibits official aid or preference for religion over non-religion.[221] The effect of this approach, of

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[216]3 ELLIOT'S DEBATES, *supra* note 2, at 659 (emphasis added).

[217]4 ELLIOT'S DEBATES, *supra* note 2, at 244.

> 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.

Id. See also id. at 208 (quoting Richard Spaight at the North Carolina ratifying convention as stating, "As to the subject of religion, ... [n]o sect is preferred to another [by the Constitution]. Every man has a right to worship the Supreme Being in the manner he thinks proper.").

[218]*Id.* at 194.

[219]*See supra* note 178 (referencing this interchange). Ellsworth responded, "Against preambles, we have no animosity." 3 DOCUMENTARY HISTORY, *supra* note 2, at 593.

[220]*Supra* note 137 and accompanying text.

[221]CHEMERINSKY, *supra* note 2, at 986–87 (pointing out that advocates of both strict separation and "neutrality" favor the approach of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which requires that government actions neither be intended to benefit religion nor have that principal or primary effect); *see also* Engel v. Vitale, 370 U.S. 421, 443 (1962) (Douglas, J., concurring) ("The First Amendment leaves the Government in a position

course, is to assure atheism or agnosticism equal standing with religion for constitutional purposes.

Probably the most respected legal historian in this camp is Professor Leonard W. Levy, who expounds it in his 1994 book, *The Establishment Clause: Religion and the First Amendment*. He reasons as follows:

- The founding generation meant by the word "establishment" not only exclusive establishments but also systems that subsidized Christianity or Protestantism generally.[222]
- Seven states had either general Christian or general Protestant "establishments" at the time the First Amendment was ratified: Connecticut, Massachusetts, New Hampshire, Vermont, Maryland, South Carolina, and Georgia.[223]
- In each of those states the population was so universally affiliated with sects within the established group (Christian or Protestant) that as a practical matter those establishments amounted to "nonpreferential" aid to *all* religion (i.e., all relevant sects).[224]
- Therefore, by abolishing such "establishments," the First Amendment abolished all systems that favor religion over irreligion.[225]

However, a close reading of Professor Levy's book — even without reference to other sources — induces one to question his argument. For example, at several points he undercuts his first premise by honestly acknowledging that many educated people (he cites some distinguished lawyers) *did not* think systems of non-exclusive subsidy were "establishments."[226] At another point he concedes that the dominant usage in New England identified "establishment" only with exclusive establishments,[227] and elsewhere he tells us that some Virginians thought similarly.[228]

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not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic — the nonbeliever — is entitled to go his own way."); Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947). For examples of commentators adopting this view, see LEVY, *supra* note 2. *See, e.g.*, Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 902 (1986) ("Curry, Levy, and I agree on the central point: the framers of the establishment clause had no specific intention to permit nonpreferential aid to religion. Levy and I agree on the stronger formulation that the Framers intended to forbid such aid.").

[222]LEVY, *supra* note 2, at 75–76.

[223]*Id.* at 42–78.

[224]*Id.*

[225]*Id.* at 75–77.

[226]*Id.* at 43, 47; *see also id.* at 88 (citing Rep. Francis Cummins as defining an establishment as "the state[] giving preference to any religious denomination").

[227]*Id.* at 47–48.

[228]*Id.* at 107 (noting that, in Virginia, opponents of ratifying the Bill of Rights interpreted the Establishment Clause as banning only a national religion).

In support of his second premise — that the population of states with nonpreferential "establishments" was such that those "establishments" amounted to subsidies of all religion — Levy writes:

> In general, where Protestantism was established, it was synonymous with religion, because there were no Jews and Roman Catholics or too few of them to make a difference; and where Christianity was established, as in Maryland, which had many Catholics, Jews were scarcely known. Where Jewish congregations existed, as in Savannah and Charleston, state law reflected obliviousness to their presence rather than deliberate discrimination, and no evidence exists to show that Jews were actually taxed to support Christianity.[229]

Professor Levy does not clarify, however, what he means by "too few of [Jews or Catholics] to make a difference."[230] He acknowledges that Jews were a presence in both Savannah, Georgia and Charleston, South Carolina;[231] indeed, the Jewish presence in Savannah was significant.[232] Yet both states had "Christian" establishments,[233] so neither state practiced nonpreferentialism. Was the legislature "oblivious" because Jews were politically powerless? If so, this helps explain why there was a Christian establishment, but it does not make such an establishment nonpreferential. Moreover, Professor Levy does not explain why state lawmakers should be "oblivious" to Jewish congregations. Even if they were, were they similarly oblivious of other non-Christians? Perhaps the American Indians who had mixed with the state population but retained native beliefs could be mentally marginalized — but what of the more verbal adherents of deism? In sum, it is unlikely the First Amendment's ban on a national "establishment" was a ban on nonpreferentialism; on the contrary, a fair reading of record supports the view that the word "establishment" implied a system whereby government promoted some religious views over others.

B. Evidence that the Establishment Clause Protected All Theists

On the opposite end of the spectrum from those who claim the Establishment Clause forbade preference for religion over non-religion are those who argue that it did no more than interdict a "national church" and protect state religious establishments.[234] According to this narrow interpretation of the Clause, official

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[229]*Id.* at 76.
[230]*Id.*
[231]*Id.*
[232]McConnell, *supra* note 2, at 1424.
[233]*See id.* (discussing Georgia); *id.* at 1425 (discussing South Carolina).
[234]*See* Zelman v. Simmons-Harris, 536 U.S. 639, 678 n.2 (Thomas, J., concurring) (citing Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 309–310 (1963) (Stewart, J.,

favors to a broad religious grouping, such as Christianity or Protestantism, do not violate the ban on establishments.

There is more historical evidence to support this narrow interpretation of the Establishment Clause than to support the view that the Clause prohibits all assistance to religion. The most common system of "establishment" in the eighteenth century was a state church such as the Church of England.[235] Some participants in the ratification process spoke about establishments in this sense, usually expressing it as state preference for one "sect,"[236] "society,"[237] or "church."[238] Madison called this an "exclusive[] establish[ment]" and spoke against it at the Virginia ratifying convention.[239] Moreover, both New York and Rhode Island proposed amendments to prevent federal preference for any "religious sect or society."[240]

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dissenting)); *cf.* ANTIEAU, *supra* note 2, at 140–42 (expressing federalism or states' rights as possibly "one reason" for the Establishment Clause). For a modern defense of this purely "federalism" view, see SMITH, FOREORDAINED FAILURE, *supra* note 2, at 17–43; *see also* DREISBACH, *supra* note 2, at 60 (supporting the federalism view, but overlooking federal implied powers by inaccurately stating that all matters not "explicitly" entrusted to the federal government were reserved to the states or people).

[235]*See infra* notes 236–40 and accompanying text.

[236]*See, e.g.*, *Z*, BOSTON INDEP. CHRON., Dec. 6, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 359 ("If the rights of conscience, for instance, are not sacredly reserved to the people, what security will there be, in case the government should have in their heads a predilection for any *one* sect in religion?") (emphasis in original); *see also* 2 ELLIOT'S DEBATES, *supra* note 2, at 202 (remarks of Oliver Wolcott) (speaking from a federalist perspective at the Connecticut ratifying convention); 4 ELLIOTT'S DEBATES, *supra* note 2, at 208 (remarks of Richard Spaight) (speaking at the North Carolina ratifying convention); 3 ELLIOT'S DEBATES, *supra* note 2, at 204 (remarks of Edmund Randolph) (speaking at the Virginia ratifying convention).

[237]*See infra* note 240.

[238]*An Old Whig*, PHILA. INDEP. GAZETTEER, Nov. 1, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 540–41 (offering an antifederalist perspective).

> I hope and trust that there are few persons at present hardy enough to entertain thoughts of creating any religious establishment for this country; although I have lately read a piece in the newspaper, which speaks of *religious* as well as civil and military *offices*, as being hereafter to be disposed of by the new government; but if a majority of the continental legislature should at any time think fit to establish a form of religion, for the good people of this continent, with all the pains and penalties which in other countries are annexed to the establishment of a national church, what is there in the proposed constitution to hinder their doing so? *Id.* (emphasis in original).

[239]3 ELLIOT'S DEBATES, *supra* note 2, at 330.

[240]Ratification of the Constitution by the State of Rhode Island (May 29, 1790), The Avalon Project at Yale Law School, *available at* http://www.yale.edu/lawweb/avalon/const/ ratri.htm (last visited Aug. 25, 2005) (stating

However, "the meaning of the word establishment was not precisely fixed,"[241] and a review of the entire course of ratification shows that public opinion finally coalesced around the idea of a broader restriction on federal power than merely protection for state establishments and a ban on a national church. Shortly after the Constitution became public, Tench Coxe, one of its most influential advocates, celebrated "catholicism in ecclesiastical affairs" — that is, nonpreferentialism.[242] Some antifederalists adopted a similar position, praising the virtues of equal treatment for all religions, denominations, and sects — without any proviso that those religions, denominations, or sects be Protestant or Christian.[243] Similarly, an amendment approved by a committee of the

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that "no particular religious sect or society ought to be favoured, or established by law in preference to others"); Ratification of the Constitution by the State of New York (July 26, 1788), Avalon Project at Yale Law School, *available at* http://www.yale.edu/lawweb/avalon/const/ratny.htm (last visited Aug. 25, 2005) (stating "[t]hat 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 favoured or established by Law in preference of others").

[241]Feldman, *supra* note 2, at 380.

[242]*See An American Citizen*, *On the Federal Government*, PHILA. INDEP. GAZETTEER, Sept. 26, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 247:

> To take a proper view of the ground on which we stand, it may be necessary to recollect the manner in which the United States were originally settled and established. — Want of charity in the religious systems of Europe and of justice in their political governments were the principal moving causes, which drove the emigrants of various countries to the American continent. The Congregationalists, Quakers, Presbyterians and other British dissenters, the Catholics of England and Ireland, the Hugonots of France, the German Lutherans, Calvinists, and Moravians, with several other societies, established themselves in the different colonies, thereby laying the ground of that catholicism in ecclesiastical affairs, which has been observable since the late revolution: Religious liberty naturally promotes corresponding dispositions in matters of government. *Id.* at 248.

[243]*Centinel*, PHILA. FREEMAN'S J., Oct. 24, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 466; *Timothy Meanwell*, PHILA. INDEP. GAZETTEER, Oct. 29, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 511; *Letter VI*, Dec. 25, 1787, *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 2, at 268, 274 ("The following, I think, will be allowed to be unalienable or fundamental rights in the United States: — No man, demeaning himself peaceably, shall be molested on account of his religion or mode of worship[.]"); *Petition Against Confirmation of the Ratification of the Constitution*, in 2 DOCUMENTARY HISTORY, *supra* note 2, at 710, 711 ("That the rights of conscience should be secured to all men, that no man should be molested for his religion, and that none should be compelled contrary to their principles and inclination to hear or support the clergy of any one religion.").

Maryland convention (but rejected by the whole) would have proscribed not only preference for a particular "sect or society," but any "national religion."[244]

Leading federalists seem to have adopted nonpreferentialism partly as a natural consequence of their understanding of the Constitution's oaths — that such oaths amounted to a necessary and sufficient test of theism.[245] As noted earlier, nonpreferentialism meshed well with state government practices during the 1776–1789 period, when public assistance to a wide range of religious denominations was common.[246]

In any event, people on both sides began to judge the Constitution by the criterion of whether it furthered equal treatment for all religions. One antifederalist author wrote critically of the Constitution because it seemed to reflect either of two extremes, both of which were unacceptable to most people:

> From the proceedings of the convention, respecting *liberty of conscience*, foreign politicians might be led to draw a strange conclusion, *viz*. that the majority of that assembly were either men of *no* religion, or all of *one* religion; such a conclusion naturally follows their silence on that subject; they must either have been indifferent about religion, or determined to compel the whole continent to conform to their own.[247]

On the federalist side, the "Landholder" and William Williams publicly exchanged letters[248] in which they agreed that the Constitution should recognize God in a non-denominational way.[249] Another Connecticut citizen chimed in with a proposal for a religious test acceptable to almost all theists:

> I swear, in the name of the all-seeing DEITY, that I will henceforth be a slave to no sect or party of men . . . . I likewise solemnly declare that I consider myself as a citizen of the intellectual world and a subject of its Almighty Lawgiver and Judge. That by Him I am placed upon an honorable theater of action to sustain, in the sight of mortal and IMMORTAL beings, that character and part which He shall assign me, in order to my being trained up for perfection

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[244]2 ELLIOT'S DEBATES, *supra* note 2, at 553 ("That there be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty.").

[245]*See supra* Part III.

[246]*Supra* Part IV.A.1.

[247]*Philadelphiensis*, PHILA. FREEMAN'S J., Nov. 28, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 2, at 251, 253 (emphasis in original).

[248]*Supra* note 178 and accompanying text.

[249]*See* 3 DOCUMENTARY HISTORY, *supra* note 2, at 587–90, 593.

> and immortality — and shall, from this time forth, devote my life to the service of GOD, my country, and mankind.
>
> So help me GOD![250]

I already have quoted at length from James Iredell's speech at the North Carolina ratifying convention, arguing for equal recognition of the oaths of people of all religions.[251] Apparently, most North Carolina delegates firmly rejected the bigoted arguments that if the Constitution were adopted, America's doors would open to "Jews and pagans of every kind to come among us."[252] Rather, North Carolina's temporary recalcitrance derived from other sources.[253] Indeed, North Carolina and other states took affirmative steps to implement nonpreferential theism. For example, North Carolina, Virginia, and Rhode Island all recommended exemptions for groups that objected to oaths or military service.[254] New Hampshire,[255] Virginia,[256] New York,[257] North Carolina,[258] and

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[250]*A New Test*, NEW HAVEN GAZETTE, Jan. 31, 1788, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 2, at 588 (emphasis in original). The piece was titled "A NEW TEST" and proclaimed that it was "[h]umbly proposed to those who wish for a test in the new Constitution." *Id.*

[251]*See supra* notes 168–78 and accompanying text.

[252]*Id.* at 199 (quoting David Caldwell, speaking at the North Carolina ratifying convention).

[253]ANTIEAU, *supra* note 2, at 155–56.

[254]Two of the Virginia amendments were as follows:

> 14th. That every freeman has a right to be secure from all unreasonable searches and seizures . . . all warrants . . . without information on oath (*or affirmation of a person religiously scrupulous of taking an oath*) of legal and sufficient cause, are grievous and oppressive . . . .
>
> . . . .
>
> 19th. [A]ny person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead. 3 ELLIOT'S DEBATES, *supra* note 2, at 658–59 (emphasis added).

Similar amendments were adopted elsewhere. *See* 2 ELLIOT'S DEBATES, *supra* note 2, at 244 (discussing North Carolina's proposal); *Ratification of the Constitution by the State of Rhode Island*, May 29, 1790, Avalon Project at Yale Law School, *available at* http://www.yale.edu/lawweb/avalon/const/ratri.htm (last visited Aug. 29, 2005) ("[A]ny person religiously scrupulous of bearing arms, ought to be exempted, upon payment of an equivalent, to employ another to bear arms in his stead.").

[255]*Ratification of the Constitution by the State of New Hampshire* (June 21, 1788), The Avalon Project at Yale Law School, *available at* http://www.yale.edu/lawweb/avalon/const/ ratnh.htm (last visited Dec. 29, 2004) ("Congress shall make no Laws touching Religion, or to infringe the rights of Conscience.").

[256]3 ELLIOT'S DEBATES, *supra* note 2, at 659.

> 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

Rhode Island[259] all proposed guarantees of free exercise and bans on establishments. South Carolina's proposal to treat the oath explicitly as a religious test was an additional endorsement of nonpreferential theism.[260] Not a single convention, not even that of pious Massachusetts,[261] sought preference for Protestantism or even Christianity.[262] This unanimity emerged despite the desires of some antifederalists for a Christian government and the practical need to secure antifederalist votes for ratification.

This unanimity was remarkable, but ideologically consistent: The anti-establishment principle flowed from the free exercise principle. By free exercise, the founders meant protecting God's dominion over the individual conscience, so long as the individual admitted God's dominion over that conscience — no matter what one's faith might be.[263]

In the aftermath of ratification, apologists for the Constitution trumpeted the inclusive theism of the new regime. In July 1788, Tench Coxe addressed the skeptical folk of Western Pennsylvania:

> I want those good people to read the constitution quietly by themselves, and to judge like reasonable and free men for

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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. *Id.*

[257]*Ratification of the Constitution by the State of New York* (July 26, 1788), The Avalon Project at Yale Law School, *available at* http://www.yale.edu/lawweb/avalon/const/ratny.htm (last visited Aug. 29,2005) ("[T]he 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 favoured or established by Law in preference of others.").

[258]4 ELLIOT'S DEBATES, *supra* note 2, at 244 ("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.").

[259]*See Ratification of the Constitution by the State of Rhode Island* (May 29, 1790), The Avalon Project at Yale Law School, *available at* http://www.yale.edu/lawweb/avalon/const/ ratri.htm (last visited Aug. 29, 2005).

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

[261]Massachusetts did not offer an amendment on the subject of religion. *See* 2 ELLIOT'S DEBATES, *supra* note 2, at 177–78.

[262]Thus, the Court's suggestion in *Wallace v. Jaffree*, 472 U.S. 38 (1985), that Christianity was thought to be preferred, is simply inaccurate. *Id.* at 52 & n.36 (citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1874, at 593 (1801)).

[263]*Supra* Part II.D.

> themselves. . . . They will see that every man among them, whether [P]rotestant or [C]atholic, rich or poor, may elect or be elected. The Assembly may chuse [*sic*] any of them a Senator, or the people may chuse any of them a foederal [*sic*] Representative, or any of them may be chosen Vice-President or President of the United States. Nothing in the constitution forbids it, though they must be sensible that a man must be very good and very wise, to deserve and receive such great trusts from the Assembly and from the people . . . . In other countries *religious* tests would prevent him, though he were ever so wise, ever so good, or ever so much beloved and esteemed. . . . But our new foederal [*sic*] constitution admits all, whether [P]rotestant, or [C]atholic, or [P]resbyterian, or [E]piscopalian, &c. for it expressly says there shall be *no religious test*. . . . The foederal [*sic*] connexion, established on these liberal and generous principles . . . which it has pleased God to raise up in the world. . . . They will not render to each other nor to the government, tithes, nor tenths, nor free gifts (as they have been preposterously termed) nor any species of taxes, as religious men or societies. Nothing will be expected, nothing will be required but peace and good will, and brotherly loving kindness. This excellent quality of the new government will warm and expand our bosoms whenever we reflect upon it. The liberality and virtue of America is establishing perfect equality and freedom among all religious denominations and societies, and will no doubt produce to us a great reward . . . . There alone can the sincere votaries of religion enjoy their lives, their civil and religious rights and property, without suffering from their attachment to that church in which they have been *born and bred*, and which they believe to be *right and true*.[264]

Coxe published those words the same month James Iredell presented his speech at the North Carolina ratifying convention wherein Iredell stirringly affirmed respect for oaths sworn by Jews, Hindus, and other non-Christians.[265] The following month, the noted clergyman Manasseh Cutler further proclaimed the new national doctrine of inclusive theism:

> By the Constitution now established in the United States, religious as well as civil liberty is secured. Full toleration is

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[264]*A Friend of Society and Liberty, To the* INHABITANTS *of the Western Counties of Pennsylvania*, PENN. GAZETTE, Jul. 23, 1788, *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 2, at 281–82 (emphasis in original).
[265]*See supra* notes 168–78 and accompanying text.

> granted for free inquiry, and the exercise of the rights of conscience. No one kind of religion, or sect of religion, is established as the national religion, nor made, by national laws, the test of truth. Some serious Christians may possibly tremble for the Ark, and think the Christian religion in danger when divested of the patronage of civil power. They may fear inroads from licentiousness and infidelity, on the one hand, and from sectaries and party divisions on the other. But we may dismiss our fears, when we consider that truth can never be in real hazard, where there is a sufficiency of light and knowledge, and full liberty to vindicate it. . . .[266]

Iredell had explicitly included Jews and Hindus in the new order.[267] Coxe had explicitly included Catholics and Protestants and proclaimed "perfect equality and freedom among all religious denominations and societies."[268] Cutler affirmed that no sect nor any *one kind of religion* would be preferred — apparently not even Christianity.[269]

That such were the terms of the Gentlemen's Agreement was reflected in the response from America's largest single non-Christian minority — the Jews. On September 7, 1787, Jonas Phillips, a prominent Philadelphia Jew,[270] had petitioned the federal convention to adjust any oath for participating in public life so it could be taken by people of his faith.[271] Once the Constitution was ratified, Jews were very much among the celebrants. Just as importantly, they were welcomed as such. On August 2, 1788, the Comte de Moustier wrote to the Comte de Montmorin from New York:

> The city of Newyork [*sic*] did not even wait for the State Convention to give its decision. It had its procession at a time when it was strongly doubted that the State would adopt the Constitution. . . . I had been invited [to a celebration dinner], and I attended . . . . To the left of Congress were its Officers and the members of the Clergy from the City, Anglicans, Presbyterians, Catholics, Lutherans, Calvinists, Jews, all

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[266]Manasseh Cutler, *Sermon at Marietta, Northwest Territory*, Aug. 24, 1788, in 18 DOCUMENTARY HISTORY, *supra* note 2, at 342.
[267]2 ELLIOTT'S DEBATES, *supra* note 2, at 193–98.
[268]*See supra* note 264 and accompanying text.
[269]*See supra* note 266.
[270] He was a founding member of Philadelphia's Mickvé Israel Congregation. *See Jewish History in Philadelphia*, *available at* http://www.en.wikipedia.org/wiki/Jewish_history_in_ Philadephia (last visited Sept. 6, 2005).
[271]The text of the letter appears at 3 FARRAND, *supra* note 2, at 78–80.

> indiscriminately seated, except that the Anglican Bishop had taken the right from all the others and had said the *blessing*.[272]

Philadelphia eclipsed even this show of unity. Its parade of celebration was quite a spectacular affair. We have a lengthy eye-witness account by Dr. Benjamin Rush, reading in part:

> The Clergy formed a very agreeable part of the Procession — They manifested, by their attendance, their sense of the connection between religion and good government. They amounted to seventeen in number. Four and five of them marched arm in arm with each other, to exemplify the Union. Pains were taken to connect Ministers of the most dissimilar religious principles together, thereby to shew [*sic*] the influence of a free government in promoting christian charity. *The Rabbi of the Jews, locked in the arms of two ministers of the gospel, was a most delightful sight.* There could not have been a more happy emblem contrived, of that section of the new constitution, which opens all its power and offices alike, not only to every sect of christians, but to worthy men of *every* religion.[273]

V. CONGRESSIONAL ADOPTION OF THE RELIGION CLAUSES

When framed by the terms of the Gentlemen's Agreement, the pieces of the congressional process snap easily into place. In essence, that process was one of shaping the First Amendment to fit the adopters' understanding of the Gentlemen's Agreement.[274]

In Part I.B, I discussed in a general way the First Congress's adoption of the Bill of Rights. In this Part, I focus more specifically on the debate over the Establishment Clause.

On June 8, 1789, Madison rose in the House of Representatives to introduce his amendments. After some discussion he detailed each of these. There were three pertaining to religion. One was that "[n]o state shall violate the equal rights

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[272]Letter from Comte de Moustier to Comte de Montmorin (Aug. 2, 1788), *in* 18 DOCUMENTARY HISTORY, *supra* note 2, at 308–09 (footnote omitted) (emphasis in original).

[273]Benjamin Rush, *Observations on the Fourth of July Procession in Philadelphia*, PENN. MERCURY, July 15, 1788, *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 2, at 265 (footnote omitted) (first emphasis added).

[274]ANTIEAU, *supra* note 2, at 208 ("Moreover, the task of the First Congress was not to write into law the personal views of its members; rather it was to assimilate the proposals submitted by the states together with what was thought to be politically satisfactory and in the best interests of both religion and government.").

of conscience."[275] Another was that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person."[276] The former was Madison's own idea.[277] The latter had been endorsed by the conventions of only two states[278] (although Rhode Island was later to make it three).[279] Neither amendment survived Congress.

Madison's remaining proposal, however, was a genuine effort to embody the "religion terms" of the public bargain. It read as follows:

> 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.[280]

The phrase that eventually became the foundation of the Establishment Clause was, of course, "nor shall any national religion be established."[281] As befits the Clause's role in furthering free exercise, this language was embedded between two free exercise provisions. It was wider than a prohibition, as existed in some state constitutions, of preference for any particular "sect or society."[282] Rather, it was similar to the amendment proposed by the convention minority in Maryland[283] in that it proscribed a national "religion." Thus, Madison's language also would have banned preference for Protestantism or for Christianity in general.

Over two months passed before the House of Representatives discussed this proposal once again. On August 15, Madison explained that his proposed wording meant 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."[284] Representative Daniel Carroll of Maryland

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[275]ANNALS, *supra* note 2, at 452.
[276]*Id.* at 451.
[277]*See supra* note 68 and accompanying text.
[278]*See* 3 ELLIOT'S DEBATES, *supra* note 2, at 659 (reporting one of Virginia's proposed amendments as providing "[t]hat any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead"); 4 ELLIOTT'S DEBATES, *supra* note 2, at 244 (reporting an identical proposal from North Carolina).
[279]*Ratification of the Constitution by the State of Rhode Island*, May 29, 1790, The Avalon Project at Yale Law School, *available at* http://www.yale.edu/lawweb/avalon/const/ ratri.htm (last visited Aug. 29, 2005) ("[A]ny person religiously scrupulous of bearing arms, ought to be exempted, upon payment of an equivalent, to employ another to bear arms in his stead.").
[280]ANNALS, *supra* note 2, at 451.
[281]*Id.*
[282]*See supra* note 240.
[283]*See supra* note 94.
[284]ANNALS, *supra* note 2, at 758.

urged adoption of the amendment because "[h]e thought it would tend more towards conciliating the minds of the people to the Government than almost any other amendment he had heard proposed."[285]

Significantly, Madison did not claim that this language represented his own views. When Connecticut's Roger Sherman expressed skepticism about the need for the amendment,[286] Madison, like Representative Carroll, offered public sentiment as the justification:

> 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 [the Necessary and Proper Clause] . . . enabled [Congress] to make laws of such a nature as might infringe the rights of conscience, and establish a national religion.[287]

Other members of Congress had their own ideas of the precise language needed to comply with the Gentlemen's Agreement, and they sought to shape the proposed amendment to comply with their understanding of the bargain. For example, the Gentlemen's Agreement contemplated no constitutional protection for atheism.[288] Accordingly, Peter Sylvester of New York wanted reassurance that the amendment would not "have a tendency to abolish religion altogether,"[289] and Benjamin Huntington of Connecticut "hoped . . . 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 patronise [*sic*] those who professed no religion at all."[290] This could explain, of course, why the same houses of Congress that adopted the Establishment Clause saw no inconsistency in hiring chaplains to

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[285]*Id.* at 730.

[286]*Id.*

[287]*Id.* That he did not claim that the language reflected his own thoughts renders unnecessary Professor Hamburger's speculation that Madison had changed his mind from the time of the *Remonstrance*, in which he had argued "that Religion is wholly exempt from its [Civil Society's] cognizance." HAMBURGER, *supra* note 2, at 106 (discussing James Madison, *Memorial and Remonstrance* (1785), *available at* http://www.law.ou.edu/hist/remon.html (last visited Sept. 20, 2005). Given the context of the *Remonstrance*, however, and the understanding of the time, it is unlikely that Madison meant the words, "Religion is wholly exempt from its cognizance," in quite the way we would understand them. *See supra* notes 134–37 and accompanying text (quoting Oliver Ellsworth's views that government should not meddle in religion, but supporting legal sanctions against blasphemy and atheism).

[288]*Supra* Parts II.D & III.

[289]ANNALS, *supra* note 2, at 729.

[290]*Id.* at 730–31. *See also* Feldman, *supra* note 2, at 410.

offer prayers[291] or in resolving to reserve a "day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God."[292]

Under the Gentlemen's Agreement the term "establishment" had a broader meaning than merely a government church.[293] Accordingly, Elbridge Gerry of Massachusetts thought the passage "would read better if it was, that no religious doctrine shall be established by law."[294] Huntington asked for assurance that the amendment would not interfere with the multiple establishments in New England[295] — one of the few suggestions that a goal of the amendment was to protect state establishments.[296]

Still, Madison's language was too narrow to satisfy the terms of the Gentlemen's Agreement because even if the amendment banned a "national religion," the federal government might favor a group of religions — such as Christianity and Judaism (or Protestantism and Catholicism) — over others. Thus, Samuel Livermore of New Hampshire suggested that the clause be re-written to read "that Congress shall make no laws touching religion,"[297] and the House initially passed this version.[298] But this was too broad for the Gentlemen's Agreement because it would have prevented Congress from using its express and implied powers to foster all religions equally.

The Senate responded with a proposal stating, "Congress shall make no law establishing articles of faith or a mode of worship."[299] The House rejected it in favor of Fisher Ames's version: "Congress shall make no law establishing religion,"[300] which made it clear that multiple establishments were interdicted, whether of sects or of religions. The final language, of course, has a similar effect. Meanwhile, Congress removed all reference to "rights of conscience"

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[291]*See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 858 (1995) (Thomas, J., concurring); *see also* Marsh v. Chambers, 463 U.S. 783, 794 (1983) (sustaining use of legislative chaplains to open the day with prayer).

[292]ANNALS, *supra* note 2, at 914.

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

[294]ANNALS, *supra* note 2, at 730.

[295]*Id.*

[296]For another, see PETERSBURG VA. GAZETTE, July, 26, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 2, at 178–79 ("Let Congress be invested with an independent power over the states, without violating the religious tenets or customs of any perticular [*sic*] state."). Nevertheless, Professor Howe was probably correct to conclude that this was not a major motivation for the Establishment Clause. HOWE, *supra* note 2, at 22–23; *see also* Feldman, *supra* note 2, at 408 (concluding that this was not a major motivation for the Establishment Clause because no one thought federal government had power to interfere with state establishments anyway).

[297]ANNALS, *supra* note 2, at 731.

[298]LEVY, *supra* note 2, at 101.

[299]*Id.* at 102.

[300]*Id.* at 101; ANNALS, *supra* note 2, at 766.

from the amendment, thereby eliminating any suggestion that it protected atheistic or non-religious claims.[301]

Finally, insertion of the phrase, "Congress shall make no law" apparently reflected a decision not to accommodate the fear that the President and Senate might use the treaty power to interfere with matters of faith. That fear, however, had not been widely expressed.[302]

CONCLUSION

The Establishment Clause was not crafted to reflect the notions of Jefferson or Madison or any other small collection of individuals — not even the individuals who happened to sit in the First Congress. The Establishment Clause was designed to fulfill part of the public bargain — the Gentlemen's Agreement — pursuant to which the Constitution was ratified. Thus, reconstructing the "religion terms" of the public bargain enables us to illuminate the meaning of the Clause to a far greater degree than previously thought possible.[303] Based on the terms of the Gentlemen's Agreement, the following conclusions seem fairly certain:

- Before adoption of the First Amendment, Congress had no express power over religion. The First Amendment did not change that.[304]
- Nevertheless, as many participants in the debate recognized, Congress could exercise *implied* powers over religion through the incidental powers doctrine recognized in the Necessary and Proper Clause.[305]

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[301]Whether "rights of conscience" was dropped to eliminate redundancy or to limit First Amendment to religion, the effect is the same: "the framers deliberately confined the clause to religious claims." McConnell, *supra* note 2, at 1496.

Incongruously, while conceding that the original meaning of the religion clauses would deny atheists religious exemptions, McConnell claims without support that "to subject an atheist to civil disabilities would be a violation of free exercise." *Id*. at 1500. I rather think it would be a violation of equal protection instead.

[302]I have found three instances. *See supra* notes 120–122 and accompanying text.

[303]*See, e.g.*, CHEMERINSKY, *supra* note 2, at 1141–43 (discussing perceived historical uncertainties about the meaning of the religion clauses) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1158–60 (2d ed. 1988) for supposedly different views about religion among the framers); NOWAK & ROTUNDA, *supra* note 2, at 1411 (claiming "there is no clear history" on the religion clauses).

[304]*See supra* note 102 and accompanying text.

[305]*See supra* notes 103–21 and accompanying text. In the Necessary and Proper Clause, the word "necessary" meant absolutely or reasonably necessary or in a customary and convenient manner for executing an enumerated power. "Proper" meant in accordance with fiduciary norms. *See* Natelson, *Necessary and Proper*, *supra* note 2, at 261–65. However, Congress could not resort to its enumerated powers merely as a "pretext" to govern religion in the states. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 357–59 (1819) (Opinion of Marshall, C.J.).

- Thus, Congress had plenary control over religion in the District of Columbia, in all other federal enclaves, and wide control of it in the territories. Congress could impose excise taxes on church sales, define the content of religion in the armed forces and in the militia, grant or deny religious exemptions from military service, regulate the interstate commerce of religious sects, and promote some or all faiths in dealings with the Indians. Moreover, the federal government could impact religion by treaty.[306]
- The formal role of the Establishment Clause in the Constitution was as an exception to the Necessary and Proper Clause. The Establishment Clause qualified the Necessary and Proper Clause by interdicting certain means of executing enumerated powers even if those means were otherwise necessary and proper. It is apparent, however, that the Establishment Clause did not eliminate entirely federal power over religion.[307]
- The Establishment Clause was designed to buttress free exercise by requiring the federal government, to the extent its legislation touched religion, to treat all faiths in a non-discriminatory manner. This requirement obviously went beyond a mere ban on a national church. Rather the Establishment Clause was an extension of the trust duty of impartiality that already pervaded the Constitution.[308]
- The impartiality of the Establishment Clause was not perfect. Like the Free Exercise Clause, the Establishment Clause was seen as irrelevant to the irreligious. Both provisions protected only theists. Those who did not believe in God did not have a "religion" within the meaning of the

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> Nor does the rule of interpretation we contend for, sanction any usurpation, on the part of the national government; since, if the argument be, that the implied powers of the constitution may be assumed and exercised, for purposes not really connected with the powers specifically granted, under color of some imaginary relation between them, the answer is, that this is nothing more than arguing from the abuse of constitutional powers . . . ; that the danger of the abuse will be checked by the judicial department, which, by comparing the means with the proposed end, will decide, whether the connection is real, or assumed as the pretext for the usurpation of powers not belonging to the government. *Id.* at 357.

[306]*See supra* notes 106–21 and accompanying text.

[307]*Cf.* notes 297–98 and accompanying text. My conclusion thus conflicts somewhat with that of Professor Kurt Lash, who argues that the contemporaneous meaning of the Clause is one of "no federal power" over religion — although he concedes some exceptions. *See* Lash, *supra* note 2, at 1096–99. The "no federal power" view has encouraged some to search for Establishment Clause meaning in the Fourteenth Amendment. *See, e.g.*, Richard Albert, *Beyond the Conventional Establishment Clause Narrative*, SEATTLE U. L. REV. 329 (2005). I think it is important, however, to get the meaning of the First Amendment correct before we move to the Fourteenth!

[308]*See* Natelson, *Public Trust*, *supra* note 2, at 1136–68.

First Amendment and had no standing under that Amendment.[309] In other words, under the original meaning, Michael Newdow[310] is out of court.

- The Clause said that "*Congress* shall make no law."[311] It did not address federal interference with religion through mechanisms other than congressional lawmaking, such as the treaty power.[312]
- As everyone concedes, the Clause did not apply to the states.[313]

Even the most thorough original meaning analysis cannot solve all problems. For example, original meaning analysis is not conclusive on the question of whether the "theism" protected by the Clause is limited to belief in a God who rewards moral conduct and punishes immoral conduct.[314] Many of the ratifiers spoke in terms of such a God, but others acknowledged that deists — believers in a more impersonal divinity — should be protected as well.[315]

Professor Robert Cord, whose own study of the Establishment Clause led him to conclusions similar to my own, poses a problem of application. America today is a more religiously diverse country than in the late eighteenth century,[316] so equal treatment of all faiths presents more challenges. A law subsidizing religion in the District of Columbia and defining it to include Christianity and Judaism but to exclude Islam, might have been constitutional in 1820 when there were no Muslims present to be disadvantaged. Today, however, our population includes a significant number of Muslims.[317] Moreover, a prayer enacted for District of Columbia public schools that invoked "Almighty God," as did the

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[309]*Cf.* CHEMERINSKY, *supra* note 2, at 1146 (summarizing *Welsh v. United States*, 398 U.S. 333 (1970), which held that belief in God was not a necessary part of a "religion" for selective service purposes).

[310]*See supra* note 4 and accompanying text.

[311]U.S. CONST. amend. I.

[312]*See supra* notes 119–21 and accompanying text.

[313]*See* Kurland, *supra* note 2, at 843 (stating that the evidence "overwhelmingly supports" this conclusion); HOWE, *supra* note 2, at 1–32 (arguing that the First Amendment was targeted at federal establishments, not state establishments).

[314]This was seen by many as the "teeth" in an oath. *See supra* notes 158–59 and accompanying text. As comments such as those of Theophilus Parsons show, however, it probably was not absolutely necessary to a contemporaneous definition of religion. *See supra* note 152 and accompanying text.

[315]*See, e.g.*, *supra* note 152 and accompanying text (reporting the remarks of Theophilus Parsons at the Massachusetts ratifying convention).

[316]*See* CORD, *supra* note 2, at 165; *see also* CHEMERINSKY, *supra* note 2, at 1142–43.

[317]The number of Muslims in the United States is not known with any degree of exactitude, and estimates vary widely. *See* THE ISLAM PROJECT, http://www.theislamproject. org/education/United_States.html (last visited Aug. 28, 2005) (reporting reputable estimates for the year 2000 as 1,104,000 and 4,132,000).

New York State Regents prayer in *Engel v. Vitale*,[318] would violate the original meaning of the Establishment Clause today — not because it offended atheists or agnostics,[319] but because some people worship a God who is extremely powerful, but not, technically speaking, "almighty."[320]

The conclusion that the religion clauses protect only theists does not, of course, eliminate other constitutional protections for atheists and agnostics. They can appeal to the Fourteenth Amendment's Equal Protection Clause[321] for protection against state discrimination and to the Fifth Amendment's Due Process Clause[322] for protection against federal discrimination. Exactly how much protection these provisions offer, however, is an unanswered question.

So there are issues that original meaning analysis does not resolve. Yet it does resolve difficulties and inconsistencies that have bedeviled courts and commentators for years. Perhaps, after all, it is better to devote our energy to solving real constitutional problems than to be trapped in snares created only by our own misunderstanding.

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[318]370 U.S. 421 (1962). The prayer, which I regularly said as an elementary school child in New York State, was "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

[319]*Cf. id.* at 443 (1962) (Douglas, J., concurring) ("The First Amendment leaves the Government in a position not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic — the nonbeliever — is entitled to go his own way."). This view would seem to vary, at least in emphasis, from Justice Douglas's pronouncement when writing for the court ten years earlier in *Zorach v. Clauson*, 343 U.S. 306 (1952):

> We are a religious people whose institutions presuppose a Supreme Being. . . . We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.

Id. at 313–14. *See also* HOWE, *supra* note 2, at 14 (discussing the differences between Douglas's views in the two cases). The conclusion of this Article suggests that Douglas's earlier opinion was more constitutionally accurate.

[320]For example, some Jews, such as Rabbi Harold S. Kushner, resolve the "all good/all powerful" dilemma by concluding that God is not all powerful. *See* HAROLD S. KUSHNER, WHEN BAD THINGS HAPPEN TO GOOD PEOPLE 129 (1981) (arguing that some things are "too hard even for God").

[321]U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[322]The Fifth Amendment Due Process Clause reads, "No person shall. . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954). My conclusion is that equal protection principles are part of the Necessary and Proper Clause, not the Due Process Clause. *See* Natelson, *Public Trust*, *supra* note 2, at 1171–74. *See generally* Natelson, *Necessary and Proper*, *supra* note 2, at 243–322.