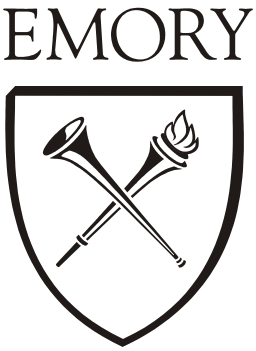

RELIGIOUS RIGHTS IN THE FOUNDING ERA

John Witte, Jr.
Emory University School of Law

Prepared for Barry Shain, ed., *Rights in the Founding Era*

Religious Rights in the Founding Era

John Witte, Jr.[1]

Religious rights were a central concern of the eighteenth-century American founders. Churchmen and statesmen, believers and skeptics alike issued a torrent of writings to define and defend these rights. The founders considered religious rights to be among "the most essential"[2] and "the most sacred of human rights,"[3] and regarded their firm constitutional guarantee to be indispensable to the success of the American constitutional experiment.

The American constitutional experiment in religious rights cannot be reduced to the First Amendment religion clauses alone ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof"). And the "original understanding"[4] of religious

---

[1] This article is, in part, an excerpt and update of my *Religion and the American Constitutional Experiment: Essential Rights and Liberties* (Boulder/New York/Oxford, 2000) [hereafter "RCE"].

[2] See, e.g., Elisha Williams, *The Essential Rights and Liberties of Protestants: A Seasonable Plea for the Liberty of Conscience, and the Right of Private Judgment in Matters of Religion, Without any Controul from Human Authority* (Boston, 1744); Jonathan Elliot, ed., *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* (Washington, DC, 1854), 1:327 (quoting the Virginia Ratifying Convention that included liberty of conscience "among other essential rights") [hereafter *Debates*]. James Madison spoke of "essential rights" of religious freedom in his House speech of August 17, 1789. See *The Debates and Proceedings in the Congress of the United States, March 3, 1789–May 27, 1824* (Washington, DC: Gales and Seaton, 1834–1856), vol. 1, column (col.) 784 (hereafter *Annals*). Likewise, John Adams included religion among "our most essential rights and liberties." "Instructions of the Town of Braintree to their Representative, 1765," in *The Works of John Adams,* ed. C.F. Adams (Boston, 1850–1856), 3:465 [hereafter "Adams, Works"]. The Federal Framer also saw "the free exercise of religion" as one of the "essential rights." Letter IV (October 12, 1787), in Herbert J. Storing. ed., *The Anti-Federalist* (Chicago, 1985), 58.

[3] Thomas Jefferson, "Freedom of Religion at the University of Virginia (Oct. 7, 1822)," in *The Complete Jefferson, Containing His Major Writings*, ed. Saul K. Padover, (Freeport, NY, 1943), 958.

[4] See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York, 1996), 3-22, 288-338 and id., "Fidelity Through History (Or to It)," *Fordham Law Review* 65 (1997):

rights cannot be determined by simply studying the debates on these religion clauses in the First Session of Congress in 1789. Not only is the record of these congressional debates very slender and unreliable--a mere three pages of uneven notes in modern edition.[5] But the First Amendment religion clauses, by design, reflect only a part of the early constitutional experiment and experience. The religion clauses, on their face, define only the outer boundaries of appropriate governmental action respecting religion: Congress may not prescribe ("establish") religion nor proscribe ("prohibit") its exercise. Precisely what governmental conduct short of outright prescription or proscription of religion is constitutionally permissible was left open for debate and development in the Congress and the federal courts.

Moreover, the religion clauses bind only the federal government ("Congress"), rendering prevailing state constitutional provisions, and the sentiments of their drafters and ratifiers, equally vital sources of the original understanding of religious rights. By 1784, eleven of the thirteen original states had enacted constitutional provisions on religion, many of them quite detailed. The two remaining states, Connecticut and Rhode Island, retained their colonial charters on religious liberty, but augmented them amply with new legislation.

Six principles recurred regularly in discussions of these federal and state legal guarantees of religious rights: (1) liberty of conscience; (2) free exercise of religion; (3) religious pluralism; (4) religious equality; (5) separation of church and state; and (6) disestablishment of religion. These six principles, though given widely varying emphases and applications, came in for repeated and heated debate in the state constitutional debates in the 1770s to 1790s. They recurred in some of the surviving debates and draft provisions on religion in the First Congress of 1789 and in the state ratification debates about the same. And they were the subject of many hundreds of sermons, speeches, pamphlets, letters, and other documents in the last half of the eighteenth century.

1587-1609 (arguing for a distinction among the original "meaning," "intention," and "understanding" of the Constitution, and urging a use of both "textual" and "contextual" material to understand the "original understanding").

[5] *Annals*, 1:451, 452, 468, 757-9, 778-80, 783-4, 795-6, 808; *Journal of the First Session of the Senate of the United States of America* (New York, 1789), (Evans, First Series, No. 22207), 1:116-7, 129, 145, 148 [hereafter *Journal*]. Both texts are reprinted with commentary in RCE, 63-86, 241-3.

This article explores a cross section of these documents to test the meaning and to take the measure of religious rights in the American founding era. I first summarize the prevailing understanding of each of these six principles and their manifestation in some of the new state constitutions. I then sift through the surviving drafts of the First Amendment to assess the place of these six principles in its final text.

Liberty of Conscience

Liberty of conscience was the general solvent used in the early American constitutional experiment in religious rights. It was almost universally embraced in the young republic--by everyone from conservative Calvinist congregationalists and civic republicans to radical "new light" Evangelicals and exponents of various forms of Enlightenment liberalism. "Liberty of conscience" was an ancient guarantee, rooted in early Roman and Christian sources, and laden with multiple meanings in the traditions of canon law, common law, and civil law alike. The plasticity of the phrase was not lost on the American founders. Like their predecessors, they often conflated or equated "liberty of conscience" with other favorites, such as "free exercise of religion," "religious freedom," "religious liberty," "religious privileges," and "religious rights." James Madison, for example, simply rolled into one linguistic heap "religious freedom" or "the free exercise of religion according to the dictates of conscience."[6] In another passage, he spoke of "liberty of conscience" as the "religious rights and privileges ... of a multiplicity of sects."[7] Such patterns of interwoven language appear regularly in writings of the day. One term often implicated and connoted several others.[8] To read the original guarantee of liberty of conscience too dogmatically is to ignore its inherent plasticity.

That said, the founders did ascribe distinct content to the phrase "liberty of conscience," which won wide assent in the early republic.

---

[6] Virginia Bill of Rights (1776), Art. 16.
[7] *Debates,* 3:113–114; see also *The Papers of James Madison,* W.T. Hutchinson, et al., eds. (Chicago, 1962), 11:130–131 [hereafter Madison, *Papers*]. See further Anson P. Stokes and Leo Pfeffer, *Church and State in the United States,* rev. ed. (Westport, CT, 1975), 61.
[8] See, e.g., John Mellen, *The Great and Happy Doctrine of Liberty* (Boston, 1795), 17–18; Amos Adams, *Religious Liberty an Invaluable Blessing* (Boston, 1768), 39–40, 45–46; *A Manual of Religious Liberty,* 3d ed. (New York, 1767).

First, for most founders liberty of conscience protected *voluntarism*--"the unalienable right of private judgment in matters of religion," the unencumbered ability to choose and to change one's religious beliefs and adherences.[9] The Puritan moralist Elisha Williams put the matter strongly already in 1744:

> Every man has an equal right to follow the dictates of his own conscience in the affairs of religion. Every one is under an indispensable obligation to search the Scripture for himself ... and to make the best use of it he can for his own information in the will of God, the nature and duties of Christianity. And as every Christian is so bound; so he has the inalienable right to judge of the sense and meaning of it, and to follow his judgment wherever it leads him; even an equal right with any rulers be they civil or ecclesiastical.[10]

Every person must be "left alone" to worship God "in the manner and season most agreeable to the Dictates of his own conscience," John Adams echoed. For the rights of conscience are "indisputable, unalienable, indefeasible, [and] divine."[11] James Madison wrote more generically: "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."[12] The Baptist leader John Leland echoed these sentiments:

> Every man must give an account of himself to God, and therefore every man ought to be at liberty to serve God in that way that he can reconcile it to his conscience.... It would be sinful for a man to surrender to man [that] which is to be kept sacred for God. A man's mind should be always open to conviction, and an honest man will receive that doctrine which appears the best demonstrated; and

---

[9] Williams, *Essential Rights,* 42. See also John Lathorp, *A Discourse on the Peace* (Boston, 1784), 29; Hugh Fisher, *The Divine Right of Private Judgment, Set in a True Light,* repr. ed. (Boston, 1790).
[10] Williams, *Essential Rights,* 7–8.
[11] Adams, *Works,* 3:452–456; and Massachusetts Constitution (1780), Pt. I, Art. II.
[12] James Madison, "Memorial and Remonstrance Against Religious Assessments," (1785), para. 1, in Madison, *Papers,* 8:298.

> what is more common for the best of men to change their minds?[13]

While some eighteenth-century American theologians continued the ancient Christian battle over free will and determinism, and over voluntarism and predestination, the main architects of the constitutional religion clauses presumed that faith was to be freely chosen.

Second, and closely related, liberty of conscience *prohibited* religiously-based *discrimination* against individuals. Persons could not be penalized for the religious choices they made nor swayed to make certain choices because of the civil advantages attached to them. Liberty of conscience, Ezra Stiles opined, permits "no bloody tribunals, no cardinal inquisitors-general, to bend the human mind, forcibly to control the understanding, and put out the light of reason, the candle of the Lord in man."[14] Liberty of conscience also prohibits more subtle forms of discrimination, prejudice, and cajolery by state, church, or even other citizens. "[N]o part of the community shall be permitted to perplex or harass the other for any supposed heresy," wrote a Massachusetts pamphleteer. "[E]ach individual shall be allowed to have and enjoy, profess and maintain his own system of religion."[15]

Third, in the view of some founders, liberty of conscience guaranteed "a freedom and *exemption* from human impositions, and legal restraints, in matters of religion and conscience."[16] Persons of faith were to be "exempt from all those penal, sanguinary laws, that generate vice instead of virtue."[17] Such laws not only included the onerous criminal rules that traditionally encumbered and discriminated against religious nonconformists, and led to fines, whippings, banishments, and occasional executions of dissenting colonists. They also included more facially benign laws that worked injustice to certain religious believers: conscription laws that required religious

---

[13] See esp. John Leland, "The Rights of Conscience Inalienable (1791)," in Ellis Sandoz, ed., *Political Sermons of the American Founding Era, 1730-1805* (Indianapolis, 1991), 1079–1099, at 1085; Israel Evans, "A Sermon Delivered at Concord, Before the Hon. General Court of the State of New Hampshire at the Annual Election (1791)," in Sandoz, ed., *Political Sermons,* 1057–1078, at 1063ff.

[14] Ezra Stiles, *The United States Elevated to Glory and Honor* (New Haven, 1783), 56.

[15] "Worcestriensis, Number IV (1776)," in Charles S. Hynemann and Donald S. Lutz, eds., *American Political Writing During the Founding Era, 1760–1805* (Indianapolis, 1983), 1:449–450.

[16] Mellen, *The Great and Happy Doctrine of Liberty,* 17 (emphasis added).

[17] Ibid., 20.

pacifists to participate in the military, oath-swearing laws that ran afoul of the religious scruples of certain believers, tithing and taxing laws that forced believers to support churches, religious schools, and other causes that they found religiously otiose, if not odious.[18] Liberty of conscience required that persons be exempt or immune from civil duties and restrictions that they could not, in good conscience, accept or obey.[19] As Henry Cumings put it: "Liberty of conscience requires not [only] that persons are ... exempt from hierarchical tyranny and domination, from the usurped authority of pope and prelates, and from every species of persecution on account of religion." It also requires that they "stand on equal ground, and behaving as good members of society, may equally enjoy their religious opinions, and without molestation, or being exposed to fines or forfeitures, or any other temporal disadvantages."[20]

It was commonly assumed in the eighteenth century that the laws of conscientious magistrates would not often tread on the religious scruples of their subjects. As George Washington put it in a letter to a group of Quakers: "In my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit."[21] It was also commonly understood that the growing pluralization of American religious life might make such inherent accommodation of all religions increasingly difficult. Where general laws and policies did intrude on the religious scruples of an individual or group, liberty of

---

[18] See, e.g., Jonathan Parsons, *Freedom from Civil and Ecclesiastical Slavery* (Newburyport, 1774); Isaac Backus, *Appeal to the Public for Religious Liberty Against the Oppressions of the Present Day* (Boston, 1773).

[19] Henry Cumings, *A Sermon Preached at Billerica* (Boston, 1797), 12–13. See also Thomas Jefferson, "Draft of Bill Exempting Dissenters from Contributing to the Support of the Church, 30 Nov. 1776," in Philip B. Kurland and Ralph S. Lerner, eds., *The Founders' Constitution* (Chicago, 1987), 5:74 (arguing that dissenters be "totally free and exempt from all Levies Taxes and Impositions whatever towards supporting and maintaining the [established Anglican] church" as a means of ensuring "equal Liberty as well religious as civil" to all "good People").

[20] Cumings, *A Sermon Preached at Billerica,* 12–13.

[21] Letter to the Religious Society Called Quakers, October, 1789, in *The Writings of George Washington from the Original Manuscript Sources, 1745–1799,* ed. J. C. Fitzpatrick (Washington, 1931), 30:416. See similar sentiments in *George Washington on Religious Liberty and Mutual Understanding: Selections from Washington's Letters,* ed. Edward F. Humphrey (Washington, DC, 1932); and discussion in Paul F. Boller Jr., *George Washington and Religion* (Dallas, 1963).

conscience demanded protection of religious minorities through exemptions from such laws and policies. Whether such exemptions should be accorded by the legislature or by the judiciary and whether they were per se a constitutional right or simply a rule of equity—-the principal bones of contention among a raft of recent commentators—-the eighteenth-century sources do not dispositively say.

All the early state constitutions included a guarantee of liberty of conscience for all.[22] The Delaware Constitution had typical language:

> That all men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences and understandings; and that no man ought or of right can be compelled to attend any religious worship or maintain any religious ministry contrary to or against his own free will and consent, and that no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner controul the right of conscience and free exercise of religious worship.[23]

The Pennsylvania Constitution added a protection against religious discrimination: “Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship.” It also provided an exemption for conscientious objectors: “Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent.”[24] The Constitution of New York addressed both state and church intrusions on conscience, endeavoring “not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance ... wherewith the bigotry and ambition of weak and wicked priests have scourged mankind.” It thus declared, “that the free

---

[22] For good summaries of these state developments, see Chester Antieau, et al., *Religion Under the State Constitutions* (Washington, DC, 1965); John K. Wilson, “Religion Under the State Constitutions, 1776–1800,” *Journal of Church and State* 32 (1990): 753; Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York/Oxford, 1986).

[23] Delaware Declaration of Rights (1776), sec. 2.

[24] Pennsylvania Declaration of Rights (1776), II, VIII.

exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind."[25] The Constitution of New Jersey provided exemptions from religious taxes, using typical language: "nor shall any person ... ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church, ... or ministry, contrary to what he believes to be right."[26]

Free Exercise of Religion

Liberty of conscience was a guarantee to be left alone to choose from among the plural religions that were equally available to all. Free exercise of religion was the right to act publicly on the choices of conscience once made, without intruding on or obstructing the rights of others or the general peace of the community. This organic tie between religious conscience and religious exercise was well known in the Western tradition and was not lost on English and American writers. In 1670, for example, the Quaker leader William Penn had linked these two guarantees, insisting that religious liberty entails "not only a mere Liberty of the Mind, in believing or disbelieving ... but [also] the Exercise of ourselves in a visible Way of Worship."[27] In the next century, this organic linkage was commonplace. Religion, Madison wrote, "must be left to the convictions and conscience of every man; and it is the right of man to exercise it as these may dictate."[28] For most eighteenth-century writers, religious belief and religious action went hand-in-hand, and each deserved legal protection.

Although the founders offered no universal definition of "free exercise," they generally used the phrase to describe the freedom to engage in various forms of public religious action—-religious worship, religious speech, religious assembly, religious publication, and religious education, among others. Free exercise of religion also embraced the right of the individual to join with like-minded believers in religious societies, which were free to devise their own modes of worship, articles of faith, standards of discipline, and patterns of ritual, without

---

[25] Constitution of New York (1777), art. xxxviii.
[26] Constitution of New Jersey, (1776), art. xviii.
[27] William Penn, "The Great Case of Liberty of Conscience (1670)," in *The Works of William Penn* (London, 1726), 1:443, 447.
[28] Madison, "Memorial and Remonstrance," sec. 1. See also Levi Hart, *Liberty Described and Recommended* (Hartford, 1775), 14–15.

undue influence or intrusion by the state.[29] The founders did not speak of "religious group rights" or "corporate free exercise rights" as we do today. But they did regularly call for "ecclesiastical liberty," "the equal liberty of one sect ... with another," and the right "to have the full enjoyment and free exercise of those purely spiritual powers ... which, being derived only from CHRIST and His Apostles, are to be maintained, independent of every foreign, or other, jurisdiction, so far as may be consistent with the civil rights of society."[30]

Virtually all the early state constitutions guaranteed "free exercise" rights-—adding the familiar caveat that such exercise must not violate the public peace or the private rights of others. Most states limited their guarantee to "the free exercise of religious worship" or the "free exercise of religious profession"—-thereby leaving the protection of other non-cultic forms of religious expression and action to other constitutional guarantees, if any. A few states provided more generic free exercise guarantees. The Constitution of Virginia, for example, guaranteed "the free exercise of religion, according to the dictates of conscience"[31]—-thereby expanding free exercise protection to cultic and non-cultic religious expression and action, provided these were mandated by conscience. The Constitution of Georgia provided even more flatly: "All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State."[32]

Religious Pluralism

The founders regarded religious "multiplicity," "diversity," or "plurality" to be an equally essential principle of religious rights. Two kinds of pluralism were distinguished.

Evangelical and Enlightenment writers stressed the protection of *confessional pluralism*—-the maintenance and

---

[29] See, e.g., Williams, *Essential Rights,* 46ff.; Isaac Backus, *Isaac Backus on Church, State, and Calvinism: Pamphlets, 1754–1789,* ed. William G. McLoughlin (Cambridge, 1968), 348ff.; Parsons, *Freedom, from Civil and Ecclesiastical Slavery,* 14–15; Stiles, *The United States Elevated,* 55ff.; Amos Adams, *Religious Liberty,* 38–46.

[30] See respectively, Hart, *Liberty Described and Recommended,* 14; *Isaac Backus on Church, State, and Calvinism,* 348–349; "A Declaration of Certain Fundamental Rights and Liberties of the Protestant Episcopal Church in Maryland," quoted in Anson P. Stokes, *Church and States in the United States,* 3 vols. (New York, 1950), 1:741.

[31] Virginia Declaration of Rights (1776), sec. 16.

[32] Constitution of Georgia (1777), art. lvi.

accommodation of a plurality of forms of religious expression and organization in the community. Evangelical writers advanced a theological argument for this principle, emphasizing that it was for God, not the state, to decide which forms of religion should flourish and which should fade. "God always claimed it as his sole prerogative to determine by his own laws what his worship shall be, who shall minister in it, and how they shall be supported," Isaac Backus wrote.[33] "God's truth is great, and in the end He will allow it to prevail."[34] Confessional pluralism served to respect and reflect this divine prerogative.

Enlightenment writers advanced a rational and utilitarian argument for this same principle of confessional pluralism. "Difference of opinion is advantageous in religion," Thomas Jefferson wrote. "The several sects perform the office of a *Censor morum* over each other. Is uniformity attainable? Millions of innocent men, women, and children, since the introduction of Christianity, have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch towards uniformity.... Reason and persuasion are the only practicable instruments."[35] When Jefferson seemed to be wandering from these early sentiments, John Adams wrote to him: "Checks and balances, Jefferson," in the political as well as the religious sphere, "are our only Security, for the progress of Mind, as well as the Security of Body. Every Species of these Christians would persecute Deists, as [much] as either Sect would persecute another, if it had unchecked and unbalanced Power. Nay, the Deists would persecute Christians, and Atheists would persecute Deists, with as unrelenting Cruelty, as any Christians would persecute them or one another. Know thyself, human Nature!"[36] Madison wrote similarly that "freedom arises from the multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society. For where there is such a variety of sects,

---

[33] *Isaac Backus on Church, State, and Calvinism,* 317. See also, e.g., *The Freeman's Remonstrance Against an Ecclesiastical Establishment* (Boston, 1777), 13.

[34] Isaac Backus, *Truth Is Great and Will Prevail* (Boston, 1781). For comparable sentiments, see John R. Bolles, *A Brief Account of Persecutions, in Boston and Connecticut Governments* (Boston, 1758), 47, 59. See also George Washington, who expressed comparable sentiments to Roman Catholics, Quakers, Jews, and other religious minorities in the young republic. Humphrey, ed., *George Washington on Religious Liberty.*

[35] Jefferson, *Notes on the State of Virginia,* query 17, in *The Complete Jefferson*, 673–676. See also Thomas Paine, *Common Sense* (1776), in *Common Sense and the Crisis* (Garden City, NJ, 1960), 50.

[36] John Adams, Letter to Thomas Jefferson, June 25, 1813, in Lester J. Cappon, ed., *The Adams-Jefferson Letters,* (Chapel Hill, NC, 1959), 334.

there cannot be a majority of any one sect to oppress and persecute the rest."[37] Other writers added that the maintenance of multiple faiths is the best protection of the core guarantee of liberty of conscience.[38]

Congregationalist and civic republican writers, while endorsing confessional pluralism with comparable arguments, also urged the protection of *social pluralism*—-the maintenance and accommodation of a plurality of associations to foster and to protect religion. Churches and synagogues were not the only "religious societies" that deserved constitutional protection. Families, schools, charities, and other learned and civic societies were equally vital bastions of religion and equally deserving of the special protections of religious liberty. These diverse social institutions had several redeeming qualities. They provided multiple forums for religious expressions and actions, important bulwarks against state encroachment on natural liberties, particularly religious liberties, and vital sources of theology, morality, charity, and discipline in the state and broader community.[39] John Adams put it thus:

> My opinion of the duties of religion and morality comprehends a very extensive connection with society at large.... The benevolence, charity, capacity and industry which exerted in private life, would make a family, a parish or a town happy, employed upon a larger scale, in support of the great principles of virtue and freedom of political regulations might secure whole nations and generations from misery, want and contempt.[40]

Benjamin Rush concurred:

> Religion is best supported under the patronage of particular societies.... Religion could not long be maintained in

---

[37] *Debates,* 3:313.
[38] See Williams, *Essential Rights,* 40–42; Stiles, *The United States Elevated,* 55ff.; *Debates,* 3:207–208; Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven/London/Oxford, 1911), 3:310.
[39] See, e.g., *The Works of James Wilson,* ed. R. G. McCloskey (Cambridge, 1967); and general discussion in W. C. McWilliams, *The Idea of Fraternity in America* (Berkeley, 1973), 112–123; Clinton Rossiter, *The Political Thought of the American Revolution* (New York, 1963), 204.
[40] Letter from John Adams to Abigail Adams (October 29, 1775), quoted in John R. Howe Jr., *The Changing Political Thought of John Adams* (Princeton, 1966), 156–157 (capitalization modernized).

> the world without [these] forms and the distinctions of sects. The weaknesses of human nature require them. The distinction of sects is as necessary to the perfection and government of the whole as regiments and brigades are in an army.[41]

Religious pluralism was thus not just a sociological fact for many of the founders. It was also an essential condition for the guarantee of religious rights. This was a species and application of Madison's argument in the *Federalist Papers* about the virtues of republican pluralism. In a federalist republic, Madison had argued famously in Federalist Paper No. 10:

> The influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source.[42]

Madison summarized this general point crisply in Federalist Paper No. 51: "In a free government, the security for civil rights must be the same as that for religious rights; it consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects."[43]

Religious Equality

The efficacy of a religious rights regime also depended on a guarantee of equality of all peaceable religions before the law. For the state to single out one pious person or one form of faith for either preferential benefits or discriminatory burdens would skew the choice of conscience, encumber the exercise of religion, and upset the natural plurality of faiths. Many of the founders therefore insisted on the principle of a presumptive equality of all peaceable religions before the law.

---

[41] Letter from Benjamin Rush to John Armstrong (March 19, 1793), in *The Founders' Constitution,* 5:78.
[42] Clinton Rossiter, ed., *The Federalist Papers: Alexander Hamilton, James Madison, John Jay* (New York, 1961), 84.
[43] Ibid., 324.

James Madison captured well the prevailing sentiment: "A just Government ... will be best supported by protecting every Citizen in the enjoyment of his religion, with the same equal hand which protects his person and property; by neither invading the equal rights of any sect, nor suffering any sect to invade those of another."[44] John Adams concurred: "[A]ll men of all religions consistent with morals and property [must] enjoy equal liberty, ... security of property ... and an equal chance for honors and power."[45] Isaac Backus wrote similarly that religious liberty requires that "each person and each [religious] society are equally protected from being injured from others, all enjoying equal liberty to attend the worship which they believe is right."[46]

The founders' argument for religious equality became particularly pointed in their debates over religious test oaths as a condition for holding federal political office and positions of public trust. Oaths were commonly accepted in the early republic as "one of the principal instruments of government." They induce "the fear and reverence of God, and the terrors of eternity," one Puritan preacher put it, and thus impose "the most powerful restraints upon the minds of men."[47] Following colonial custom, eleven of the original thirteen states prescribed such oaths. These ranged in specificity from a general affirmation of belief in God or in (Protestant) Christianity to the Trinitarian confession required by Delaware: "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."[48] A number of Quakers, Baptists, and Moravians, before and after the American Revolution, had condemned such oaths as a violation of the

---

[44] Madison, *Memorial and Remonstrance*, secs. 4, 8.
[45] Adams, *Works,* 8:232; see further Frank Donovan, ed., *The John Adams Papers* (New York, 1965), 181; *The Freeman's Remonstrance,* 5, 10–13.
[46] *Isaac Backus on Church, State and Calvinism,* 333.
[47] Phillips Payson, "Election Sermon of 1778," in *American Political Writing*, 523, 529. A decade later, Payson apparently changed his mind, arguing in the Massachusetts Ratifying Convention that such religious tests were "attempts to erect human tribunals for the consciences of men, impious encroachments upon the prerogatives of God." *Debates,* 2:120.
[48] Delaware Constitution (1776), Art. XXII. This oath was outlawed by a 1792 amendment to the Delaware Constitution. For quotations and analysis of other original oath provisions, see Daniel L. Dreisbach, "The Constitution's Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban," *Journal of Church and State* 38 (1996): 263–295, at 264–269; Wilson, "Religion Under the State Constitutions," 764–766.

liberty of conscience and as an "invading of the essential prerogatives of our Lord Jesus Christ."[49] The few Jewish voices of the day protested oaths as a violation of their liberty of conscience and civil rights.[50] In response, most colonies and states exempted Quakers (and sometimes others with conscientious objections) from the oaths in deference to the principle of liberty of conscience.

The addition of an argument from religious equality proved particularly persuasive in outlawing religious test oaths. The argument first came to prominence in the federal constitutional convention of 1787 and in the ratification debates that followed. Article VI of the Constitution provided that "no religious Test shall ever be required as a Qualification to any office or public Trust under the United States." James Iredell of North Carolina offered a typical defense of this provision: "This article is calculated to secure universal religious liberty, by putting all sects on a level."[51] Fellow Carolinian Richard Spaight elaborated the argument: "No sect is preferred to another. Every man has the right to worship the Supreme Being in the manner that he thinks proper. No test is required. All men of equal capacity and integrity are equally eligible to offices."[52]

Such an argument for equality proved persuasive enough to garner state ratification of Article VI of the Constitution in 1789. It also helped to outlaw some of the state religious test oaths: Georgia (1789), Delaware (1792), and Vermont (1793) dropped their test oaths. Pennsylvania (1790) extended theirs to include Jews. The new state constitutions of Kentucky (1792) and Tennessee (1796) included no religious test oaths, although they still required that political officials be theists, if not Christians.[53]

Most founders extended the principle of equality before the law to all peaceable religions-—though sometimes they only grudgingly conceded its application to Jews and Muslims. A few founders pressed the principle further, arguing for the equality of religions and nonreligions—-

---

[49] *Debates,* 2:148; see further *The Founders' Constitution,* 4:633ff.
[50] See "Petition of the Philadelphia Synagogue to the Council of Censors of Philadelphia (December 23, 1783)," in *The Founders' Constitution,* 4:635; and "Jonas Phillips to the President and Members of the Convention (September 7, 1789)," in *Records of the Federal Convention,* 3:78–79.
[51] *Records of the Federal Convention,* 3:204. See also ibid., 3:207.
[52] *Debates,* 4:208.
[53] See Wilson, "Religion Under the State Constitutions," 765; Antieau, et al., *Religion Under the State Constitutions*, 101–107.

particularly on issues of test oaths and religious taxes. Luther Martin of Maryland grumbled about this solicitude for the nonreligious shown during the 1787 constitutional convention debates over religious test oaths:

> The part of the system which provides, that no religious test shall ever be required as a qualification to any office or public trust under the United States, was adopted by a 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.*[54]

Similarly, James Madison, in protesting the proposed state tax scheme to support religious teachers in Virginia, wrote:

> Above all are they to be considered as retaining an "equal title to the free exercise of religion according to the dictates of conscience." While we assert for ourselves a freedom to embrace, to profess and to observe the religion which we believe to be of divine origin, *we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us*. If this freedom be abused, it is an offence against God, not against man.[55]

The founders' principal concern, however, concerned equality among religions, not equality between religion and nonreligion. Benjamin Huntington indicated during the House debate over the First Amendment that "he hoped the amendment would be made in such a way to secure the rights of conscience, and a free exercise of the rights of religion *but not to patronize those who professed no religion at*

---

[54] *Records of the Federal Convention,* 3:227 (italics revised).
[55] Madison, *Memorial and Remonstrance*, sec. 4 (emphasis added).

all."[56] Likewise, in the House debates about including conscientious objection to military service among the rights of conscience, Representative Scott stated firmly, without rejoinder: "There are many sects I know, who are religiously scrupulous in this respect; I do not mean to deprive them of any indulgence.... *[M]y design is to guard against those who are of no religion*."[57]

This principle of equality of all peaceable religious persons and bodies before the law found its way into a number of early state constitutions. New Jersey insisted that "there shall be no establishment of any one religious sect in ... preference to another."[58] Delaware guaranteed Christians "equal rights and privileges"-—a guarantee soon extended to all religions.[59] Maryland insisted that Christians "are equally entitled to protection in their religious liberty."[60] Virginia guaranteed that "all men are equally entitled to the free exercise of religion."[61] New York guaranteed all persons "free exercise and enjoyment of religious profession and worship, without discrimination or preference."[62] Even Massachusetts, which maintained what John Adams called "a mild and equitable establishment of religion,"[63] nonetheless guaranteed that "all religious sects and denominations, demeaning themselves peaceably, and as good citizens of the commonwealth, shall be equally under the protection of the law; and no subordination of one sect or denomination to another shall ever be established by law."[64]

Separation of Church and State

"Separation of church and state" was a familiar Western principle, particularly in European Protestant circles.[65] The principle was rooted firmly in the Bible. In the Hebrew Bible, the chosen people of Israel were repeatedly enjoined to remain separate from the Gentile world around them (Lev. 20:24-5; 1 Kings 8:53; Ezra 6:21; 10:1; Neh. 9:1-15, 10:28-31, 13:1-3) and to separate the Levites and other temple

---

[56] *Annals,* 1:758 (emphasis added).
[57] Ibid., 1:796 (emphasis added).
[58] Constitution of New Jersey (1776), Art. XIX.
[59] Delaware Declaration of Rights (1776), Sec. 3.
[60] Maryland Declaration of Rights (1776), Sec. XXXIII.
[61] Virginia Declaration of Rights (1776), Art. 16.
[62] Constitution of New York (1777), Art. XXXVIII.
[63] Adams, *Works*, 2:399.
[64] Constitution of Massachusetts (1780), Part I, Art. 3, as amended by Art. XI.
[65] See Daniel L. Dreisbach, *The Wall of Separation Between Church and State* (New York, 2002); Philip Hamburger, *Separation of Church and State* (Cambridge, MA, 2002).

officials from the rest of the people (Num. 8:14, 16:9; Deut. 10:8, Deut. 32:8, I Chr. 23:13; Ezek. 40-42). The Hebrew Bible also made much of building and rebuilding "walls" to separate the temple from the commons and the city of Jerusalem from the outside world (1 Kings 3:1, Neh. 3:1-32, 4:15-20, 12:27-43; Ezek. 42). The New Testament commanded Christians to "render to Caesar the things that are Caesar's and to God the things that are God's" (Matt. 22:21; Mk. 12:17; Lk. 20:25). Christians were "not conform to the world" (Rom 12:2) but remain "separate" from the world and its temptations (2 Cor. 6:17). Echoing Hebrew Bible passages, St. Paul also spoke of a "wall of separation" (*parietem maceriae*) between Christians and non-Christians (Eph. 2:14).

Early modern European Protestants had used these biblical passages to press for all manner of separations--between church and state, religion and politics, faith and government, cleric and magistrate, ecclesiastical power and political power, spiritual law and temporal law, church counsel and state coercion, and more. And, in a time where walled towns and cities were commonplace, they often drew on the biblical images of walls of separation to illustrate what distinctions were appropriate and inappropriate.[66] The German reformer Martin Luther, for example, had spoken of "a paper wall ... between the spiritual estate [and] the temporal estate" and built thereon his intricate theory of the two kingdoms.[67] The Genevan reformer John Calvin repeatedly invoked St. Paul's image of a "wall of separation" to argue that the "political kingdom" and "spiritual kingdom" must always be "considered separately." For there is "a great difference between the ecclesiastical and civil power" and it would be "unwise to mingle these two which have a completely different nature."[68] Such early Protestant views were repeated in a number of Puritan writings and laws both in England and New England.[69] The

---

[66] Ibid., 29ff.

[67] Quoted and discussed in my *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge/New York, 2002), 87-117.

[68] See, e.g., John Calvin, *Institutes of the Christian Religion* (1559), bk. 3., chap. 19.15; bk. 4., chap. 11.3; bk. 4, chap. 20.1–2. Comm. Acts 13:1 and Lect. Jer. 49:6, in G. Baum, et al., eds. *Ioannis Calvini Opera Quae Supersunt Omnia* (Brunswick, 1863), 48:277; 39:352. See further sources and discussion in my "Moderate Religious Liberty in the Theology of John Calvin," *Calvin Theological Journal* 31 (1996): 359–403, at 392ff.

[69] See references in my "How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism," *Emory Law Journal* 39 (1990): 41-64. Richard Hooker, the staunch defender of Elizabeth's Anglican establishment accused the English Puritans of improperly constructing "walls of separation" between Church and commonwealth. See

early Anabaptist leader Menno Simons had called for a "wall of separation" (*Scheidingsmaurer*) between the redeemed realm of religion and the fallen realm of the world, and urged Christians to remain faithful within the religious realm.[70] Such views recurred in Roger Williams's image of "a wall of separation between the garden of the Church and the wilderness of the world" and were repeated by later Evangelical writers in the eighteenth century, notably Isaac Backus.[71]

The principle of separation of church and state, and the image of a wall of separation, also had solid grounding in political sources that appealed to American Enlightenment and Republican writers. James Burgh, for example, a Scottish Whig who was popular among several American founders, pressed for the principle in his influential writings of the 1760s and 1770s.[72] Burgh lamented the "ill consequences" of the traditional "mixed-mungrel-spiritual-secular-eccesiastical establishment." Such conflations of church and state, said Burgh, lead to "follies and knaveries," and make "the dispensers of religion despicable and odious to all men of sense, and will destroy the spirituality, in which consists the whole value, of religion." "Build an impenetrable wall of separation between sacred and civil," Burgh enjoined. "Do not send the graceless officer, reeking from the arms of his trull [i.e., prostitute], to the performance of a holy rite of religion, as a test for his holding the command of a regiment. To profane, in such a manner, a religion, which you pretend to reverence, is an impiety sufficient to bring down upon your heads, the roof of the sacred building you thus defile."[73]

Tunis Wortman, a Jeffersonian, also wrote boldly:

> It is your duty, as Christians, to maintain the purity and independence of the church, to keep religion separate from politics, to prevent an union between the church and the state, and to preserve the clergy from temptation, corruption and reproach. ... Unless you maintain the pure and primitive spirit

---

Richard Hooker, *Laws of Ecclesiastical Polity*, ed. A.S. McGrade (Cambridge, 1989), VIII.1.2 and discussion in Hamburger, *Separation,* 32-38.

[70] Dreisbach, *Wall of Separation*, __.

[71] Roger Williams, Letter to John Cotton (1643), in *The Complete Writings of Roger Williams*, 7 vols. (New York, 1963), 1:392.

[72] See sources and discussion in Dreisbach, "'Sowing Useful Truths,'" 486–490.

[73] James Burgh, *Crito, or Essays on Various Subjects* (London, 1767), 2:117–119 (emphasis removed).

> of Christianity, and prevent the cunning and intrigue of statesmen from mingling with its institutions, you will become exposed to a renewal of the same dreadful and enormous scenes which have not only disgraced the annals of the church, but destroyed the peace, and sacrificed the lives of millions.... Religion and government are equally necessary, but their interests should be kept separate and distinct.[74]

Such quotes, from both theological and political sources, reflect the central understanding of the principle of separation inherited by the eighteenth-century American founders: The offices and officers of the churches and states must break their traditional alliances. "Upon no plan, no system," wrote Wortman, "can they become united, without endangering the purity and usefulness of both-—the church will corrupt the state, and the state pollute the church."[75]

Separation, in this sense, benefited both the church and the state. On the one hand, it guaranteed "ecclesiastical purity and liberty"—-the independence and integrity of the internal processes of religious bodies. Elisha Williams spoke for many churchmen when he wrote: "[E]very church has [the] right to judge in what manner God is to be worshipped by them, and what form of discipline ought to be observed by them, and the right also of electing their own officers" without interference from political officials.[76] On the other hand, separation guaranteed "political and social stability"—the protection of individual rights and social cohesion. James Madison put this well in discussing church and state:

> Their jurisdiction is both derivative and limited. It is limited with regard to the co-ordinate departments; more necessarily is it limited with regard to the constituents. The preservation of a free government requires not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that

---

[74] Tunis Wortman, "A Solemn Address to Christians and Patriots (New York, 1800)," reprinted in *Political Sermons,* 1477–1528, at 1482, 1487–1488.
[75] Ibid., 1488.
[76] Williams, *Essential Rights,* 46.

> neither of them be suffered to overleap the great barrier which defends the rights of the people.[77]

The principle of separation of church and state was also readily understood by the founders as a means to protect the liberty of conscience of the religious believer. Thomas Jefferson, for example, in his famous 1802 letter to the Danbury Baptist Association, tied the principle of separationism directly to the principle of liberty of conscience:

> Believing with you that *religion is a matter which lies solely between a man and his God*, that he owes account to none other for his faith or his worship, that the [legitimate] powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that the act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," *thus building a wall of separation between church and State*. Adhering to this expression of the supreme will of the nation *in behalf of the rights of conscience*, I shall see with sincere satisfaction the progress of those sentiments which tend to *restore to man all his natural rights*, convinced he has no natural right in opposition to his social duties.[78]

Separatism thus assured individuals of their natural, inalienable right of conscience, which could be exercised freely and fully to the point of breaching the peace or shirking social duties. Jefferson is not talking here of separating politics and religion altogether. Indeed, in the very next paragraph of his letter, President Jefferson performed an avowedly religious act of offering prayers on behalf of his Baptist correspondents: "I reciprocate your kind prayers for the protection and blessing of the common

---

[77] Madison, *Memorial and Remonstrance*, sec. 2.

[78] *The Writings of Thomas Jefferson,* ed. H. Washington, (Washington, DC, 1853–1854), 8:113 (emphasis added). The Washington edition of the letter inaccurately transcribes "legitimate" as "legislative." See a more accurate transcription in Dreisbach, "'Sowing Useful Truths,'" 468–469.

Father and Creator of man."[79] This was consistent with a number of his other political acts in support of religion, both as governor of Virginia and as president of the United States.[80]

Disestablishment of Religion

The term "establishment of religion" was an ambiguous phrase—-in the eighteenth century, as much as today. In the dictionaries and common parlance of the founders' day, to "establish" meant "to settle firmly," "to fix unalterably," "to settle in any privilege or possession," "to make firm," "to ratify," "to ordain," "to enact," "to set up," to "build firmly."[81] Such was the basic meaning of the term, for example, when used in the 1787 Constitution-—"We the people of the United States, in order to form a perfect union, to *establish* justice ... do ordain and *establish* this Constitution" (preamble); Congress shall have power "[t]o *establish* an uniform rule of naturalization" and "[t]o *establish* post offices" (Art. I.8); Governmental offices "shall be *established* by law" (Art. II.2); Congress may "ordain and *establish* ... inferior courts" (Art. III.1); the ratification of nine states "shall be sufficient for the *establishment* of this Constitution" (Art. VI).[82]

Following this basic sense of the term, the founders understood the *establishment* of religion to mean the actions of government to "settle," "fix," "define," "ordain," "enact," or "set up" the religion of the community—-its religious doctrines and liturgies, its religious texts and traditions, its clergy and property. The most notorious

---

[79] *The Writings of Thomas Jefferson,* 114. For the original drafts of the letter and the political machinations at work in its drafting and revision, see James Hutson, "'A Wall of Separation': FBI Helps Restore Jefferson's Obliterated Draft," *Library of Congress Information Bulletin* 57 (June 1998): 136–139, 163.

[80] See Thomas E. Buckley, "The Political Theology of Thomas Jefferson," in Peterson and Vaughan, eds., *The Virginia Statute for Religious Freedom,* 75–108; id., "The Use and Abuse of Jefferson's Statute: Separating Church and State in Nineteenth-Century Virginia," in James H. Hutson, ed., *Religion and the New Republic: Faith in the Founding of America* (Lanham, MD: Rowman & Littlefield, 2000), 41-64.

[81] See entries under "establish" and "establishment" in John Andrews, *A Complete Dictionary of the English Language,* 4th ed. (Philadelphia, 1789); John Ash, *A New and Complete Dictionary of the English Language* (London, 1775); Samuel Johnson, *A Dictionary of the English Language,* 4th ed. (London, 1773); William Perry, *The Royal Standard English Dictionary,* 1st Am. ed. (Worcester, 1788); Thomas Sheridan, *A Complete Dictionary of the English Language,* 2d ed. (London, 1789).

[82] See T. Jeremy Gunn, *A Standard for Repair: The Establishment Clause, Equality, and Natural Rights* (New York/London, 1992), 46–47, 71–73.

example of this, to their minds was the establishment by law of Anglicanism. English ecclesiastical law formally required use of the Authorized (King James) Version of the Bible and of the liturgies, rites, prayers, and lectionaries of the *Book of Common Prayer*. It demanded subscription to the Thirty-Nine Articles of Faith and the swearing of loyalty oaths to the Church, Crown, and Commonwealth of England. When such ecclesiastical laws were rigorously applied—-as they were in England in the early Stuart period of the 1610s–1630s, and again in the Restoration of the 1660s–1670s, and intermittently in the American colonies-—they led to all manner of state controls of the internal affairs of the established church, and all manner of state repression and coercion of religious dissenters.

Those founders who called for the disestablishment of religion sought to outlaw at least this traditional form of religious establishment and so protect the foregoing first principles of religious liberty.

Disestablishment of religion thus served to protect the principle of liberty of conscience and free exercise of religion by foreclosing government from coercively prescribing mandatory forms of religious belief, doctrine, and practice. As both the Delaware and Pennsylvania constitutions put it: "[N]o authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner control, the right of conscience in the free exercise of religious worship."[83]

Disestablishment of religion further protected the principles of religious equality and religious pluralism by preventing government from singling out certain religious beliefs and bodies for preferential treatment. This concept of disestablishment came through repeatedly in both state and federal debates. In the Virginia Ratification Convention, for example, both Madison and Edmund Randolph stressed that religious pluralism would "prevent the establishment of any one sect in prejudice, to the rest, and will forever oppose all attempts to infringe religious liberty."[84] South Carolina conventioneer Francis Cummins likewise stated that it was "his duty and honor to oppose the ideas of religious establishments; or of states giving preference to any religious denomination."[85] The New Jersey

---

[83] Delaware Declaration of Rights (1776), sect. 3; Pennsylvania Declaration of Rights (1776), II.
[84] *Debates,* 3:208, 313, 431.
[85] Quoted in Chester J. Antieau, et al., *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (Milwaukee, 1964), 106. Cummins went on to say: "It would be impolite for a state to give preference to one religious order

Constitution provided "there shall be no establishment of any one religious sect ... in preference to another."[86] Both the New York and the Rhode Island Ratifying Conventions suggested amendments to the Constitution that "no religious sect or society ought to be favored or established by law in preference to others."[87]

Disestablishment of religion also served to protect the principle of separation of church and state. It prohibited government, as Jefferson put it, "from intermeddling with religious institutions, their doctrines, discipline, or exercises" and from "the power of effecting any uniformity of time or matter among them. Fasting & prayer are religious exercises. The enjoining them is an act of discipline. Every religious society has a right to determine for itself the times for these exercises, & the objects proper for them, according to their own peculiar tenets."[88] To allow such governmental intermeddling in the affairs of religious bodies would inflate the competence of government. As Madison wrote, it "implies either that the Civil Magistrate is a competent judge of religious truth; or that he may employ religion as an engine of civil policy. The first is an arrogant pretension falsified by the contradictory opinions of rulers in all ages, and throughout the world, the second an unhallowed perversion of the means of salvation."[89] Governmental interference in religious affairs also compromises the pacific ideals of most religions. Thomas Paine, who is usually branded as a religious skeptic, put this well:

> All religions are in their nature mild and benign, and united with principles of morality. They could not have made proselytes at first, by professing anything that was vicious, cruel, persecuting or immoral.... Persecution is not an original feature in any religion; but it is always the strongly marked feature of all law-religions, or religions established by law. Take away the law-establishment, and every

---

over any others in matters of state, and to dictate and prescribe in points of religion, in which men have from different modes of education and circumstances of one kind or other, will and must split in opinion." Ibid.

[86] Art. XIX.

[87] *Debates,* 1:328, 334.

[88] *The Founders' Constitution,* 5:98–99.

[89] Madison, *Memorial and Remonstrance*, sec. 5.

> religion reassumes its original benignity.[90]

The question that remained controversial-—in the eighteenth century as much as today-—was whether more gentle and generic forms of governmental support for religion could be countenanced. Did disestablishment of religion prohibit governmental support for religion altogether, or did it simply require that such governmental support be distributed nonpreferentially among religions?

It takes a bit of historical imagination to appreciate this question in eighteenth-century terms. In eighteenth-century America, government typically patronized religion in a variety of ways. Officials donated land and personalty for the building of churches, religious schools, and charities. They collected taxes and tithes to support ministers and missionaries. They exempted church property from taxation. They incorporated religious bodies. They outlawed blasphemy and sacrilege, unnecessary labor on the Sabbath and on religious holidays. They administered religious test oaths. They made regular political use of the Bible, of religious imagery, of the services and facilities of religious institutions.

Historically, such forms of state patronage of religion had been reserved to the established church alone. All other faiths, if tolerated at all, were left to depend on their own resources. In the course of the eighteenth century, the growth of religious freedom often entailed the gradual extension of these forms of state privilege and patronage to other faiths. Often this was done in a piecemeal fashion: benefit by benefit, congregation by congregation, county by county. By the later eighteenth century, the hard constitutional questions became this: Should state patronage for religion end altogether? Or should state patronage be extended to all religions non-preferentially, rather than granted only in this piecemeal fashion? Given the overwhelmingly Christian, indeed Protestant, character of the new nation, a policy of nonpreferential governmental support for virtually all religions could be quite realistically envisioned-—particularly if some accommodation were made for Jewish sabbatarian beliefs and Quaker aversions to religious oaths and military service. (No founder seriously thought of having to accommodate the African religions of the slaves or the traditional religions of the Native Americans.)

---

[90] Thomas Paine, *Rights of Man* (1791), in *The Founders' Constitution,* 5:95–96.

The question of whether disestablishment of religion outlaws all governmental support for religion or only preferential governmental support for some religions was not resolved in the eighteenth century. The founders were divided on the question. A number of Evangelical and Enlightenment writers viewed the principle of disestablishment as a firm bar on state support, particularly financial support, of religious beliefs, believers, and bodies.[91] James Madison, for example, wrote late in his life: "Every new & successful example ... of a perfect separation between ecclesiastical and civil matters, is of importance. And I have no doubt that every new example, will succeed, as every past one has done, in shewing that religion & Govt. will both exist in greater purity, the less they are mixed together."[92] Similar sentiments can be found in contemporaneous Baptist tracts, particularly those of Isaac Backus and John Leland.[93] Puritan and Republican writers often viewed the principle of separation of church and state only as a prohibition against direct financial support for the religious worship or exercise of one particular religious group. General governmental support for religion of all sorts-—in the form of tax exemptions to religious properties, land grants and tax subsidies to religious schools and charities, tax appropriations for missionaries and military chaplains, and similar general causes—-were considered not only licit but necessary for good governance.

The state constitutions were likewise divided on the question. A number of states explicitly authorized such support in their original constitutions. The Constitution of Maryland (1776) was quite typical. It included strong guarantees of religious liberty that touched each of the principles of religious liberty we have rehearsed. "[A]ll persons, professing the Christian religion, are equally entitled to protection in their religious liberty." This includes freedom from "molestation" "on account of his

---

[91] See Leo Pfeffer, *Church, State, and Freedom,* rev. ed. (Boston, 1967); Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (New York, 1986).

[92] *The Founders' Constitution,* 5:105–106. See also Madison, Memorial and Remonstrance, sec. 9: "Distant as it may be in its present form from the Inquisition, it [i.e., the general assessment for religion] differs from it only in degree. The one is the first step, the other the last step in the career of intolerance."

[93] See, e.g., *The Freeman's Remonstrance,* 5–11; Isaac Backus, *The Infinite Importance of the Obedience of Faith, and of a Separation from the World, Opened and Demonstrated* (Boston, 1791), 15–31; id., *Policy as well as Honesty Forbids the Use of Secular Force in Religious Affairs* (Boston, 1779).

religious persuasion or profession, or for his religious practice"; "nor ought any person to be compelled to frequent or maintain, or contribute, unless on contract [i.e., by agreement] to maintain any particular place of worship, or any particular ministry." But, the Maryland Constitution continues, without pause, to provide that "the Legislature may, in their discretion, lay a general and equal tax, for the support of the Christian religion; leaving to each individual the power of appointing the payment over of the money, collected from him, to the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general of any particular county."[94] Similar provisions were included in the original constitutions of Massachusetts, New Hampshire, and Connecticut.[95] The other original state constitutions simply repeated the general principles of religious liberty, without touching the issue of whether government could support religion(s).

Drafts of the First Amendment Religion Clauses

It is in the context of this plurality of opinions and panoply of principles of religious rights that the First Amendment religion clauses should, in my view, be understood. Many of the representatives and senators gathered in the First Session of Congress of 1789 had participated in the formation of state constitutional laws of religious rights. A good number of them had also written detailed pamphlets, sermons, and letters on the subject. Even those uninitiated members of this First Congress could take instruction on the meaning religious rights from the four drafts of the religion clauses that submitted by the state ratification conventions.

The states sent in four proposed drafts of the religion clauses for the First Congress to consider:

1. *"Congress shall make no laws touching religion, or to infringe the rights of conscience."* New Hampshire Proposal, June 21, 1788.

2. *"That religion, or the duty which we owe to our creator, and the manner of discharging it, can be directed*

---

[94] Declaration of Rights, XXXIII. This was outlawed by amendment, Art. XIII (1810). See Francis Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws*, 7 vols. (Washington, DC, 1909), 3:1189, 1705.

[95] See my "A Most Mild and Equitable Establishment of Religion: John Adams and the Massachusetts Experiment," *Journal of Church and State* 41 (1999): 213.

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." Virginia Proposal, June 26, 1788.

3. *"That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others."* New York Proposal, July 26, 1788.

4. *"That 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. 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."* North Carolina Proposal, August 1, 1788; Repeated by Rhode Island, June 16, 1790.[96]

Thirteen drafts of the religion clauses were ultimately debated in the House in the summer of 1789. They read thus in the order they were put to the floor:

5. *"The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or any pretext infringed."* Draft Proposed to the House by James Madison, June 8, 1789.

6. *"No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."* Draft Proposed to House by James Madison, June 8, 1789.

7. *"no religion shall be established by law, nor shall the equal rights of conscience be infringed."* Draft Proposed to House by Committee of Eleven, July 28, 1789.

8. *"no person religiously scrupulous shall be compelled to bear arms."* Draft Proposed to House by Committee of Eleven, July 28, 1789.

---

[96] *Debates* 1:327, 328, 331, 333-335; 3:591, 594; 4:244.

9. *"no State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases."* Draft Proposed to House by Committee of Eleven, July 28, 1789.

10. *"Congress shall make no laws touching religion, or infringing the rights of conscience."* Draft Proposed by Charles Livermore on August 15, 1789; Passed by the House.

11. *"the equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed by any State."* Draft Proposed by Charles Livermore on August 17, 1789; Passed by the House.

12. *"Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."* Revised Draft Proposed by Fisher Ames on August 20, 1789; Passed by the House.

13. *"No person religiously scrupulous shall be compelled to bear arms in person."* Revised Draft Passed by the House, August 20, 1789.

14. *"Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."* Final Draft Proposed by the Style Committee, Passed by the House, and Sent to the Senate, August 25, 1789.[97]

Four more drafts of the religion clauses were considered in the Senate:

15. *"Congress shall make no law establishing One Religious Sect or Society in preference to others, nor shall the rights of conscience be infringed."* Draft Proposed and Defeated in the Senate, September 3, 1789.

16. *"Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society."* Draft Proposed and Defeated in the Senate, September 3, 1789.

17. *"Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."* Draft Proposed and Defeated in the Senate, September 3, 1789.

18. *"Congress shall make no law establishing religion, or prohibiting the free exercise thereof."* Draft Proposed and Passed by the Senate, September 3, 1789.

---

[97] *Annals*, 1:451-452, 757-759, 778-789, 783-784, 795-796, 808. The full debate on these drafts is reproduced in RCE, 64-71.

19. *"Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."* Draft Proposed and Passed by the Senate, and Sent to the House, September 9, 1789.[98]

What ultimately passed both Houses was a draft proposed by a joint House-Senate Committee:

20. *"Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof."* Proposed on September 24, 1789 and Passed by House and Senate on September 25, 1789.[99]

The Original Understandings of the First Amendment

Determining the original understanding of the First Amendment has been the perennial challenge of the American experiment ever since. The final text has no plain meaning. The Congressional record holds no rosetta stone for easy interpretation. Twenty separate drafts of the religion clauses came under Congress's consideration. The Congressional record holds no dispositive argument against any one of the nineteen interim drafts, and few clear clues on why the sixteen words that comprise the final text were chosen.

It is worth pondering the possible original understandings of these sixteen words, based on what survives of the House debates, and what was consistent with the more general opinions on religious rights that prevailed in the later eighteenth century.

"Congress" -- The First Amendment's specification of "Congress" underscored the founders' general agreement that the religion clauses were binding not on the states but on the most dangerous branch of the new federal government. This was the strong sentiment of the 1787 constitutional convention and the state ratification debates. It was repeated in several of the surviving speeches in the House.

The first draft of the religion clauses, submitted by New Hampshire, had specified "Congress" (No. 1). The three other state drafts submitted in the summer of 1788 included general guarantees of religious liberty that could be read to bind both federal and state governments. In his June 8, 1789 consolidated draft, Madison had sought to accommodate both readings -- by outlawing a "national" establishment and by prohibiting states from infringing on conscience (Nos. 5, 6). This construction failed, despite Madison's two

---

[98] *Journal,* 1:116, 117, 129.
[99] Ibid., 1:145, 148; *Annals*, 1:948.

arguments for it in the August 15 debate. The original New Hampshire focus on "Congress" became the norm.

In his same June 8 draft, Madison had also included generic guarantees of religious liberty without specifying the government entity bound thereby -- "the full and equal rights of conscience shall not be infringed" and "the civil rights of none shall be abridged on account of religion" (No. 5). Such provisions, too, died without explanation. By August 20, Fisher Ames's draft (No. 12) specified Congress alone, and the Senate held to this.

"Shall make" -- The phrase "*shall make* no law" is rather distinctive -- written in a future active imperative voice. In eighteenth-century parlance, "shall," as opposed to "will," is an imperative; it is an order, rather than a prediction, about what Congress does in the future. "Shall" is so used fifteen times in the Bill of Rights alone. But why the construction "shall make no law," which is a phrasing unique to the First Amendment? Could it be that Congress could make no new laws on religion, but could confirm laws that had already been made -- before the First Amendment was passed, or by the Continental Congress before it?

Such a reading seems fanciful until one notes the exchange in the House, on September 25, 1787, the very day the House approved the final text of the religion clauses. Elias Boudinot of New Jersey, who chaired the recorded House debates on the religion clauses, announced that "he could not think of letting the session pass over without offering an opportunity to all the citizens of the United States of joining, with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured down upon them." He then moved that both houses of Congress request the President to set aside a day of "public thanksgiving and prayer, to be observed by acknowledging ... the many signal favors of Almighty God." Aedanus Burke of South Carolina thought this too redolent of a military European custom which made "a mere mockery of thanksgiving." Thomas Tucker, also of South Carolina, objected that "it is a business with which Congress ha[s] nothing to do; it is a religious matter, and, as such, is proscribed to us. If a day of thanksgiving must take place, let it be done by the authority of the several States; they know best what reason their constituents have to be pleased with the establishment of the Constitution." Roger Sherman countered that the tradition of offering such public prayers was "laudable," and, after citing a few biblical precedents for it, declared the practice "worthy of Christian imitation on the present occasion." Boudinot defended his motion on grounds that it was "a measure both prudent and just" and quoted "further

precedents from the practice of the late Congress" to drive home his point. The motion passed in the House, and later also in the Senate.[100] President Washington set aside a Thanksgiving Day, and gave a robust proclamation on October 3, 1789. This Thanksgiving tradition has continued virtually uninterrupted ever since.

This was not the only such inherited tradition touching religion that the First Congress confirmed and continued. On April 15, 1789, before deliberating the religion clauses, the Congress voted to appoint "two Chaplains of different denominations" to serve Congress, one in each house.[101] On April 27, the Congress ordered, relevant to the pending inauguration of President Washington: "That after the oath shall have been administered to the President, he, attended by the Vice President, and members of the Senate, and House of Representatives, proceed to St. Paul's Chapel, to hear divine service, to be performed by the Chaplain of Congress already appointed."[102] These chaplains served the Congress throughout the period of the debates on the religion clauses. On September 22, 1789, just as the joint committee was polishing the final draft of the religion clauses, Congress passed an act confirming their appointment and stipulating that the chaplains were to be paid a salary of $500 per annum.[103] Similarly, on August 7, 1789, after the committee of eleven had put to the House its three proposed religion clauses, the Congress reenacted without issue the Northwest Ordinance, with its two religion clauses: "No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments"; and "Religion, morality and knowledge, being necessary to good government and happiness of mankind, schools and other means of education shall forever be encouraged...."[104]

It is rather clear that the First Session of Congress had little compunction about confirming and continuing the Continental Congress's tradition of supporting chaplains, prayers, Thanksgiving Day proclamations, and religious education. And, in later sessions in the 1790s and 1800s, the Congress also continued the Continental Congress's practice of including religion clauses in its treaties, condoning the American edition of the Bible, funding chaplains in the military, and celebrating religious

---

[100] *Annals,* 1:949-950, 958-959.
[101] Ibid., 1:18-19, 233; *Journal* 1:16.
[102] *Annals* 1:25, 241.
[103] Ibid., 2:2237.
[104] Statutes 1789, C. VIII, in *Documents of American History*, Henry Steele Commager, 5th ed. (New York, 1949), 130, 131.

services officiated by congressional chaplains -- all with very little dissent or debate. The ease with which Congress passed such laws does give some guidance on what forms of religious support the First Congress condoned within the constraints of the religion clauses.

"Respecting an establishment" -- The phrase "respecting an establishment of religion" has long been the most hotly contested phrase of the First Amendment. We certainly cannot resolve all the modern contests on a reading of the Congressional record alone. But at least three plausible lines of interpretation, that speak to perennial questions of the relationship of religion and government, can be made out.

Thirteen of the nineteen drafts of the religion clauses included disestablishment clauses. The only recorded debate is that of August 15 on the formulation: "no religion shall be established by law" (No. 7), but there is nothing in what survives that is dispositive. While all the words of the final text of the disestablishment clause appear and recur in earlier drafts, the word "respecting" is new. It is a studiously ambiguous term, variously defined in the day as: "to look at, regard, or consider"; to "heed or pay attention to"; "to regard with deference, esteem, or honor"; to "expect, anticipate, look toward."[105]

One plausible reading of the final text is that Congress shall make no laws "respecting" a state establishment of religion. In 1789, six states still had some form of religious establishment, which both their state legislatures and constitutional conventions defined and defended, often against strong opposition from religious dissenters. Moreover, Virginia had just passed Jefferson's bill "for the establishment of religious freedom," also against firm opposition by defenders of the traditional establishment of Anglicanism. Having just defended their state establishments at home, the new members of Congress were not about to relinquish control of them to the new federal government. There was special concern to prevent Congress, the law-making body, from passing laws that might interfere in such religious matters -- particularly through the "necessary and proper clause" of Article I, which Madison in the August 15 debate signaled as the danger point.[106]

To be sure, the First Congress had already quite explicitly rejected those drafts of the religion clauses

---

[105] See dictionaries cited above in n. 81 (s.v. “respect” “respecting”).
[106] *Annals*, 1:757-759.

that bound the states directly, or were cast in general terms, and thus potentially binding on the states. And to be sure, the Tenth Amendment guaranteed generally: "The powers not delegated to the United States by the Constitution ... are reserved to the States respectively, or to the people." But, perhaps on so sensitive an issue as religion, it was best to be triply sure -- and explicitly outlaw any Congressional interference in the state's religious establishments. Perhaps, in the final House-Senate committee of six, it was the hard political issue of federal versus state power that was resolved by adding the curious phrase "respecting an establishment." Congress could simply make no law that "looked at," "regarded," "paid attention to" a state establishment of religion -- whether benignly or unfavorably.

This reading of the disestablishment clause would be considerably easier to press if the final draft said "a state establishment," rather than "an establishment." But since reference to "state establishments" had not appeared before in the drafts, perhaps the final committee thought it prudent to avoid introducing a new contested term so late in the debate -- particularly given the squabbling over the term "national establishment" in the August 15 House debate.

A second plausible reading is that Congress could neither establish religion outright, nor make laws that would "point toward," "anticipate" or "reflect" such an establishment. On this reading, Congress could not pass a comprehensive new religion law defining the texts, doctrines, and liturgies of the nation's faith and/or governing religious polity, clergy, and property. Such a law, reminiscent of prevailing English ecclesiastical laws, would clearly be unconstitutional. But that was not the founders' only fear, according to this reading. Congress could also not make more discrete laws that might "respect" -- that is, point toward, anticipate, or reflect -- such an establishment. The First Congress's concern was to prevent not only a comprehensive new law that established a national religion, but also piecemeal laws that would move incrementally toward the same.

The disestablishment clause, on this reading, was not necessarily a prohibition against all laws "touching" religion, as some earlier drafts had indicated. After all, Congress had already passed several such laws (supporting chaplains, prayers, religious education, and the like). Such laws presumably did not point toward or reflect an established religion, but simply reflected commonplaces of the day about what was proper for the young nation. But the disestablishment clause was a rather firm barrier against a

large number of laws touching religion that might move toward an establishment.

This reading turns on a crucial judgment about why the First Congress had rejected earlier drafts that were more specific about defining a religious establishment. On August 15, the House debated whether to outlaw "religious establishment" per se (No. 7). There seemed to be consensus on this, as Roger Sherman said early in the debate.[107] The moment that the Representatives began to specify what they meant by religious establishment, however, the conversation broke down: Gerry was concerned about establishing religious doctrines, Huntington about forced payments of religious tithes, Madison about compulsory worship of God and giving preeminence to one sect -- all of which were features of a traditional establishment of religion. The initial compromise was Livermore's clause that sought "no law touching religion" at all (No. 10). By August 20, the House had returned to the language that opened the August 15 debate: "no law establishing religion" (No. 12). That was the language sent to the Senate. The Senate also could not nuance this "no establishment" formulation -- failing to reach agreement on clauses that would outlaw the establishment of "one Religious Sect or Society" or "articles of faith or a mode of worship" or that would outlaw the preference of one religious sect, society, or denomination (Nos. 15-17, 19). On this second reading of the disestablishment clause, the word "respecting," therefore, becomes something of an umbrella term for these and other features of a religious establishment. Congress could not agree on what specifics of a religious establishment to outlaw -- and so they simply outlawed the establishment of religion altogether, and anything that "pointed to" or "moved toward" the same.

On the first reading, the disestablishment clause is a limited prohibition against congressional interference with state controls of religion. This leaves little guidance for what Congress might do at the federal level respecting (an establishment of) religion. On the second reading, the establishment is a comprehensive prohibition against any congressional inclination toward establishing religion. This leaves a little room for Congress to pass laws "touching religion," but not much. Between these two readings of "respecting an establishment" of religion, one can find in the literature a whole host of alternatives.

Among the more popular of such intermediate readings is that of "non-preferentialism." The disestablishment clause,

---

[107] Ibid.

on this reading, simply outlaws preferential support for a "national religion," but allows for "non-preferential" support for multiple religions. On this reading, the feature of "establishment" that concerned Congress most was not a grand scheme of ecclesiastical law as prevailed in England; that was clearly beyond the pale, and no one was seriously advocating this for America in 1780s. Congress's real concern was to avoid official "preferences" for certain religious sects, denominations, doctrines, or modes or worship. Six drafts, including the penultimate one, sought to formulate this directly by outlawing various types of "preferential" establishments by name (Nos. 2, 3, 15-17, 19). None of these drafts passed muster. But Congress accomplished its goal of outlawing preferential support more efficiently by simply prohibiting laws against "an" establishment of this sort -- rather than prohibiting laws against "the" establishment of religion altogether. On this formulation, Congress could certainly "touch religion" -- rather generously in fact -- so long as it did so in a way that would not prefer one religious sect or society above another. And Congress demonstrated what such non-preferential support meant by appointing and funding chaplains from different denominations, supporting general "religious education," and condoning pious but ecumenical prayers and Thanksgiving Day proclamations.

This "non-preferential" reading of the disestablishment clause, while certainly plausible, relies heavily on Madison's rejected concern about "national establishment." It does rather little to explain the insertion of the curious word "respecting." It also relies heavily on a clever distinction between "an" and "the" establishment of religion -- words on which the sloppy Congressional record slipped more than once.[108]

"Prohibiting free exercise." -- While the origins of the disestablishment clause have long occupied commentators, the origins of the free exercise clause have only recently come into prominent discussion. A modern controversy has driven much of the new interest -- the weakening of the free exercise clause, culminating in the Supreme Court case of *Employment Division v. Smith* (1990)[109] and Congress's

---

[108] See, e.g. ibid. 1:948 transcribing the final Senate version of the free exercise clause: “prohibiting *a* free exercise thereof.” See also ibid., 1:451, 778-780 variously quoting Madison’s call for disestablishment of “*any*” and “*a*” religion. On the sloppiness of the record, see generally James H. Hutson, “The Creation of the Constitution: The Integrity of the Documentary Record,” *Texas Law Review* 65 (1986): 1.

[109] 494 U.S. 872 (1990).

(ultimately failed) attempt in the Religious Freedom Restoration Act (1993) to restore a more rigorous free exercise test. Here, too, as in the case of the disestablishment clause, the record does not resolve all modern questions. Indeed, in the case of the free exercise clause, the congressional record raises as many questions as it answers.

First, the free exercise clause merely outlaws congressional acts that "prohibit" the free exercise of religion. Earlier drafts had included much more embracive protections, outlawing laws that would "touch," "infringe," "abridge," "violate," "compel" or "prevent" the same. All this is replaced by the seemingly minimalist guarantee that Congress not "prohibit" the free exercise of religion.

Second, the free exercise clause is not matched by a liberty of conscience clause. The first seventeen drafts of the religion clauses had included a provision protecting the liberty or rights of conscience, sometimes generally, sometimes specifically with respect to religious scruples against bearing arms. The final recorded House debates on August 20 show agreement on both such protections: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience" (No. 12). And again, "no person religiously scrupulously shall be compelled to bear arms in person" (No. 13). The Senate included such a guarantee in its first three drafts, but then abruptly dropped it for good at the end of September 3 (No. 18). We are left with the final spare free exercise clause.

Third, it must be remembered that while formulating the free exercise clause, Congress was also formulating the free speech, free press, and free assembly clauses. The House had combined the speech, press, and religion clauses already on July 28 (Nos. 9, 11). The Senate combined these and the assembly clause on September 9 (No. 19), and thereafter, they were considered together. The surviving House debates on these other First Amendment provisions make rather clear that religious speech, religious press, and religious assembly were covered by these three clauses.[110] The free exercise clause could not be merely redundant of these attendant clauses of the First Amendment. So what is protected by the free exercise clause beyond free religious speech, free religious press, and free religious assembly?

To read the free exercise clause too minimally is hard to square with the widespread solicitude for rights of

---

[110] See debates in *The Founders' Constitution,* 5:111-208.

conscience and free exercise reflected in the First Congress's debates. All four drafts of the religion clauses proposed by the states included strong protections of free exercise. The House debates that have survived show equal solicitude. Daniel Carroll, for example, spoke eloquently that "the rights of conscience are, in their nature of such peculiar delicacy, and will little bear the gentlest touch of government."[111] Benjamin Huntington warned against anything "hurtful to religion" and hoped the "amendment would be made in such a way as "to secure the rights of conscience and a free exercise of the right of religion...."[112] Elias Boudinot gave the final resounding word of the House on August 20: "I hope that in establishing this Government, we may show the world that proper care is taken that the Government may not interfere with the religious sentiments of any person."[113]

How does all this enthusiasm in the First Congress for the rights of conscience and freedom of exercise square with the seemingly crabbed guarantee that "Congress shall make no law ... prohibiting the free exercise" of religion?

The free exercise clause is somewhat less crabbed when read in eighteenth-century terms, rather than ours. The word "prohibiting," in eighteenth-century parlance, was as much a synonym as a substitute for the terms "infringing," "restraining," or "abridging." Both dictionaries and political tracts of the day conflated these terms. To flip from one to the other, particularly in the charged political rhetoric of the First Congress, might well have been driven more by aesthetics and taste than by substantive calculation.[114]

One can see this conflation of terms in the original draft submitted by the Virginia Ratification Convention in the summer of 1788. In the preface to its proffered amendments, the convention cites its main concern -- "that essential rights, the liberty of conscience, and of the press, cannot be cancelled, abridged, restrained, or modified, by any authority...." Commenting on this passage in 1800, Madison argued that the point of listing all these verbs was simply to underscore "that the liberty of conscience and the freedom of press were equally and completely exempted from all authority whatever of the

---

[111] *Annals*, 1:757.
[112] Ibid., 1:757-758.
[113] Ibid., 1:796.
[114] See Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," *Harvard Law Review* 103 (1990): 1409, 1486-1488.

United States." And such rights, in Madison's view, were equally and completely protected by the First Amendment, despite its use of the alternative terms, "prohibiting" and "abridging." To read the First Amendment otherwise would lead to silly results:

> [I]f Congress may regulate the freedom of the press, provided they do not abridge it, because it is said only "they shall not abridge it," and is not said, "they shall make no law respecting it," the analogy of reasoning is conclusive that Congress may regulate and even abridge the free exercise of religion, provided they do not prohibit it; because it is said only "they shall not prohibit it," and is not said "they shall make no law respecting, or no law abridging it."[115]

One cannot lean too heavily on this construction, since the primary meaning of "prohibit" in the eighteenth century was still to "forbid," "prevent," or "preclude." But awareness both of the elasticity of the term in the day and of the inexactitude of the congressional record helps to explain what the First Congress may have been about.

Moreover, the word "free exercise," in eighteenth-century parlance, was both a source and a summary of a whole range of principles of religious rights and liberties. "Free exercise" did have a distinct meaning in the eighteenth century, as we saw. It was conventionally understood to protect the religious speech, press, assembly, and other activities of individuals, and the actions respecting the religious property, polity, discipline, and clergy of religious groups. But "free exercise" was just as much an umbrella term that connoted protections of liberty of conscience, religious equality and pluralism, and (in some formulations) separation of church and state. In earlier drafts of the religion clauses, Congress sought to spell out these various principles separately -- listing liberty of conscience fifteen times, free exercise and religious equality nine times each, and religious pluralism six times. Perhaps in an attempt to avoid giving priority to any particular construction, Congress thought it best to use the generic term "free exercise," and leave its specific province open to ongoing constitutional development and

---

[115] *The Founders' Constitution*, 5:146-147.

application. This is a speculative reading, but plausible even on the thin congressional record.

The record of the First Congress does give a better indication of why the clause on conscientious objection to bearing arms might have been excluded. The North Carolina ratification convention had introduced this provision in 1788 (No. 4). The House committee of eleven had repeated it on July 28 (No. 8). The House debated the clause on August 17 and 20. It was clearly controversial -- passing only 24-22 in the full House on August 20, before being silently dropped by the House style committee four days later. Both Representatives Gerry and Scott objected because such an open-ended clause might well be abused, with the military and the nation thereby imperiled. Both Representatives Scott and Jackson thought it unfair that "one part" of the nation "would have to defend the other in case of invasion." Chairman Boudinot ultimately carried the slender majority with an impassioned speech: "what justice can there be in compelling them to bear arms, when, according to their religious principles, they would rather die than use them?"[116]

But three of the Representatives had suggested a legislative alternative that may have ultimately led to the quiet disappearance of this clause after August 20. Sherman hinted at this by saying the clause was not "absolutely necessary." Scott said more explicitly that conscientious objection status was not a constitutional but a "legislative right." Benson elaborated this view, advising that such questions be left "to the benevolence of the Legislature," to the "discretion of the Government." "If this stands part of the constitution," Benson reasoned, "it will be before the Judiciary on every regulation you make with respect to the organization of the militia."[117] Such a reading has proved prophetic. The contentious issue of conscientious objection status in the military has remained almost consistently sub-constitutional ever since--handled by statute and regulation, rather than by direct free exercise inquiry.

"Religion." -- "What is religion?" is today a recurrent refrain that echoes through much First Amendment law. The issue is as intractable at modern law as it is in modern theology, philosophy, sociology, and anthropology. At law, a claim or claimant must be deemed religious to seek the protection of the free exercise clause. A government action must be deemed religious to trigger the remedies of the

---

[116] *Annals*, 1:778-780, 796.
[117] Ibid.

disestablishment clause. With the remarkable pluralism of modern America, featuring more than 1,000 denominations, charting the course between religion and non-religion is often a hazardous exercise.

The issue was a good bit simpler in the eighteenth century. The founders recognized and celebrated a plurality of Protestant Christian faiths. The issue was how much further to extend the pale of recognized religion, and thus of constitutional protection. Some set the legal line at Protestantism. Others set the legal line at Christianity, thereby including Catholics and Eastern Orthodox. Others set the legal line at theism, thereby including Jews, Muslims, and Deists. No founders writing on religious rights and liberties argued seriously about setting the line any further--to include African or Native American religions, let alone non-theistic faiths from the East, such as Buddhism.

The First Congress did little more than repeat this conventional lore. The House debates repeated the general endorsement of a plurality of sects, societies, and denominations, but touched by name only Quakers and Moravians. They also alluded to a distinction between religion and non-religion, seeking to reserve the protections of constitutional religious rights to the former. In the House debates, Sylvester expressed concern about "abolishing religion altogether" by crafting too broad a disestablishment clause.[118] Huntington wished "to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all."[119] Scott wanted to prevent misuse of the conscientious objection clause by "those who are of no religion." But precisely what constituted religion and non-religion, and where the line was to be drawn between them, the congressional record simply does not say.

Summary and Conclusions

Six principles lay at the heart of the new American constitutional experiment in religious rights--liberty of conscience, free exercise of religion, religious equality, religious pluralism, separation of church and state, and disestablishment of religion.

These principles came to fullest expression and experimentation in the eleven new state constitutions forged between 1776 and 1784. No state constitution, however,

---

[118] Ibid., 1:757.
[119] Ibid., 1:758-759.

embraced all six of these principles equally. Nor did they institute them without the kind of qualifications we would regard as improper, if not unconstitutional, today. Most states still retained some semblance of a traditional religious establishment--usually by favoring certain religious ceremonies and moral codes; sometimes by instituting religious tithes, taxes, and test oaths; occasionally by condoning only certain modes and manners of religious worship and organization. Most of the states still retained ample constraints on the free exercise of religion--usually by prohibiting breaches of the peace and public morality; sometimes by curbing religious speech that was deemed blasphemous, religious assemblies that were considered dangerous, or religious allegiances that were judged unpatriotic, if not treasonous.

These principles of religious rights were also incorporated into the First Amendment to the United States Constitution. The religion clauses bound only the national government ("Congress"). They set only outer boundaries to constitutional congressional conduct respecting religion. These religion clauses were designed in part to legitimate, and to live off, the state constitutional guarantees of religious rights and liberties. The twin guarantees of disestablishment and free exercise depended for their efficacy both on each other and on other religious rights that the founders regarded as "essential." The guarantees of disestablishment and free exercise of religion standing alone--as they came to be during the 1940s when the Supreme Court "incorporated" these two guarantees into the due process clause of the Fourteenth Amendment[120]--could legitimately be read to have multiple principles incorporated within them.

Indeed, it might not be too strong to say that the "first incorporation" of religious rights was engineered not by the Supreme Court in the 1940s but by the First Congress in 1789 when it drafted the First Amendment religion clauses. This "first incorporation"--if it can be so called--had two dimensions. First, the pregnant language that "Congress shall make no law respecting an establishment of religion" can be read as a confirmation and incorporation of prevailing state constitutional precepts and practices. Such state practices included "the slender establishments" of religion in New England, Maryland, and the Carolinas, which nonetheless included ample guarantees of liberty of conscience, free exercise, religious equality, religious

---

[120] Per Cantwell v. Connecticut, 310 U.S. 296 (1940) and Everson v. Board of Education, 330 U.S. 1 (1947).

pluralism, and separation of church and state. Such practices also included the "establishment of religious freedom" that prevailed in Virginia since 1786. The First Amendment drafters seem to have contemplated and confirmed a plurality of constitutional constructions "respecting" religion and its establishment.

Second, the embracive terms "free exercise" and "establishment" can be read to incorporate the full range of "essential rights and liberties" discussed in the eighteenth century. The founders often used the term "free exercise" synonymously with liberty of conscience, religious equality, religious pluralism, and separation of church and state. They similarly regarded "non-" or "disestablishment" as a generic guarantee of liberty of conscience, religious equality, and separation of church and state Read in historical context, therefore, the cryptic religion clauses of the First Amendment can be seen to "embody"--to "incorporate"--multiple expressions of the essential rights of religion.