

ARTICLE

THE ORIGINAL MEANING OF THE ESTABLISHMENT
CLAUSE AND THE IMPOSSIBILITY OF ITS
INCORPORATION*Vincent Phillip Muñoz**

INTRODUCTION

No aspect of constitutional law has been dominated more by “originalism” than First Amendment Establishment Clause jurisprudence.¹ Although not every decision and not every approach invokes the Founding Fathers,² their presence in modern church-state court opinions is unparalleled.³ Yet despite repeated appeals to James Madison and Thomas Jefferson, both the original intention and the contemporary meaning of the Establishment Clause remain sharply

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¹ For a recent history of “originalism” that notes the importance of the First Amendment in its development, see JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 86–90, 151–52 (2005) (discussing how the mid-twentieth century First Amendment cases resulted in a greater focus on originalism).

² For examples of Establishment Clause jurisprudence that do not rely on originalist intent, see Justice Kennedy’s “Coercion” test in *Lee v. Weisman*, 505 U.S. 577, 586–88 (1992), Justice O’Connor’s “Endorsement” test in her concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 688, 690 (1984), and Justice Burger’s “Lemon” test in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

³ According to Donald L. Drakeman, approximately 100 federal and state court decisions have highlighted James Madison’s role in crafting the religion clauses of the First Amendment. Donald L. Drakeman, *James Madison and the First Amendment Establishment of Religion Clause*, in RELIGION AND POLITICAL CULTURE IN JEFFERSON’S VIRGINIA 219, 219 (Garrett Ward Sheldon & Daniel L. Dreisbach eds., 2000). Even Justice William Brennan, no champion of “originalism,” claimed that in the context of prayer in public schools, “the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.” *Sch. Dist. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring). In the same case, however, Justice Brennan also stated that he “doubt[ed] that [Madison and Jefferson’s] view, even if perfectly clear one way or the other, would supply a dispositive answer to the question presented by these cases” and that “[a] too literal quest for the advice of the Founding Fathers . . . seems to me futile and misdirected.” *Id.* at 236–37.

contested.⁴ Among contemporary scholars and jurists, in fact, less agreement exists now about the Establishment Clause's original meaning than when the Supreme Court first attempted to decide the matter in *Everson v. Board of Education*.⁵ The more historical research devoted to the subject, it seems, the more contentious the debate becomes.

Not only has the debate continued, it has become increasingly complicated. In the 2004 *Elk Grove Unified School District v. Newdow* case, Justice Clarence Thomas advanced a federalist construction of the Establishment Clause,⁶ a position he reasserted in the 2005 Ten Commandments case *Van Orden v. Perry*.⁷ According to Justice Thomas, "the Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual right."⁸ In *Newdow*, Thomas implicitly rejected his earlier "non-preferentialist" interpretation,⁹ an approach that he had shared with Chief Justice William Rehnquist. In the 1985 case *Wallace v. Jaffree*, then-Associate Justice Rehnquist argued that the Framers intended to allow governmental support of religion as long as the state did not prefer one sect over others.¹⁰ Rehnquist's "non-preferentialist" construction itself was challenged on originalism grounds by Justice David Souter, who championed a

⁴ For a discussion of Jefferson's and Madison's roles in the Supreme Court's religion jurisprudence, see David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 MD. L. REV. 94 (2002).

⁵ 330 U.S. 1, 8–13 (1947) (summarizing the history of and purpose behind the First Amendment's enactment); see also *infra* Part I.A for a discussion of *Everson v. Board of Education*.

⁶ See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring) ("I would take this opportunity to begin the process of rethinking the Establishment Clause. I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation.").

⁷ See *Van Orden v. Perry*, 125 S. Ct. 2854, 2865 (2005) (Thomas, J., concurring) ("I have previously suggested that the Clause's text and history 'resis[t] incorporation' against the States. If the Establishment Clause does not restrain the States, then it has no application here, where only state action is at issue." (citation omitted)).

⁸ *Newdow*, 542 U.S. at 50 (Thomas, J., concurring). It should be noted that Justice Thomas had suggested this position in passing in *Zelman v. Simmons-Harris* stating: "The Establishment Clause originally protected States, and by extension their citizens, from the imposition of an established religion by the Federal Government." 536 U.S. 639, 678 (2002) (Thomas, J., concurring).

⁹ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 861–63 (1995) (Thomas, J., concurring) (arguing that the Establishment Clause does not "compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants" but rather permits the participation of religious entities in neutral, even-handed programs).

¹⁰ *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the 'incorporation' of the Establishment Clause as against the States via the Fourteenth Amendment . . . , States are prohibited as well from establishing a religion or discriminating between sects.").

“strict-separationist” interpretation in *Lee v. Weisman*, the 1992 public-school graduation prayer case.¹¹ Souter argued that the “Framers meant the Establishment Clause’s prohibition to encompass non-preferential aid to religion,”¹² an interpretation he further developed three years later in *Rosenberger v. Rector & Visitors of University of Virginia*.¹³

At least the three competing accounts of the original meaning of the Establishment Clause inform church-state jurisprudence. More than fifty years after the Supreme Court first turned to the Framers to interpret the Establishment Clause, the Court remains divided over what the Framers actually meant. One might have expected that a half-century of legal scholarship and constitutional development would have clarified the historical record, but the opposite seems to have occurred. This failure of scholarship and jurisprudence may help explain why the Court’s Establishment Clause jurisprudence remains, as Justice Thomas once described it, “in hopeless disarray.”¹⁴

What, then, are we to make of the original meaning of the Establishment Clause? Is that meaning, as some scholars claim, impossible to decipher?¹⁵ Is Justice Thomas’s attention to federalism historically

¹¹ *Lee v. Weisman*, 505 U.S. 577, 612–16 (1992) (Souter, J., concurring) (“[H]istory neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some.”).

¹² *Id.* at 613.

¹³ *Rosenberger*, 515 U.S. at 868–74 (Souter, J., dissenting).

¹⁴ *Id.* at 861 (Thomas, J., concurring).

¹⁵ See, e.g., Daan Braveman, *The Establishment Clause and the Course of Religious Neutrality*, 45 MD. L. REV. 352, 375 (1986) (arguing that the “historical evidence . . . does not provide many answers, and . . . a literal quest for the Framers’ intent may be both futile and misdirected”); William P. Marshall, *Unprecedented Analysis and Original Intent*, 27 WM. & MARY L. REV. 925, 930–31 (1986) (arguing that the historical record is ambiguous in regard to whether the Establishment Clause was intended to allow accommodation of religion or require strict separation between church and state); Mark Tushnet, *Religion and Theories of Constitutional Interpretation*, 33 LOY. L. REV. 221, 229 (1987) (“[D]ifficulties with originalist theories of the establishment clause simply exemplify the general problem of originalism, which is that social change makes it a theory of constitutional interpretation that regularly fails to provide guidance on matters of contemporary constitutional controversy because it disregards the complexities of both the historical record and the current situation.”); see also DANIEL O. CONKLE, *CONSTITUTIONAL LAW: THE RELIGION CLAUSES* 26 (2003) (claiming that “the original understanding is an overrated source of constitutional values in this area [(religious establishment)]”); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 417 (2002) (asserting that “an accurate account of the intellectual origins of the Establishment Clause does not, and cannot, provide a definitive answer to the question of what exactly the Establishment Clause prohibited then or prohibits now”); Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 129 (1990) (“At most, Rehnquist’s originalist arguments prove that history provides support for two alternative traditions concerning the role of religion in our political culture Although history helps to define the choices between these alternative traditions, it cannot make this choice for us.”); Frank Guliuza III, *The Practical Perils of an Original Intent-Based Judicial Philosophy: Originalism and the Church-State Test Case*, 42 DRAKE L. REV. 343, 372 (1993) (noting originalism’s failure to resolve historical contradictions when it comes to the adoption of the religion clauses).

accurate? Is Justice Rehnquist's "non-preferential" approach or Justice Souter's "strict-separationist" interpretation correct? This Article addresses these questions by reexamining the original meaning of the Establishment Clause. Part I reviews the leading "originalist" interpretations that have been set forth by members of the Supreme Court. Part II begins my attempt to recover the original meaning of the Establishment Clause through an investigation of the historical and political context in which the Establishment Clause emerged.¹⁶ Part III offers a detailed analysis of the drafting of the clause in light of the historical and political contexts described in Part II. I conclude that Justice Thomas's federalism interpretation most accurately captures the Establishment Clause's original meaning. In his *Newdow* opinion, however, Justice Thomas failed to consider the implications of his federalist construction. Part IV focuses on those implications, concluding that the Founders' original concern with federalism necessarily means that the original meaning that animated the adoption of the Establishment Clause cannot be applied to modern day incorporated "no-establishment" jurisprudence.

I. THE SUPREME COURT'S QUEST FOR THE ORIGINAL MEANING OF THE ESTABLISHMENT CLAUSE

A. *The Building of the "Strict-Separationist" Wall: Everson v. Board of Education*

Historical scholarship on the original meaning of the Establishment Clause remains influenced by *Everson*, the Supreme Court's first modern Establishment Clause case. In *Everson*, the Court upheld, 5–4, a local New Jersey school district policy that reimbursed transportation costs incurred by parents of children attending parochial schools.¹⁷ *Everson's* lasting impact lies not in its result, however, but in Justice Hugo Black's majority opinion and Justice Wiley Rutledge's dissent, both of which invoked the Founders to interpret the Establishment Clause as requiring the "strict separation" of church and state.

Justice Black's opinion presents the adoption of the Establishment Clause as the result of the revolutionary movement for religious free-

¹⁶ This Article attempts to uncover the "original meaning" of the Establishment Clause consistent with what Vasán Kesavan and Michael Stokes Paulsen call "original public meaning textualism." It should be noted, however, that the Establishment Clause's "original meaning" is consistent with the phrases "original intention" and its "original understanding." For a discussion of the different types of originalism, see Vasán Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003).

¹⁷ *Everson v. Bd. of Educ.*, 330 U.S. 1, 16–17 (1947).

dom that “reached its dramatic climax in Virginia in 1785–86,”¹⁸ when the Virginia Assembly, led by James Madison, adopted Thomas Jefferson’s “Virginia Bill for Religious Liberty.”¹⁹ Justice Black turned to 1785–86 Virginia, and not the First Federal Congress, because “[t]his Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.”²⁰

Given the central importance of the Virginia Statute to his interpretation, Justice Black, surprisingly, failed to offer any direct exegesis of the text of Jefferson’s bill. Instead, he treated Jefferson’s and Madison’s thoughts as self-explanatory, presenting only an extended quotation from Jefferson’s bill²¹ and a one-sentence summary of

¹⁸ *Id.* at 11.

¹⁹ *Id.* at 12.

²⁰ *Id.* at 13. Justice Black offered only the following citations to substantiate his assertion that the Court previously recognized that the First Amendment had the same objective and was intended to provide the same protection against governmental intrusion on religious liberty as the Virginia Statute: *Reynolds v. United States*, 98 U.S. 145, 164 (1878); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); *Davis v. Beason*, 133 U.S. 333, 342 (1890). *Id.* Checking Justice Black’s references does not support his assertion. In *Reynolds*, the landmark Mormon polygamy case, the Court suggested that “[t]he controversy upon this general subject [of religious establishment] . . . seemed at last to culminate in Virginia” and the passing of Jefferson’s Virginia Statute. *Reynolds*, 98 U.S. at 163. However, the opinion then suggested that Jefferson’s letter to the Danbury Baptist Association—not the Virginia Statute—“may be accepted almost as an authoritative declaration of the scope and effect of the [First] [A]mendment.” *Id.* at 164. *Watson v. Jones* lacks a single reference to the Virginia Statute; it is unclear why Justice Black cites it. Checking Justice Black’s citation to *Davis v. Beason*, similarly, fails to reveal a reference to the Virginia Statute or its relationship to the First Amendment. Justice Field’s majority opinion in the case quoted Justice Waite’s opinion in *Reynolds* at length, but it fails to refer to Jefferson’s Virginia Statute. *Davis*, 133 U.S. at 343–44 (quoting *Reynolds*, 98 U.S. at 165–66). However, in the free exercise case *Jones v. Opelika*, Justice Murphy, in dissent, wrote that “[a]n arresting parallel exists between the troubles of Jehovah’s Witnesses and the struggles of various dissentient groups in the American colonies for religious liberty which culminated in the Virginia Statute for Religious Freedom, the Northwest Ordinance of 1787, and the First Amendment.” 316 U.S. 584, 622 (1942) (Murphy, J., dissenting). Why Justice Black failed to cite *Jones v. Opelika* is unclear. A previous Court opinion thus had mentioned the Virginia Statute, but did not claim that the First Amendment had “the same objective” as the Virginia Statute. The references to the Virginia Statute, moreover, occurred in the context of interpreting the Free Exercise Clause, not the Establishment Clause. Justice Black thus failed to substantiate his assertion that the Court had previously recognized that the original meaning of the Establishment Clause had the same objective as Jefferson’s Virginia Statute.

²¹ Justice Black cites the following from Jefferson’s Virginia Statute:

Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . . ; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him

Madison's "Memorial and Remonstrance."²² From these citations, Black derived his sweeping interpretation of the Establishment Clause:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."²³

Despite this expansive separationist reading, Justice Black concluded that the First Amendment was not violated by the school district's policy of refunding the transportation costs of children attending Catholic schools.²⁴

In his dissent, Justice Rutledge agreed that the Founding Fathers intended the Establishment Clause to enact a "wall of separation" between church and state, and, for that reason, he concluded the school district's policy violated the Constitution.²⁵ Rutledge's opinion

of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern

That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief

Everson, 330 U.S. at 12–13 (citation omitted).

²² Justice Black noted:

In ["Memorial and Remonstrance"], [Madison] eloquently argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions.

Id. at 12.

²³ *Id.* at 15–16.

²⁴ *Id.* at 17 ("Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools.")

²⁵ *Id.* at 56–57 (Rutledge, J., dissenting); *see also id.* at 19 (Jackson, J., dissenting) ("[T]he undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters.")

begins with the seemingly awkwardly phrased text, “respecting an establishment.”²⁶ The Framers, Justice Rutledge explained, meant that “[n]ot simply an established church, but any law respecting an establishment of religion is forbidden.”²⁷ As interpreted by Justice Rutledge, “respecting an” means “tending toward”—that is, the Founders not only intended to prohibit a traditional establishment like the Church of England, they also sought to prohibit anything tending toward such an arrangement. Interpreted this way, “respecting an” expands the prohibition against religious establishments. Justice Rutledge thus concluded that the Framers meant “to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.”²⁸

To support this reading, Justice Rutledge turned to the “generating history” of the religion clauses, which he claims includes the proceedings of the First Congress and “also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the [First] Amendment was the direct culmination.”²⁹ Whereas Justice Black emphasized Jefferson’s Virginia Statute and his “wall of separation” letter to the Danbury Baptists, Justice Rutledge focused upon James Madison and his “Memorial and Remonstrance.” The “Memorial,” he explained, is “the most concise and the most accurate statement of the views of the First Amendment’s author concerning what is ‘an establishment of religion.’”³⁰ Madison’s views take precedence above all others, moreover, because “[h]e epitomized the whole of that tradition in the [First] Amendment’s compact, but nonetheless comprehensive, phrasing.”³¹

As interpreted by Justice Rutledge, Madison advanced a categorical separation between church and state: “With Jefferson, Madison believed that to tolerate any fragment of establishment would be by so much to perpetuate restraint upon that [religious] freedom. Hence he sought to tear out the institution not partially but root and branch, and to bar its return forever.”³² The “Memorial” contains “a broadside attack upon all forms of ‘establishment’ of religion, both general and particular, nondiscriminatory or selective.”³³ Madison was “unrelentingly absolute . . . in opposing state support or aid [to

²⁶ *Id.* at 28 (Rutledge, J., dissenting).

²⁷ *Id.* at 31.

²⁸ *Id.* at 31–32. This interpretation of “respecting” was subsequently instrumental to Chief Justice Burger’s majority opinion in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

²⁹ *Everson*, 330 U.S. at 33–34 (Rutledge, J., dissenting).

³⁰ *Id.* at 37.

³¹ *Id.* at 39.

³² *Id.* at 40.

³³ *Id.* at 37.

religion] by taxation. Not even ‘three pence’ contribution was thus to be exacted from any citizen for such a purpose.”³⁴ In short, “Madison opposed every form and degree of official relation between religion and civil authority.”³⁵

Justice Rutledge did pause to consider the debates in the First Congress surrounding the drafting of the First Amendment. But these debates, he found, “reveal only sparse discussion.”³⁶ The First Congress had little to debate because “the essential issues had been settled. Indeed, the matter had become so well understood as to have been taken for granted in all but formal phrasing.”³⁷ The First Congress was little more than a mark-up session, Justice Rutledge suggested, because the Founders had adopted Madison’s absolute separation principle as articulated in the “Memorial and Remonstrance.”

B. The “Non-Preferentialist”—“Strict-Separationist” Debate: Wallace v. Jaffree, Lee v. Weisman, and Rosenberger v. Rector & Visitors of University of Virginia

After *Everson*, various Justices sprinkled references to the Founding Fathers in their Establishment Clause opinions.³⁸ No single opinion, however, contained anything like *Everson*’s historical analysis until then-Associate Justice William Rehnquist’s fiery dissent in *Wallace v. Jaffree*.³⁹ Armed with then-recent scholarship, Justice Rehnquist launched a full-scale assault on *Everson*’s historical accuracy and the “wall of separation” interpretation built upon it. His strategy was not to reveal *Everson*’s inaccuracies point-by-point, but rather to show that

³⁴ *Id.* at 40.

³⁵ *Id.* at 39.

³⁶ *Id.* at 42.

³⁷ *Id.*

³⁸ See, e.g., *Sch. Dist. v. Schempp*, 374 U.S. 203, 233–35 (1963) (Brennan, J., concurring) (discussing the Framers’ purpose in enacting the Establishment Clause and noting that the Clause was intended “to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not . . . make of religion, as religion, an object of legislation”); *Engel v. Vitale*, 370 U.S. 421, 446–47 n.3 (1962) (Stewart, J., dissenting) (discussing the historical tradition, beginning with the Founders, among all three branches of government to use prayer in opening sessions and in assumption of office); *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring) (“Jefferson’s metaphor in describing the relation between Church and State speaks of a ‘wall of separation,’ not of a fine line easily overstepped.”); *Id.* at 244–48 (Reed, J., dissenting) (determining that the Illinois school district did not violate the Establishment Clause when it permitted religious instructions to be given in public school buildings through relying on Jefferson’s annual report to the University of Virginia authorizing religious education at public universities and rejecting the applicability of Madison’s “Memorial and Remonstrance”).

³⁹ 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

Justices Black and Rutledge looked in the wrong place to find the Establishment Clause's original meaning.

Justice Rehnquist's dissenting opinion began by dismissing the relevance of Jefferson and questioning the applicability of statements made by Madison as a Virginia state legislator.⁴⁰ Justice Black asserted that Jefferson played a "leading" role in the drafting and adoption of the First Amendment;⁴¹ but Jefferson, Rehnquist pointed out, was in France at the time and was not involved in the drafting or adoption of the First Amendment.⁴² Jefferson's letter to the Danbury Baptists—from which the phrase "the wall of separation" comes—was written fourteen years after Congress passed the Bill of Rights.⁴³ Madison, Justice Rehnquist admitted, composed the first draft of what would become the Bill of Rights and shepherded the proposed amendments through the First Congress.⁴⁴ However, the Madison who secured the passage of the First Amendment, according to Justice Rehnquist, was not the same Madison who led the battle for religious freedom in Virginia.⁴⁵ In the First Congress, Madison spoke "as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution."⁴⁶ Madison's original proposed text—"nor shall any national religion be established"—and his subsequent modifications and comments in the House debates—that the proposed language "no religion shall be established by law" should be amended by inserting the word "national" in front of the word "religion"—reveal, according to Justice Rehnquist, "that [Madison] saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects."⁴⁷ Madison may have defended and defined the "wall of separation" in Virginia (Justice Rehnquist did not comment on the matter), but those statements are irrelevant to interpreting the meaning of the First Amendment.

⁴⁰ *Id.* at 92–94 ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years. . . . [W]hen we turn to the record of the First Congress . . . , including Madison's significant contributions thereto, we see a far different picture than the highly simplified 'wall of separation' . . .").

⁴¹ *Everson*, 330 U.S. at 13.

⁴² *Jaffree*, 472 U.S. at 92 (Rehnquist, J., dissenting).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See id.* at 93–94 ("Madison's subsequent remarks in urging the House to adopt his drafts of the proposed amendments were less those of a dedicated advocate to the wisdom of such measures than those of a prudent statesman seeking the enactment of measures sought by a number of his fellow citizens which could surely do no harm and might do a great deal of good.").

⁴⁶ *Id.* at 98.

⁴⁷ *Id.*

Justice Rehnquist failed to make the point explicitly, but his opinion contains a methodological assumption fundamental to his argument. To grasp the meaning of the First Amendment, he assumed that one must look to the intentions of those who drafted it within the context of its actual adoption. Only the debate over the text of the amendment in the First Congress is relevant, then, not the establishment of religious freedom in Virginia. In this way, Justice Rehnquist made Madison's statements as a Virginia state legislator—including the "Memorial and Remonstrance"—inapposite to determine the Establishment Clause's original meaning. He concluded, accordingly, that *Everson* was based "upon a mistaken understanding of constitutional history."⁴⁸ The Court made a jurisprudential error when it derived the meaning of the First Amendment from the Virginia debates on religious freedom. "[N]othing in the Establishment Clause," Justice Rehnquist asserted, "requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means."⁴⁹

To reinforce the point, Justice Rehnquist presented various examples of the ways that the Founding Fathers' public policy explicitly favored religion. The First Federal Congress—the same body that drafted the First Amendment—passed the Northwest Ordinance, which stated that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."⁵⁰ Presidents Washington, Adams, and Madison issued official proclamations declaring official days of prayer and thanksgiving.⁵¹ President Jefferson, who thought such proclamations were unconstitutional, signed a treaty with the Kaskaskia Indians that provided annual cash support for the Tribe's Roman Catholic priest and church.⁵² Justice Rehnquist resoundingly declared that "[t]here is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in *Everson*."⁵³

Justice Rehnquist's *Jaffree* dissent, which itself largely followed historian Robert Cord's work,⁵⁴ launched a wave of historical scholarship on the Founders and religious liberty. Some of the work most critical

⁴⁸ *Id.* at 92.

⁴⁹ *Id.* at 113.

⁵⁰ *Id.* at 100 (quoting the Northwest Ordinance of 1787, art. III, 1 Stat. 50, 52 (1789)).

⁵¹ *Id.* at 103.

⁵² *Id.*

⁵³ *Id.* at 106.

⁵⁴ Justice Rehnquist cites Robert L. Cord only once in his opinion (*id.* at 104) but his entire opinion seems to closely follow Cord's argument in *SEPARATION OF CHURCH AND STATE: HISTORICAL REALITY AND CURRENT FICTION* (1982).

of Rehnquist would be utilized by then-newly appointed Justice David Souter in the public-school graduation prayer case, *Lee v. Weisman*.⁵⁵ *Weisman* involved the constitutionality of a non-denominational prayer composed and recited by a rabbi at a public middle school graduation.⁵⁶ Concurring with the Court's decision to strike down the prayer, Justice Souter approached the Establishment Clause much in the same manner as Justice Rehnquist, focusing on the intentions of its drafters.⁵⁷ But whereas Rehnquist focused on Madison's initial proposal and subsequent revision and comments, Souter examined both the text the First Congress proposed and also the text it rejected.⁵⁸ In examining what the First Congress considered but rejected, Justice Souter claimed to find the key that unlocks the Framers' true intentions.

According to Souter's historical excavation, the Framers considered but rejected a prohibition only against preferential aid to religion. Madison's original proposal read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."⁵⁹ The text went through various amendments and revisions in the House until the following was sent over to the Senate: "Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."⁶⁰ The Senate first considered the language: "Congress shall make no law establishing One Religious Sect or Society in preference to others, nor shall the rights of conscience be infringed."⁶¹ It rejected this language and chose a provision identical to the House's proposal, but without the "rights of conscience" clause.⁶² Six days later, however, the Senate

⁵⁵ 505 U.S. 577 (1992). Academic literature cited by Justice Souter included LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1986) and Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986).

⁵⁶ *Weisman*, 505 U.S. at 580 ("The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religious Clauses of the First Amendment . . .").

⁵⁷ *See id.* at 612–16 (Souter, J., concurring) (reviewing the Establishment Clause's enactment and finding that "the history of the Clause's textual development [provides] a more powerful argument [than Rehnquist's *Jaffree* dissent] supporting the Court's jurisprudence following *Everson*").

⁵⁸ *See id.* at 612 (describing the various religion clause versions considered, amended, and rejected by both the House and the Senate).

⁵⁹ *Id.* at 612 (quoting 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1790)).

⁶⁰ *Id.* at 613 (quoting 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: MARCH 4, 1789–MARCH 3, 1791, at 136 (Linda Grant de Pauw ed., 1972) [hereinafter DOCUMENTARY HISTORY]).

⁶¹ *Id.* (quoting DOCUMENTARY HISTORY, *supra* note 60, at 151).

⁶² *Id.* at 614.

adopted the narrow language, "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."⁶³ The Senate sent this text to the House.

Justice Souter reached his final conclusion from what happened next. A joint conference committee was established to reconcile the differences between the House and Senate versions of the future Establishment Clause. To repeat, the House had adopted the more general language, "Congress shall make no law establishing Religion," while the Senate had adopted the more narrowly restrictive text, "Congress shall make no law establishing articles of faith or a mode or worship."⁶⁴ "The House conferees," Souter claimed, "ultimately won out, persuading the Senate to accept this as the final text of the Religion Clauses: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'"⁶⁵ The narrow prohibitions against only the establishment of "one religious sect" or specific "articles of faith" were dropped. According to Souter, "[t]he Framers repeatedly considered and deliberately rejected such narrow language and instead extended their prohibition to the state support for 'religion' in general. Implicit in their choice is the distinction between preferential and nonpreferential establishments, which the weight of evidence suggests the Framers appreciated."⁶⁶

Regarding Justice Rehnquist's citations to the Founders' actions in support of religion, Souter offered two responses. He countered Washington's, Adams', and Madison's presidential proclamations of official days of prayer and thanksgiving with Jefferson's refusal to issue them because of doubts regarding their constitutionality.⁶⁷ After Madison left the presidency, moreover, he claimed that official days of prayer and thanksgiving violated the Constitution.⁶⁸ More fundamentally, the practices supporting religion, Souter claimed, "prove, at best, that the Framers simply did not share a common understanding of the Establishment Clause, and, at worst, that they, like other politi-

⁶³ *Id.* (quoting DOCUMENTARY HISTORY, *supra* note 60, at 166).

⁶⁴ *Id.* at 613–14.

⁶⁵ *Id.* at 614.

⁶⁶ *Id.* at 614–15.

⁶⁷ *See id.* at 623 ("President Jefferson . . . steadfastly refused to issue Thanksgiving proclamations of any kind, in part because he thought they violated the Religion Clauses.").

⁶⁸ *See id.* at 624–25 ("Upon retirement, . . . he concluded that '[r]eligious proclamations by the Executive recommending thanksgivings & fasts are shoots from the same root with the legislative acts reviewed . . . , they imply a religious agency, making no part of the trust delegated to political rules.'" (citation omitted)). For Madison's later reflections on the constitutionality of presidential proclamations declaring official days of prayer and thanksgiving, see Elizabeth Fleet, *Madison's "Detached Memoranda,"* 3 WM. & MARY Q. 534, 560 (1946).

cians, could raise constitutional ideals one day and turn their back on them the next.”⁶⁹

Three years after *Weisman*, Justice Souter in *Rosenberger* resumed his reconstruction of an “originalist,” “strict-separationist” interpretation of the Establishment Clause.⁷⁰ In *Rosenberger*, a group of University of Virginia students challenged a school policy that excluded religious groups from receiving student body funds.⁷¹ According to Justice Souter, the case raised the legal question of whether state money could be used to fund core, sectarian religious activity.⁷² To explain why such funding unquestionably violated the First Amendment, he returned to the Founding Fathers, this time focusing on the struggle in Virginia over religious liberty.⁷³

In the “Memorial and Remonstrance,” Souter claimed, Madison squarely addressed the question of using public funds for religious purposes.⁷⁴ In Article 3, Madison asks rhetorically, “Who does not see that . . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?”⁷⁵ Since Madison was writing against a background in which most colonies had exacted a tax for church support, Justice Souter reasoned that Madison meant to indicate that “individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.”⁷⁶ The same point, Justice Souter continued, was also made by Jefferson in his “Virginia Bill for Establishing Religious Freedom.” The bill, which was passed after Madison orchestrated the defeat of Patrick Henry’s general assessment bill, declared that “to compel a

⁶⁹ *Weisman*, 505 U.S. at 626.

⁷⁰ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 868 (1995) (Souter, J., dissenting).

⁷¹ *See id.* at 827 (majority opinion) (“[The student publication] filed suit . . . [and] alleged that refusal to authorize payment of the printing costs of the publication, solely on the basis of its religious editorial viewpoint, violated their rights to freedom of speech and press, to the free exercise of religion, and to equal protection of the law.”).

⁷² *See id.* at 863–64, 868 (Souter, J., dissenting) (“The Court today, for the first time, approves direct funding of core religious activities by an arm of the State.”).

⁷³ *See id.* at 868–72 (discussing the role of Madison in ensuring the defeat of the Virginia tax assessment bill and the passage of Jefferson’s *Virginia Bill for Establishing Religious Freedom*).

⁷⁴ *See id.* at 868 (“Madison gave his opinion on the legitimacy of using public funds for religious purposes, in the Memorial and Remonstrance . . .”).

⁷⁵ *Id.* (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 3 (1785), reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, app., at 65–66 (1947) [hereinafter *Madison, Memorial and Remonstrance*, reprinted in *Everson*]).

⁷⁶ *Id.* at 869 (quoting *Everson*, 330 U.S. at 11).

man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.”⁷⁷

In his *Jaffree* dissent, Justice Rehnquist questioned the relevance of Jefferson (at all) and Madison (in the context of the Virginia debate) for discerning the Establishment Clause’s original meaning.⁷⁸ Justice Souter never addressed these points thematically; instead, he simply cited and reasserts *Everson*’s contention that

We [the Supreme Court] have “previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.”⁷⁹

Souter also cited three leading church-state scholars—Douglas Laycock, Thomas Curry, and Jesse Choper—who, subsequent to *Everson*, supported its conclusions.⁸⁰

Justice Souter’s return to Virginia in *Rosenberger* was matched by Justice Clarence Thomas who, for the first time, entered the “originalist” church-state fray. Concurring with the majority and responding to Justice Souter, Justice Thomas claimed that a proper understanding of Madison does not, in fact, lead to the “wall of separation” but rather to the principles of neutrality and non-discrimination.⁸¹

Justice Thomas’s opinion began by establishing the context of Madison’s “Memorial and Remonstrance.”⁸² Madison wrote the “Memorial” in response to Patrick Henry’s proposed religious assessment tax bill.⁸³ Henry’s proposal, however, was not a generally-

⁷⁷ *Id.* at 871 (quoting Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1779), reprinted in 5 THE FOUNDERS’ CONSTITUTION 77 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter THE FOUNDERS’ CONSTITUTION]).

⁷⁸ See *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) (noting that Jefferson was not an “ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment”).

⁷⁹ *Rosenberger*, 515 U.S. at 871 (Souter, J., dissenting) (quoting *Everson*, 330 U.S. at 13).

⁸⁰ *Id.* at 871–72 (citing JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* 16 (1995)); THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 217 (1986); Laycock, *supra* note 55, at 923.

⁸¹ See *Rosenberger*, 515 U.S. at 854, 858, 863 (Thomas, J., concurring) (“Madison’s comments are more consistent with the neutrality principle that the dissent inexplicably discards. . . . Stripped of its flawed historical premise, the dissent’s argument is reduced to the claim that our Establishment Clause jurisprudence permits neutrality . . .”).

⁸² *Id.* at 854.

⁸³ See James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), reprinted in THE FOUNDERS’ CONSTITUTION, *supra* note 77, at 82 [hereinafter Madison, *Memorial and Remonstrance*] (“We the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill . . . entitled ‘A Bill establishing a provision for Teachers of the Christian Religion,’ and conceiving that the same if finally armed with the sanctions of a law, will be a

available subsidy program, as Justice Souter's dissent suggested;⁸⁴ it explicitly favored Christians over non-Christians. "Madison's objection to the assessment bill," Justice Thomas thus explained, "did not rest on the premise that religious entities may never participate on equal terms in neutral government programs."⁸⁵ Madison opposed the sectarian favoritism in the bill, which is why Article 4 of the "Memorial" claims that the bill "violate[d] that equality which ought to be the basis of every law."⁸⁶ According to Justice Thomas, "[e]ven assuming that the Virginia debate on the so-called 'Assessment Controversy' was indicative of the principles embodied in the Establishment Clause, this incident hardly compels the dissent's conclusion that government must actively discriminate against religion."⁸⁷ As interpreted by Justice Thomas, Madison's principle of religious liberty prohibits only preferential government policies that single out religious entities for special benefits.⁸⁸ And even if Madison did make comments more in line with Souter's analysis, Justice Thomas repeated Justice Rehnquist's position that "there is no indication that at the time of the framing [of the Establishment Clause] he took the dissent's extreme view that the government must discriminate against religious adherents by excluding them from more generally available financial subsidies."⁸⁹

The Souter-Thomas dispute over the meaning of Madison's "Memorial and Remonstrance" seems to have come to a draw.⁹⁰ Neither Justice, obviously, persuaded the other, and neither Justice persuaded enough members of the Court to write a majority opinion firmly built upon his understanding of Madison. Perhaps in part because of this deadlock, the Court drifted away from invoking the Founding Fathers for its Establishment Clause jurisprudence from 1995–2003. Most no-

dangerous abuse of power, are bound as faithful members of a free State to remonstrate against it . . .").

⁸⁴ See Patrick Henry, *A Bill Establishing A Provision for Teachers of the Christian Religion* (Dec. 24, 1784), in *JOURNAL OF THE VIRGINIA HOUSE OF DELEGATES* (proposing a tax to be assessed for the support of Christian religious educators).

⁸⁵ *Rosenberger*, 515 U.S. at 854 (Thomas, J., concurring).

⁸⁶ *Id.* (citing Madison, *Memorial and Remonstrance*, reprinted in *Everson*, *supra* note 75, at ¶ 4) (alteration in original).

⁸⁷ *Rosenberger*, 515 U.S. at 853 (Thomas, J., concurring).

⁸⁸ See *id.* at 854–55 ("The assessment violated the 'equality' principle not because it allowed religious groups to participate in a generally available government program, but because the bill singled out religious entities for special benefits.").

⁸⁹ *Id.* at 856–57.

⁹⁰ For an interpretation of Madison that disagrees with both Justice Souter and Justice Thomas, see Vincent Phillip Muñoz, *James Madison's Principle of Religious Liberty*, 97 AM. POL. SCI. REV. 17, 31 (2003) [hereinafter Muñoz, *Madison's Principle of Religious Liberty*] ("A Madisonian interpretation of the Establishment Clause would prevent the state from supporting religion as an end in itself, but it also would prevent the state from excluding religious individuals and organizations from generally available benefits supporting a secular purpose.").

tably, the Court all but neglected the Founders in *Zelman v. Simmons-Harris*, its contentious 2002 school voucher case.⁹¹

C. *The Federalist Alternative*: Elk Grove Unified School District v. Newdow

The Founders returned in a surprising manner in 2004 in *Elk Grove Unified School District v. Newdow*, the Pledge of Allegiance case.⁹² The case raised but failed to resolve the question of the constitutionality of the words “under God” in public school teacher-led recitations of the Pledge.⁹³ More significantly from an Establishment Clause jurisprudential standpoint was Justice Thomas’s abandonment of Justice Rehnquist’s “non-preferentialism” and embrace of a federalist interpretation of the Establishment Clause.

According to Justice Thomas’s *Newdow* opinion, “[t]he text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments.”⁹⁴ The Framers, he suggested, “made clear that Congress could not interfere with state establishments, notwithstanding any argument that could be made based on Congress’ power under the Necessary and Proper Clause.”⁹⁵ Unlike the Free Exercise Clause, “[t]he Establishment Clause does not purport to protect individual rights,”⁹⁶ and thus “it makes little sense to incorporate [it].”⁹⁷

Given that Justice Thomas altered his interpretation, he surprisingly presented little evidence for his new approach. To demonstrate that the Establishment Clause does not protect an individual right, he offered less than one full paragraph of textual analysis. His primary argument was to contrast the wording of Establishment Clause with the other provisions of the First Amendment. “The Free Exercise Clause,” Justice Thomas stated, “plainly protects individuals against congressional interference with the right to exercise their religion, and the remaining Clauses within the First Amendment expressly disable Congress from ‘abridging [particular] freedom[s].’”⁹⁸ But “respecting an,” Justice Thomas continued, connotes a different understanding than “abridging.”⁹⁹ Why or how we are to understand this

⁹¹ 536 U.S. 639 (2002).

⁹² 542 U.S. 1 (2004).

⁹³ The Court, instead of reaching the First Amendment issue, concluded that respondent Michael Newdow lacked standing to invoke the jurisdiction of the federal courts. *Id.* at 6.

⁹⁴ *Id.* at 49 (Thomas, J., concurring).

⁹⁵ *Id.* at 50.

⁹⁶ *Id.*

⁹⁷ *Id.* at 49.

⁹⁸ *Id.* at 50 (alterations in original).

⁹⁹ *Id.* at 49–50.

difference Thomas did not explain. He failed to address directly the construction of “respecting an” offered by Justice Rutledge in *Everson* and he neglected to analyze the words themselves. Instead, Justice Thomas merely asserted that his textual analysis “is consistent with the prevailing view that the Constitution left religion to the States.”¹⁰⁰ For “the prevailing view,” he referred to Justice Joseph Story’s *Commentaries on the Constitution of the United States* and Akhil Amar’s *The Bill of Rights*.¹⁰¹ Story and Amar may correctly capture “the prevailing view” of the Founders, but citations to them alone seem inadequate to demonstrate correctness of the assertion.

Justice Thomas also asserted that “[h]istory . . . supports this [federalist] understanding.”¹⁰² “At the [time of the] founding,” he pointed out, “at least six States had established religions.”¹⁰³ While factually correct, those states eventually disestablished their establishments.¹⁰⁴ Might they have ended their establishments to comply after the fact with the constitutional principle set forth in the Establishment Clause—an ideal that only applied to the national government until the adoption of the Fourteenth Amendment but which was adopted by states individually prior to the Civil War? Other states at the time of the founding, moreover, ended their establishments on account of their perceived abridgment of the principle of religious freedom.¹⁰⁵ The mere fact that state establishments existed at the

¹⁰⁰ *Id.* at 50.

¹⁰¹ *Id.* Justice Thomas’s full citation is as follows: “See, e.g., 2 J. Story, *Commentaries on the Constitution of the United States* § 1873 (5th ed. 1891); see also Amar, *The Bill of Rights*, at 32–42; *id.*, at 246–257.” *Id.*

¹⁰² *Id.* at 50.

¹⁰³ *Id.*

¹⁰⁴ The year of disestablishment in the various states depends on how one defines a religious establishment. Carl H. Esbeck, who defines a religious establishment as the legal authority to assess taxes for church support, identifies the following dates for disestablishment in the original states: Pennsylvania (no history of an establishment), Rhode Island (no history of an establishment), Delaware (1776), New Jersey (1776), North Carolina (1776), New York (1777), Virginia (1776–1779), Maryland (1785), South Carolina (1790), Georgia (1798), Connecticut (1818), New Hampshire (1819), and Massachusetts (1832–1833). Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1457–58. For a general discussion of what constitutes an establishment, see Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003).

¹⁰⁵ For example, Virginia’s Act for Establishing Religious Freedom, which was adopted in 1785 and effective as of January 16, 1786, declared of the “natural rights of mankind”:

[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

Act for Establishing Religious Freedom (Va. 1785), *reprinted in* THE FOUNDERS’ CONSTITUTION, *supra* note 77, at 84, 85.

time of the drafting of the Establishment Clause is insufficient in itself to demonstrate that the Framers were exclusively concerned with federalism when they adopted the Establishment Clause. These reservations do not imply that Justice Thomas's federalist thesis is incorrect, but given that he challenged the basic assumptions that guided more than fifty years of jurisprudence, we might expect him to offer more than a handful of paragraphs to demonstrate the persuasiveness of his position.

The remainder of this Article, in fact, argues that the Federalist interpretation most accurately captures the original meaning of the Establishment Clause. Justice Thomas could have drawn on a long (albeit sporadic) history of constitutional scholarship arguing that the original meaning of the Establishment Clause pertains to federalism.¹⁰⁶ That he failed to do so suggests the need for a reinvigoration

¹⁰⁶ See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 34 (1998) (stating that the Establishment Clause was not intended to prevent individual states from establishing a religion but rather was "pro-states' rights" and "simply calls for the issue to be decided locally"); DANIEL L. DREIBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 69 (2002) ("Jefferson's 'wall,' like the First Amendment, affirmed the policy of federalism. This policy emphasized that all governmental authority over religious matters was allocated to the states. . . . Insofar as Jefferson's 'wall,' . . . was primarily jurisdictional (or structural) in nature, it offered little in the way of a substantive right or universal principle of religious liberty."); WILBER G. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* 8–10 (1964) (arguing that the First Amendment "embodied a principle of federalism" as it "operated, and was intended to operate, to protect from Congressional interference the varying state policies of church establishment"); STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 18 (1995) ("The religion clauses, as understood by those who drafted, proposed, and ratified them, were an exercise in federalism."); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1157–58 (1991) (arguing that since the Establishment Clause, in addition to its congressional prohibition on establishing churches, prohibited Congress from disestablishing official state and local churches, incorporating the clause against the states via the Fourteenth Amendment becomes "quite awkward"); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 *NW. U. L. REV.* 1113, 1132–35 (1988) (concluding that the Establishment Clause served as a compromise between those states with anti-establishment policies and those with official churches by "mak[ing] it plain that Congress was not to legislate on the subject of religion, thereby leaving the matter of church-state relations to the individual states"); Edward S. Corwin, *The Supreme Court as National School Board*, 14 *LAW & CONTEMP. PROBS.* 3, 10 (1949) ("[W]hat the 'establishment of religion' clause does, and all that it does, is to forbid Congress to give any religious faith, sect, or denomination a preferred status"); Esbeck, *supra* note 104, at 1576 ("[The Establishment Clause] acted as a restraint on the national government from interfering with the states and how each state's law dealt with the matter of religion."); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 *MICH. L. REV.* 477, 481–82, 541 (1991) ("For the historical record is clear that when the religious language was first adopted it was designed to restrain the federal government from interfering with the variety of state-church arrangements then in place."); Clifton B. Kruse, Jr., *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 *WASHBURN L.J.* 65, 66 (1962) ("[The Establishment Clause's] inclusion was intended as an implied grant of power over religion to the states as it affirmatively denied the federal government power to make any law respecting a state establishment."); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 *VILL. L. REV.* 3, 13–14 (1978) ("The primary purpose of the amendment was to keep the na-

of this position. Recent scholarship, moreover, has rejected the Federalist thesis on historical grounds.¹⁰⁷ Prior scholars, furthermore, have not sufficiently placed the drafting of the Establishment Clause in its historical and political context.¹⁰⁸ Specifically, the failure to ap-

tional government out of religious matters. . . . The states were to be unaffected by the amendment. . . . [T]here is no part of the history of the fourteenth amendment that provides any guidance whatsoever for the application of the religious clauses to the states.”); Kurt T. Lash, *Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069, 1116 (1998) (“Congress had no power whatsoever over the subject of religion . . . , power over the same being reserved to the states.”); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1085, 1089–92 (1995) [hereinafter Lash, *Rise of the Nonestablishment Principle*] (agreeing with other scholars that the Establishment Clause was about federalism, in that the amendment intended only to prevent the federal government from interfering with churches established by individual states); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1111–12 (1994) [hereinafter Lash, *Religious Exemptions Under the Fourteenth Amendment*] (“[T]he First Amendment begins a theme that runs as a leitmotif throughout the original Bill of Rights, that of federalism.”); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1191 (1990) (stating that the Establishment Clause created a “framework of federalism” that allowed states to make their own decisions regarding religion); James McClellan, *Hand’s Writing on the Wall of Separation: The Significance of Jaffree in Future Cases on Religious Establishment*, in HOW DOES THE CONSTITUTION PROTECT RELIGIOUS FREEDOM? 43, 48 (Robert A. Goldwin & Art Kaufman eds., 1987) (“The [First Amendment] was framed, considered, and adopted with federalism in mind, and it applied only to the federal government. Not even Madison wished to apply the establishment clause to the states. . . .”); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 317 (1986) (arguing that the Establishment Clause was intended “to forbid establishment of a national religion and to prevent federal interference with a state’s choice of whether or not to have an official state religion”); William C. Porth & Robert P. George, *Trimming the Ivy: A Bicentennial Re-Examination of the Establishment Clause*, 90 W. VA. L. REV. 109, 136–39 (1987) (noting that the Establishment Clause was intended to prevent the federal government from disestablishing or interfering with official state churches); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 372–73, 406–07 (“[T]he Establishment Clause . . . should not, and historically and logically cannot, be incorporated into the liberty protected by the Fourteenth Amendment.”); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1701 (1992) (arguing that before *Everson v. Board of Education* in 1947, “the Establishment Clause did not restrain the states from promoting religion or even establishing one”).

In an early religious liberty case, the Supreme Court itself recognized that “[t]he Constitution makes no provision for protecting the citizens of the respective states in their religious liberties.” *Permoli v. Mun. No. 1 of New Orleans*, 44 U.S. (3 How.) 589, 609 (1845).

¹⁰⁷ See, e.g., Feldman, *supra* note 15, at 407–08 (noting the lack of historical support in the debates for the Federalist interpretation).

¹⁰⁸ For an example of legal scholarship that reflects a lack of contextual analysis, see William C. Porth & Robert P. George, *Trimming the Ivy: A Bicentennial Re-Examination of the Establishment Clause*, stating that:

The obvious meaning of “respecting an” establishment of religion, then as now, is “regarding,” or “having to do with,” or “in reference to” such an establishment. And these words are broad enough to cover both a possible national establishment and actual (and potential) state establishments. They call particular attention to the constitutional disenfranchisement of the federal government to make any law setting up an established church at the federal level or interfering with established churches (and the right of the people to opt to establish churches) at the state level.

Porth & George, *supra* note 106, at 136–37.

preciate the Founders' diversity of approaches to church-state arrangements has led to a failure to articulate with precision the Anti-Federalists' criticisms that led to the adoption of the Bill of Rights. This failure, in turn, has led to misinterpretations of the original meaning of the Establishment Clause and, correspondingly, the application of erroneous historical narratives to modern church-state cases.¹⁰⁹

II. THE HISTORICAL CONTEXT OF THE DRAFTING OF THE FIRST AMENDMENT

To understand the original meaning of the Establishment Clause, we have to understand the historical context in which the First Amendment emerged and the particular circumstances that led to the adoption of the Bill of Rights. The fundamental fact that almost all scholars and jurists overlook is that the Founders did not share a uniform understanding of the proper relationship between church and state. After the American Revolution, various states adopted different church-state arrangements.¹¹⁰ When the Constitution was proposed to form a new national government, fears emerged that the new Congress would impose one form of church-state relations throughout the nation.¹¹¹ Anti-Federalists both articulated and exacerbated this fear in their arguments against the Constitution's ratification.¹¹² The Establishment Clause was crafted by Federalists to quell these concerns and to silence their Anti-Federalist critics.

To understand the original meaning of the Establishment Clause, then, we first must describe the two leading approaches to church-state relations present during the founding era. This investigation sheds light on Anti-Federalist criticisms of the Constitution and their proposed amendments. With the Anti-Federalists' positions set forth, we can approach the actions of the First Federal Congress in its historical context. That context reveals the original meaning and clear intention expressed in the text of the First Amendment's Establishment Clause. The First Federal Congress did not constitutionalize one proper relationship between church and state, but rather it reaf-

¹⁰⁹ See, e.g., *infra* text accompanying notes 263–69 (discussing how the *Everson* Court, in both Justice Black's majority opinion and Justice Rutledge's dissent, and Justice Souter's contemporary approach apply a historically-inaccurate view of the First Amendment in determining the scope of the Establishment Clause).

¹¹⁰ See *infra* Part II.A (discussing the two leading church-state positions: the "Massachusetts Way" and the "Virginia Understanding").

¹¹¹ See *infra* Part II.B (discussing the Anti-Federalists' criticisms of the Constitution, including the fear that the proposed Congress could impose uniformity of religious practice in the United States).

¹¹² See *infra* Part II.B (noting the different statements articulated by the Anti-Federalists to warn against a national religious establishment).

firmed the Constitution's federal arrangement regarding church-state matters.

A. *Church-State Relationships During the Founding Era*

In revolutionary America, the relationship between church and state was anything but settled. In states where the Church of England had been established, the necessity of new arrangements was particularly acute.¹¹³ But even in those states that had not established Anglicanism, reevaluation of church-state relations was part of the enormous project of constitution writing. "During the Revolutionary era, every colony-turned-State altered the Church-State arrangements it had inherited from colonial times."¹¹⁴

Because state governments possessed primary legislative power over matters of education and morals, extensive debate over the proper relationship between church and state occurred at the state level.¹¹⁵ Virginia's approach to religious freedom has received the most legal and scholarly attention, but contrary to Justice Black's assumption in *Everson*, it was not the only or even the most common understanding in the new nation.

In general, two leading positions emerged. Some states, like Virginia, abolished official state establishments and ended direct government funding of religious clergy. What I shall call the "Virginia Understanding" effectively privatized religion. In other states, particularly in New England, religion as such remained an object of public funding and state concern. The "Massachusetts Way," as I will call it, sought to use public funding and public endorsement of religion as a means to nurture and to encourage good citizenship. The labels "Virginia Understanding" and "Massachusetts Way" are not meant to suggest that everyone within the respective states agreed with the position, or that the understanding belonged exclusively to that state. The "Virginia Understanding" was contested within Virginia, as was the "Massachusetts Way" in Massachusetts. Some of the most able de-

¹¹³ See, e.g., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1436 (1990) (stating that "[t]he Church of England was discredited during the Revolution by its connection to the Crown and the loyalist sympathies of most of its clergy"). Prior to 1776, Virginia, South Carolina, North Carolina, Maryland, Georgia, and some localities in New York had established the Church of England and taxed residents for its support. *Id.*

¹¹⁴ CURRY, *supra* note 80, at 134.

¹¹⁵ See G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73, 85 (1989) (noting that between the Declaration of Independence and the ratification of the Constitution "each of the original thirteen states reconsidered the relationship between church and state within its borders"). For a discussion of church-state arrangements in the founding era state constitutions, see John K. Wilson, *Religion Under the State Constitutions, 1776-1800*, 32 J. CHURCH & ST. 753 (1990).

fenders of the “Massachusetts Way” were Virginians, including Patrick Henry and George Washington; some of the strongest advocates for Virginia-like separation came from Massachusetts.¹¹⁶ Nonetheless, the positions are associated with these two states because each enshrined in its law one of the leading founding-era approaches to church-state relations.¹¹⁷

1. *The “Massachusetts Way”*

The “Massachusetts Way” is revealed in the 1780 Massachusetts State Constitution. Article III of that document states:

As the happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion, and morality, and as these cannot be generally diffused through a community but by the institution of the public worship of God and of public instructions in piety, religion, and morality: Therefore, To [sic] promote their happiness and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies-politic or religious societies to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion, and morality in all cases where such provision shall not be made voluntarily.¹¹⁸

At the heart of the “Massachusetts Way” lies a simple syllogism: republican government requires a virtuous citizenry; the cultivation of virtue depends on religion; therefore, supporters of republican government ought to support religion. These ideas were echoed most famously by President George Washington in his Farewell Address. “Tis substantially true,” Washington states, “that virtue or morality is

¹¹⁶ Isaac Backus, for example, was an evangelical Baptist from Massachusetts who, believing that religion is a matter solely belonging between God and the individual, fought for the separation of church and state. See, e.g., Isaac Backus, *An Appeal to the Public for Religious Liberty* (1773), reprinted in *POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA: 1730–1805*, at 329, 331 (Ellis Sandoz ed., 1991) (arguing that government must not interfere with “true and full [religious] liberty”).

¹¹⁷ It also should be noted that the church-state debate was not simply between pious citizens who sought government support of religion and the non-believers who sought separation. Among the most strident advocates for disestablishment were devout Baptists, such as Isaac Backus. See Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 933 (2004) (“Baptist leaders, such as Isaac Backus in Massachusetts and John Leland in Virginia, took the lead in calling for an amendment guaranteeing religious freedom against the federal government.”). It would, thus, be a mistake to characterize the debate over church-state relations during the founding as one between religious faith and secular reasoning.

¹¹⁸ MASS. CONST. of 1780, pt. 1, art. III, reprinted in *THE FOUNDERS’ CONSTITUTION*, *supra* note 77, at 77–78.

a necessary spring of popular government.”¹¹⁹ But virtue and morality, he warns, require religion: “And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.”¹²⁰ Therefore, “[o]f all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labour to subvert these great Pillars of human happiness, these firmest props of the duties of Men and citizens.”¹²¹

Because religion was believed to be essential to the development of republican citizenship, the “Massachusetts Way” authorized taxpayer support of religion, including the direct subsidization of religious ministers.¹²² State endorsement of religion was understood not only to be good public policy but an essential public good.¹²³ All citizens, including non-religious citizens, were thought to benefit from the general diffusion of religious morality.¹²⁴

Religious liberty required only that an individual not be punished for exercising his or her religion as such. As stated in the 1780 Massachusetts Constitution: “no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the

¹¹⁹ George Washington, Farewell Address (Sept. 19, 1796), in *GEORGE WASHINGTON: A COLLECTION* 521, 521 (W. B. Allen ed., 1988).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² George Washington, it should be noted, did not call directly for the tax support of religion as such in his Farewell Address. During the dispute in Virginia over Patrick Henry’s proposed general assessment, however, Washington said he was not opposed in principle to religious taxes. See Vincent Phillip Muñoz, *George Washington on Religious Liberty*, 65 *REV. POL.* 11, 13–14 (2003) (arguing that George Washington, while not personally opposed to religious assessment, was opposed to Henry’s measure because “the bill caused unnecessary political turmoil”).

¹²³ In a letter to James Madison, Richard Henry Lee, President of the Continental Congress, captured the same sentiment:

Refiners may weave as fine a web of reason as they please, but the experience of all times shews [sic] Religion to be the guardian of morals—And he must be a very inattentive observer in our Country, who does not see that avarice is accomplishing the destruction of religion, for want of a legal obligation to contribute something to its support.

Letter from Richard Henry Lee to James Madison (Nov. 26, 1784), in 2 *THE LETTERS OF RICHARD HENRY LEE* 304, 304 (James Curtis Ballagh ed., photo. reprint 1970) (1914).

¹²⁴ For a good example of a contemporaneous defense of the “Massachusetts Way,” see Worcesteriensis, *Number IV*, *MASS. SPY*, Sept. 4, 1776, reprinted in 1 *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760–1805*, at 449, 449–54 (Charles S. Hyneman & Donald S. Lutz eds., 1983). Worcesteriensis compares citizens who pay taxes to support religions they do not favor to citizens who pay taxes to support wars they believe unnecessary or imprudent. Disagreement alone, he suggests, does not exempt one from supporting public policy made by legitimate authorities. *Id.* at 453.

manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments”¹²⁵

An individual’s liberty of conscience, accordingly, was not understood to be violated by religious taxes. Massachusetts, furthermore, could claim that “no subordination of any one sect or denomination to another shall ever be established by law,”¹²⁶ because all taxes for the support of religion would be directed by the taxpayer to “the public teacher or teachers of his own religious sect or denomination.”¹²⁷

2. *The “Virginia Understanding”*

Whereas Massachusetts represents one pole in the Founders’ world of church-state relations, Virginia occupies the other. Prior to 1776, Virginia had established the Church of England. Anglican ministers were dependent on the state for financial support.¹²⁸ Minister salaries were paid by the government and financed by local taxation.¹²⁹ Certain rights and privileges, moreover, were legally reserved to Anglican clergymen—only they, for example, could perform legal marriages.¹³⁰ Ministers of dissenting religions, mostly Presbyterians and Baptists, were licensed, as were their meeting houses.¹³¹ To clarify church-state arrangements, Patrick Henry in 1784 proposed a property tax to fund religious ministers.¹³² Similar to legislation anticipated by the 1780 Massachusetts Constitution, each property owner was to specify the Christian denomination to which he wished

¹²⁵ MASS. CONST. of 1780, pt. 1, art. II, *reprinted in* THE FOUNDERS’ CONSTITUTION, *supra* note 77, at 77.

¹²⁶ *Id.* at art. III, *reprinted in* THE FOUNDERS’ CONSTITUTION, *supra* note 77, at 78.

¹²⁷ *Id.*

¹²⁸ *See* THOMAS E. BUCKLEY, S.J., CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787, at 11 (1977) (“[I]t was a ministry totally dependent upon the state for its financial support.”).

¹²⁹ *See id.* (explaining how Virginia law required that every parish provide its minister with an annual salary of 16,000 pounds of tobacco, which the town raised by collecting taxes from each head of a household within the parish boundaries).

¹³⁰ *See id.* at 36 (“Certain privileges, such as the exclusive right to perform marriages, were still retained by these ministers.”).

¹³¹ *See id.* (“The legislators had not officially yielded their authorization to license meeting-houses and dissenting preachers.”).

¹³² From 1776 to 1784, various church-state arrangements were proposed but none adopted definitively. They ranged from Thomas Jefferson’s “A Bill for Establishing Religious Freedom,” which would have ended all legally-compelled support of religion and official religious tenets, to “A Bill Concerning Religion,” proposed in 1779, which would have declared Protestant Christianity the state’s established church, legally mandated five articles of faith for all incorporated and established religious societies, and taxed all citizens for the support of Christianity. *See id.* at 47–48, 56–57 (discussing the different bills considered by the Virginia legislature, including Jefferson’s proposal and the “Bill Concerning Religion”). The strongest action the House of Delegates took during this period was to suspend, starting in 1776, the tax that provided salaries for Anglican clergy. *See id.* at 48 (“[A]s had been its custom since 1776, the Assembly voted once again to suspend the salaries of the established clergy for another session.”).

his tax directed.¹³³ Tax dollars were to be used to support “a Minister or Teacher of the Gospel . . . or the providing places of divine worship, and to none other use whatsoever.”¹³⁴ But unlike Massachusetts, which was dominated by Congregationalists, in religiously diverse Virginia, the general assessment met legislative defeat.¹³⁵ Shortly thereafter, James Madison proposed and the Virginia legislature adopted Thomas Jefferson’s “A Bill for Establishing Religious Freedom.”¹³⁶

Jefferson’s bill declared “that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . , [and] that all men shall be free to profess, and by argument to maintain their opinion in matters of religion.”¹³⁷ “[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves . . . is sinful and tyrannical”¹³⁸ Forcing an individual to support his own church was not declared a violation of the individual’s rights, but it was denounced as a deprivation “of the comfortable liberty of giving his contribution to the particular pastor whose morals he feels most persuasive to righteousness.”¹³⁹ The legislation concluded “that the rights hereby asserted are of the natural rights of mankind,”¹⁴⁰ and thus could not be repealed legitimately without violating “natural right.”¹⁴¹

While Jefferson’s bill states its position as a matter of principle, the reasons behind it also include prudential judgments.¹⁴² James

¹³³ See *id.* at 58 (“[E]ach person could determine which religious society, among those belonging to the establishment, would receive his allotment.”).

¹³⁴ A Bill “Establishing a Provision for Teachers of the Christian Religion” (1784), reprinted in BUCKLEY, *supra* note 128, app. 2 at 189. If a taxpayer failed or refused to specify a Christian society, his tax would go to the public treasury “to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning . . . and to no other use or purpose whatsoever.” *Id.* An exception to this rule was made for Quakers and Mennonites who, because they lacked the requisite clergy, were allowed to place their distribution in their general funds “to be disposed of in a manner which they shall think best calculated to promote their particular method of worship.” *Id.*

¹³⁵ See 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 383 (1950) (noting that the issue of a general religious assessment was “finally killed” in the Virginia legislature in October 1785); see also BUCKLEY, *supra* note 128, at 144–55 (describing the political effort and situation that led to the defeat of Patrick Henry’s bill in 1785).

¹³⁶ See BUCKLEY, *supra* note 128, at 162–63 (describing the passage in 1786 of Jefferson’s bill).

¹³⁷ Thomas Jefferson, *A Bill for Establishing Religious Freedom* (drafted in 1777, adopted in 1786), reprinted in THE PORTABLE THOMAS JEFFERSON 251, 253 (Merrill D. Peterson ed., 1977).

¹³⁸ *Id.* at 252.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 253.

¹⁴¹ *Id.*

¹⁴² Commentators on the Virginia Statute have emphasized its indebtedness to Locke’s political philosophy. S. Gerald Sandler sets forth a side-by-side comparison of Locke’s *A Letter Concerning Toleration*, Jefferson’s notes on the *Letter*, and Jefferson’s *A Bill for Establishing Religious Freedom*, which demonstrates Jefferson’s indebtedness to Locke. See S. Gerald Sandler, *Lockean Ideas in Thomas Jefferson’s Bill for Establishing Religious Freedom*, 21 J. HIST. IDEAS 110, 110

Madison summarized this perspective years later when reflecting on Virginia's experiment in separating church and state. "We are teaching the world the great truth," he wrote to Edward Livingston in 1822, "that [governments] do better without Kings [and] Nobles than with them. The merit will be doubled by the other lesson that Religion flourishes in greater purity, without than with the aid of [government]." ¹⁴³ In 1821, Madison wrote to F. L. Schaeffer: "The experience of the United States is happy disproof of the error so long rooted in the unenlightened minds of well-meaning Christians, as well as in the corrupt hearts of persecuting usurpers, that without a legal incorporation of religious and civil polity, neither could be supported." ¹⁴⁴

Madison saw evidence of what supporters of the "Massachusetts Way" thought could not be true: religion does not need government support to flourish and, therefore, republican government does not need to support religion. Madison argued that religiously-inspired moral character was nurtured better by limiting government's influence on religion. To the extent that ecclesiastical and political authority were united, both were corrupted. "During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits?" Madison asked rhetorically in his "Memorial and Remonstrance." ¹⁴⁵ His answer: "More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution." ¹⁴⁶ The effect of ecclesiastical establishments on civil society was similarly baneful: "In some instances [ecclesiastical establishments] have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny: in no instances have they been seen the guardians of the liberties of the people." ¹⁴⁷ Led by Jefferson and Madison, Virginia ended

(1960) ("[T]here is probably no single document in American religious history which exemplifies [Locke's] influence more clearly than Thomas Jefferson's *A Bill for Establishing Religious Freedom*."). A more theoretical explanation of Jefferson's debt to Locke has been set forth by Sanford Kessler. See Sanford Kessler, *Locke's Influence on Jefferson's "Bill for Establishing Religious Freedom,"* 25 J. CHURCH & ST. 231, 232 (1983) ("While there is considerable disagreement among scholars over the theoretical origins of the Declaration of Independence, it is generally believed that the primary sources for Jefferson's ['Bill for Establishing Religious Freedom'] are the writings of John Locke.").

¹⁴³ Letter from James Madison to Edward Livingston (July 10, 1822), in 9 THE WRITINGS OF JAMES MADISON: 1819-1836, at 98, 102-03 (Gaillard Hunt ed., 1910).

¹⁴⁴ Letter from James Madison to F. L. Schaeffer (Dec. 3, 1821), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON: 1816-1828, at 242, 242-43 (New York, R. Worthington 1884).

¹⁴⁵ Madison, *Memorial and Remonstrance*, *supra* note 83, at 82, 83.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* For an explanation of Madison's argument regarding the harmful effects resulting from the unification of ecclesiastical and political authority, see Vincent Phillip Muñoz, *Religious Liberty and the American Founding*, 138 INTERCOLLEGIATE REV. 33, 38-39 (2003).

most state regulation of religion and embraced a libertarian approach to church-state matters.¹⁴⁸

For purposes of ascertaining the original meaning of the Establishment Clause, it is unnecessary to decide whether the “Massachusetts Way” or the “Virginia Understanding” was more authentically American or more fully adopted the principle of religious liberty. What must be understood is that at the time of the American founding two distinct approaches to church-state relations emerged.¹⁴⁹ The more traditional and conservative understanding emphasized the indispensable role of religion for the cultivation of republican citizenship. Those who embraced the “Massachusetts Way” promoted governmental endorsement and equal support of religion as good public policy. They believed direct funding of religious ministers through religious taxes furthered the common good.¹⁵⁰ Such an understanding guided church-state relations in much of New England, including Connecticut, New Hampshire, and Vermont.¹⁵¹ The newer, more lib-

¹⁴⁸ See Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 22–23 (2000) (arguing that the Framers separated church and state because to do otherwise would not only create discord and persecution, but would also weaken the religious group that was the beneficiary of governmental establishment).

¹⁴⁹ See *supra* Parts II.A.1–2 (discussing the Massachusetts and Virginia approaches).

¹⁵⁰ See *supra* notes 122–24 and accompanying text (expressing the idea that supporting religion was viewed as being part of promoting the public good).

¹⁵¹ Until 1818, Connecticut functioned under its Colonial Charter of 1662, which erected a congregational establishment. For a discussion of the “enormous” social and political influence of the established Congregational ministry, see STOKES, *supra* note 135, at 408–14.

The sixth article of New Hampshire’s bill of rights declared:

As morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government, and will lay in the hearts of men the strongest obligations to due subjection; and as the knowledge of these, is most likely to be propagated through a society by the institution of the public worship of the DEITY, and of public instruction in morality and religion; therefore, to promote those important purposes, the people of this state have a right to impower, and do hereby fully impower the legislature to authorize from time to time, the several towns, parishes, bodies corporate, or religious societies within this state, to make adequate provision at their own expence, for the support and maintenance of public protestant teachers of piety, religion and morality

N.H. CONST. of 1784, pt. I—The Bill of Rights, art. VI, *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2453, 2454 (Francis Newton Thorpe ed., 1909) [hereinafter 4 FEDERAL AND STATE CONSTITUTIONS]

Vermont’s Constitution of 1777, similarly, declared:

Laws for the encouragement of virtue and prevention of vice and immorality, shall be made and constantly kept in force; and provision shall be made for their due execution; and all religious societies or bodies of men, that have or may be hereafter united and incorporated, for the advancement of religion and learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities and estates which they, in justice, ought to enjoy, under such regulations, as the General Assembly of this State shall direct.

VT. CONST. of 1777, ch. II, § XLI, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES

ertarian approach that emerged in Virginia rejected the idea that government needed to support religion financially for religion to flourish.¹⁵² Leaders of the “Virginia Understanding” sought to end the unification of governmental and ecclesiastical authority by ending the monopolistic position that established denominations enjoyed.¹⁵³ They sought to let religious societies stand on their own, just like any other non-governmental organizations. Virginia produced the most philosophical defense of this position, which was also adopted in Rhode Island and New York.¹⁵⁴

NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3737, 3748 (Francis Newton Thorpe ed., 1909) [hereinafter 6 FEDERAL AND STATE CONSTITUTIONS].

¹⁵² See *supra* notes 143–47 and accompanying text (discussing the view that government support is not needed for religion to thrive).

¹⁵³ See *supra* notes 128–31 and accompanying text (explaining the monopoly that some denominations enjoyed).

¹⁵⁴ Until 1842, Rhode Island continued under its Colonial Charter of 1663, which declared as part of its “livlie [sic] experiment” that no person shall bee [sic] any wise molested, punished, disquieted, or called in question, for any differences in opinione [sic] in matters of religion, and doe [sic] not actually disturb the civill [sic] peace of our sayd [sic] colony; but that all and everye [sic] person and persons may, from tyme [sic] to tyme [sic], and at all tymes [sic] hereafter, freeely [sic] and fullye [sic] have and enjoye [sic] his and their [sic] owne [sic] judgments and consciences, in matters of religious concernments.

Charter of Rhode Island and Providence Plantations—1663, *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 151, at 3211, 3212–13.

New York’s 1777 Constitution declared,

whereas we are required, by the benevolent principles of rational liberty, 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 and princes have scourged mankind, this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

N.Y. CONST. of 1777, art. XXXVIII, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2623, 2636–37 (Francis Newton Thorpe ed., 1909) [hereinafter 5 FEDERAL AND STATE CONSTITUTIONS]. New York’s Constitution of 1777 also abrogated all parts of the common and statutory law of England and of colonial statutes and acts that “may be construed to establish or maintain any particular denomination of Christians or their ministers.” *Id.* at art. XXXV, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2635–36.

Other states sought to take a position somewhere between the poles of Massachusetts and Virginia. Pennsylvania’s Constitution of 1776, for example, made no provision for a religious establishment and recognized “[t]hat all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding.” PA. CONST. of 1776, Declaration of Rights, art. II, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 3081, 3082. However, the constitution further mandated that

each member [of the House of Representatives], before he takes his seat, shall make and subscribe the following declaration, viz: *I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration.*

Id. at The Frame of Government, § 10, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 3081, 3085. Georgia's Constitution of 1777, similarly, provided that "[a]ll persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State; and shall not, unless by consent, support any teacher or teachers except those of their own profession," but that members of the House of Assembly—the state legislature—had to be "of the Protestant religion." GA. CONST. of 1777, arts. VI, LVI, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 777, 779, 784 (Francis Newton Thorpe ed., 1909) [hereinafter 2 FEDERAL AND STATE CONSTITUTIONS]. It appears that Pennsylvania and Georgia sought, at least among office holders, to maintain the religious character believed necessary for republican government while, at the same time, limiting direct governmental financial support for religion.

Other states introduced non-preferential restrictions regarding an establishment but maintained sectarian limits on office holding. New Jersey's Constitution of 1776, for example, recognized the rights of conscience and prohibited the establishment of one religious sect over others, but limited office holding to Protestants. *See* N.J. CONST. of 1776, arts. XVIII–XIX, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2594, 2597–98. Delaware's Constitution of 1776, similarly, prohibited the establishment of any one sect in preference to another but required office holders to subscribe to the following declaration: "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." DEL. CONST. of 1776, arts. 22, 29, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 562, 566–68 (Francis Newton Thorpe ed., 1909) [hereinafter 1 FEDERAL AND STATE CONSTITUTIONS]. North Carolina's Constitution of 1776 abolished the "establishment of any one religious church or denomination in this State, in preference to any other." N.C. CONST. of 1776, art. XXXIV, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2787, 2793. The same constitution, however, barred from public office or place of trust any one "who shall deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State." *Id.* at art. XXXII.

In 1835, North Carolina amended its constitution to bar from office anyone who denied the truth of the "Christian" religion. *See* Gary R. Govert, *Something There Is that Doesn't Love a Wall: Reflections on the History of North Carolina's Religious Test for Public Office*, 64 N.C. L. REV. 1071, 1085 (1986) ("[T]he convention approved a compromise amendment and substituted the word 'Christian' for 'Protestant' in article XXXII."). "The [North Carolina Constitutional] [C]onvention of 1868 adopted a religious test disqualifying from office 'all persons who shall deny the being of Almighty God.'" *Id.* at 1086 (quoting N.C. CONST. of 1868, art. VI, § 5). "[W]hen the North Carolina General Assembly presented a new constitution to the electorate in 1970, the religious test remained intact." *Id.* at 1087 (footnote omitted). To this day, article VI, section 8 of the North Carolina Constitution disqualifies from elective office "any person who shall deny the being of Almighty God." N.C. CONST. art. VI, § 8.

The Maryland Constitution of 1776 explicitly authorized the state legislature to tax citizens "for the support of the Christian religion." MD. CONST. of 1776, A Declaration of Rights, art. XXXIII, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1686, 1689 (Francis Newton Thorpe ed., 1909) [hereinafter 3 FEDERAL AND STATE CONSTITUTIONS]. However, when a general assessment was proposed in 1784, it failed. In 1795, Maryland adopted a constitutional amendment requiring all office holders to "subscribe a declaration of his belief in the Christian religion." *Id.* at art. LV, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 1700.

South Carolina was something of an outlier within the early state constitutions. Article XXXVIII of its 1778 Constitution explicitly stated, "The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State."

B. The Anti-Federalists' Criticisms of the Constitution

In the minds of most Anti-Federalists, the loose collection of individuals opposed to constitutional ratification, the differences in church-state arrangements at the state level signaled the impossibility of a harmonious, consolidated union.¹⁵⁵ Employing a number of different arguments (some of which contradicted one another), Anti-Federalists claimed that the proposed constitution threatened religious freedom. They lacked sufficient strength to defeat the Constitution outright, but they managed to extract the promise that amendments would be considered.¹⁵⁶ The Establishment Clause, in particular, was adopted to alleviate fears among the general population aroused by Anti-Federalist criticisms.¹⁵⁷ To understand the Establishment Clause's original meaning, then, requires that we address the Anti-Federalists' criticisms of the Constitution.

On the point of religion, Anti-Federalists had an immediate and distinct advantage in the ratification debate. The proposed constitution was nearly silent regarding religion,¹⁵⁸ which allowed Anti-

The article then proceeded to list five articles of faith to which all religious societies petitioning for establishment and incorporation had to subscribe. S.C. CONST. of 1778, art. XXXVIII, *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 151, at 3248, 3255–56. In 1790, South Carolina adopted a constitution that omitted provisions regarding an establishment or articles of faith and declared: “The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind . . .” S.C. CONST. of 1790, art. VIII, § 1, *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 151, at 3258, 3264.

¹⁵⁵ See *infra* text accompanying notes 159–64 (noting the fears among Anti-Federalists that a national religious establishment would be coercive due to the religious diversity in the United States).

¹⁵⁶ Even with the prospect of amendments, the Constitution nearly met defeat: Massachusetts ratified by a vote of 187–168; New Hampshire, 57–46; Virginia, 89–79; New York, 30–27. See VA. COMM’N ON CONSTITUTIONAL GOV’T, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: WITH A SUMMARY OF THE ACTIONS BY THE STATES IN RATIFICATION OF THE PROVISIONS THEREOF 24 (James J. Kilpatrick ed., 1961) (summarizing the ratification votes).

¹⁵⁷ For a superb recent history of ratification politics, see ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION (1997).

¹⁵⁸ The Philadelphia Convention spent very little time addressing church-state matters. With little recorded debate, the delegates prohibited religious tests or qualification for any federal office. Charles Pinckney first proposed the ban on August 20, 1787. See *Journal* (Aug. 20, 1787), *reprinted in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 334, 335 (Max Farrand ed., rev. ed. 1966) [hereinafter THE RECORDS OF THE FEDERAL CONVENTION OF 1787] (“No religious test or qualification shall ever be annexed to any oath of office under the authority of the United States . . .”). It was referred to the committee of five, and then on August 30, 1787, a slightly modified version of Pinckney’s proposal passed unanimously. See *Journal* (Aug. 30, 1787), *reprinted in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 457, 461 (documenting passage of the Article VI ban on religion-tested federal positions). See generally CHESTER JAMES ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 92–97 (1964) (documenting the common use of religion tests in the colonies); Gerald V. Bradley, *The No Religious Test Clause and*

Federalists to appeal to fear of the unknown and to parade the possibility of numerous potential abuses of powers. The primary criticism the Anti-Federalists leveled was that the proposed Congress, through its power to make all laws “necessary and proper,” could impose uniformity of religious practice through the establishment of a national religion.¹⁵⁹ According to “Deliberator,” a Pennsylvania Anti-Federalist:

Congress may, if they shall think it for the “general welfare,” establish an uniformity in religion throughout the United States. Such establishments have been thought necessary, and have accordingly taken place in almost all the other countries in the world, and will, no doubt, be thought equally necessary in this.¹⁶⁰

Most Anti-Federalists did not object to religious establishments per se, but feared a national establishment because of the religious diversity in the nation. Given such diversity, “A Countryman” explained that a national religious establishment would “make every body worship God in a certain way, whether the people thought it right or no, and punish them severely, if they would not.”¹⁶¹ “Agrippa,” one of the most articulate of Massachusetts’ Anti-Federalists, summarized the matter as follows:

Attention to religion and good morals is a distinguishing trait in our [Massachusetts] character. It is plain, therefore, that we require for our

the Constitution of Religious Liberty: A Machine that Has Gone of Itself, 37 CASE W. RES. L. REV. 674, 678–79 (1987) (asserting that the Article VI religion test ban was not meant to indicate a “constitutional philosophy” of religious freedom, but instead to allow that freedom to develop naturally); Daniel L. Dreisbach, *The Constitution’s Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban*, 38 J. CHURCH & ST. 261, 293–94 (1996) (“[Article VI is] a clause deliberately calculated to ensure sect equality before the law and promote institutional independence of civil government from ecclesiastical domination at the federal level.”); James E. Wood, Jr., “No Religious Test Shall Ever Be Required”: *Reflections on the Bicentennial of the U.S. Constitution*, 29 J. CHURCH & ST. 199, 201 (1987) (noting that the religion test ban was without historical precedent and was “at variance with the prevailing patterns and practices in all of the original colonies, and during their early years of statehood”). Toward the end of the convention, a proposal by James Madison and Charles Pinckney to grant Congress power “to establish an University, in which no preference or distinctions should be allowed on account of religion” was defeated. Madison (Sept. 14, 1787), *reprinted in* THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 612, 616. The provision regarding religion, however, does not appear to have played any part in that vote. The only recorded debate on the matter includes two sentences in opposition by New York delegate Gouverneur Morris, who claimed such a university was unnecessary. *See id.* (recording a vote of four delegates in favor and six opposed, with one divided).

¹⁵⁹ *But see* Gary D. Glenn, *Forgotten Purposes of the First Amendment Religion Clauses*, 49 REV. POL. 340, 341–42 (1987) (providing a different account of the Anti-Federalists’ objections to the Constitution and how they influenced the drafting of the Establishment Clause by arguing that Anti-Federalists demanded the clause to counter the anti-religiousness of the original Constitution).

¹⁶⁰ *Essay by Deliberator*, FREEMAN’S J. (Philadelphia), Feb. 20, 1788, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 176, 179 (Herbert J. Storing ed., 1981).

¹⁶¹ *Letters from a Countryman* (V), N.Y. J., Jan. 17, 1788, *reprinted in* 6 THE COMPLETE ANTI-FEDERALIST 86, 87 (Herbert J. Storing ed., 1981).

regulation laws, which will not suit the circumstances of our southern brethren, and the laws made for them would not apply to us. Unhappiness would be the uniform product of such laws; for no state can be happy, when the laws contradict the general habits of the people, nor can any state retain its freedom, while there is a power to make and enforce such laws. We may go further, and say, that it is impossible for any single legislature so fully to comprehend the circumstances of the different parts of a very extensive dominion, as to make laws adapted to those circumstances.¹⁶²

The warning against a national religious establishment was part of the Anti-Federalist argument that a country as large as the United States could not remain free under a set of uniform laws. Influenced by Montesquieu's maxim that republican government can encompass only a small territory and that rule in large territories necessarily tends towards tyranny,¹⁶³ Anti-Federalists claimed that the new constitution would result in centralization, consolidation, and—through enforced uniformity—despotism.¹⁶⁴

Anti-Federalists also criticized the Constitution's failure to protect explicitly the "liberty of conscience" or "free exercise of religion" from infringement by the proposed national government. The charge was part of the Anti-Federalist condemnation of the Constitution for its lack of a bill of rights.¹⁶⁵ Anti-Federalists typically grouped "liberty of conscience" or "free exercise of religion" with other individual rights they thought insecure, such as unreasonable search and seizure. "The Federal Farmer," one of the most able Anti-Federalist essayists, set forth the charge as follows:

It is true, we [the people of the United States] are not disposed to differ much, at present, about religion; but when we are making a constitution, it is to be hoped, for ages and millions yet unborn, why not establish the free exercise of religion, as a part of the national compact. There are other essential rights, which we have justly understood to be the rights of freemen; as freedom from hasty and unreasonable search

¹⁶² *Letters of Agrippa* (XII), MASS. GAZETTE, Jan. 11, 1788, reprinted in 4 THE COMPLETE ANTI-FEDERALIST 93, 94 (Herbert J. Storing ed., 1981).

¹⁶³ See CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 122 (Prometheus Books 2002) (1748) (positing a connection between population size and despotic rule in that "[a] large empire supposes a despotic authority in the person who governs"). Whether the Anti-Federalists interpreted Montesquieu properly is an altogether separate question.

¹⁶⁴ See generally HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 15–37 (1981) (discussing the Anti-Federalist concern with unlimited (in their view) powers of the national government and the consolidation that such powers would bring).

¹⁶⁵ See *id.* at 64 (noting that the Anti-Federalists stressed three kinds of rights in their call for a bill of rights: "common law procedural rights in criminal prosecutions, liberty of conscience, and liberty of the press").

warrants, warrants not founded on oath, and not issued with due caution, for searching and seizing men's papers, property, and persons.¹⁶⁶

"Liberty of conscience" and "free exercise of religion" were used interchangeably by Anti-Federalists—terms that, unfortunately, they did not define with precision.¹⁶⁷ What is clear, however, is that Anti-Federalists understood "liberty of conscience" or "free exercise of religion" to be an individual right.¹⁶⁸ Equally important to note is that Anti-Federalists never championed a right or principle of "no establishment."¹⁶⁹ Anti-Federalists disparaged religious establishments only in connection with a consolidated, unlimited national government. Because of the religious diversity in America, they argued, any sectarian national religious establishment inevitably would contradict the habits of at least some of the people.¹⁷⁰ But Anti-Federalists did not argue that non-establishment was necessary to protect free exercise at the local level.

A third Anti-Federalist criticism, advanced most strenuously in New England, concentrated on the absence of a clear endorsement of religion within the Constitution. "Samuel," a Massachusetts Anti-Federalist, charged that "all religion is expressly rejected, from the Constitution."¹⁷¹ "If civil rulers won't acknowledge God, he won't acknowledge them . . ." ¹⁷² "Samuel" focused on the Constitution's specific prohibition of religious tests for office, suggesting that it evinced a design to subjugate, if not eliminate, religion. Like many proponents of the "Massachusetts Way," he argued that republican government requires religion, and, therefore, he condemned the pro-

¹⁶⁶ *Letters from the Federal Farmer* (IV) (Oct. 12, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 245, 249 (Herbert J. Storing ed., 1981). See generally Herbert J. Storing, *Introduction to Letters from the Federal Farmer*, 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 214–17 (discussing the authorship and merits of the "Federal Farmer" letters).

¹⁶⁷ See, e.g., McConnell, *supra* note 113, at 1488 ("[I]n many of the debates in the preconstitutional period, the concepts of 'liberty of conscience' and 'free exercise of religion' were used interchangeably."). The interrelatedness of the terms pre-dates the founding period. William Penn, for example, defined "liberty of conscience" in 1670 as follows:

By *Liberty of Conscience*, we understand not only a meer [sic] *Liberty of the Mind*, in believing or disbelieving this or that Principle or Doctrine, but the *Exercise of our selves in a visible Way of Worship, upon our believing it to be indispensibly* [sic] *required at our Hands, that if we neglect it for Fear or Favour of any Mortal Man, we Sin, and incur Divine Wrath . . .*

William Penn, *The Great Case of Liberty of Conscience* (1670), reprinted in THE POLITICAL WRITINGS OF WILLIAM PENN 79, 85–86 (Andrew R. Murphy ed., 2002).

¹⁶⁸ See STORING, *supra* note 164, at 64 (describing the Anti-Federalists' call for a bill of rights to protect the "liberty of individual conscience").

¹⁶⁹ *Id.* at 23 (noting that "[m]any Anti-Federalists supported and would even have strengthened the mild religious establishments that existed in some states").

¹⁷⁰ See *supra* text accompanying notes 161–62 (discussing the Anti-Federalists' arguments against a nationally-established religion).

¹⁷¹ *Essay by Samuel*, INDEP. CHRON. & UNIVERSAL ADVERTISER (Boston), Jan. 10, 1788, reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 162, at 191, 195.

¹⁷² *Id.* at 196.

posed Constitution for failing to nurture explicitly religious sentiment.¹⁷³ This third criticism was advanced most strenuously in New England. Insofar as it implicitly demanded that the national government take cognizance of religion, it stood in tension with the Anti-Federalist arguments that sought to limit the proposed national government's jurisdiction over religious matters.¹⁷⁴

During the ratification debates, Federalists responded to these criticisms by repeatedly arguing that the proposed federal government possessed only delegated powers and that no power was delegated concerning religion. The Constitution, they therefore claimed, did not need to be amended to safeguard religious freedom. James Iredell, in North Carolina's ratifying convention, offers an example of the standard Federalist argument:

[Congress] certainly ha[s] no authority to interfere in the establishment of any religion whatsoever; and I am astonished that any gentleman should conceive they have. Is there any power given to Congress in matters of religion? Can they pass a single act to impair our religious liberties? If they could, it would be a just cause of alarm. . . . If any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass, by the Constitution, and which the people would not obey. Every one would ask, "Who authorized the government to pass such an act? It is not warranted by the Constitution, and is barefaced usurpation."¹⁷⁵

¹⁷³ For an elaboration of this argument, see *Letter by David*, MASS. GAZETTE, Mar. 7, 1788, reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 162, at 246, 246–48.

¹⁷⁴ See STORING, *supra* note 164, at 65 (noting that the Anti-Federalists' emphasis on the necessity of a bill of rights "reflects the failure of the Anti-Federalists" insofar as it "implied a fundamental acceptance of the 'consolidated' character of the new [federal] government").

¹⁷⁵ James Iredell, Statement at the North Carolina Ratifying Convention (July 30, 1788), reprinted in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 192, 194 (Jonathan Elliot ed., 2d ed., William S. Hein & Co., Inc. 1996) (1836) [hereinafter 4 DEBATES IN THE SEVERAL STATE CONVENTIONS]. For further example of commentary made at the state conventions, see Edmund Randolph, Statement at the Virginia Ratifying Convention (June 10, 1788), reprinted in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 194, 204 (Jonathan Elliot ed., 2d ed., William S. Hein & Co., Inc. 1996) (1836) [hereinafter 3 DEBATES IN THE SEVERAL STATE CONVENTIONS] (arguing that "no power is given expressly to Congress over religion," but rather that the "exclusion of religious tests is an exception from this general provision, with respect to oaths or affirmations"); Edmund Randolph, Statement at the Virginia Ratifying Convention (June 15, 1788), reprinted in 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra*, at 463, 469 (asserting that religious freedom is protected by the omission of additional provisions in the Constitution); James Bowdoin, Statement at the Massachusetts Ratifying Convention (Jan. 23, 1788), reprinted in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 81, 87 (Jonathan Elliot ed., J.B. Lippincott Co. 1901) (1836) [hereinafter 2 DEBATES IN THE SEVERAL STATE CONVENTIONS] ("[I]t would require a volume to describe [the rights of particular states], as they extend to every subject of legislation, not included in the powers vested in Congress.");

Since the Constitution did not grant authority to Congress over religion, Federalists claimed, Congress could not establish a religion or disestablish an existing establishment in the several states. State governments retained complete jurisdiction over such matters, and the federal government posed no threat to religious liberty.¹⁷⁶

C. Proposed Religion Amendments to the Constitution

As mentioned, the Anti-Federalists lacked the support to defeat ratification outright, but they did manage to obtain the promise of amendments. Seven states included amendments with their official notices of ratification.¹⁷⁷ Two types of alterations were submitted: structural amendments that limited (or explicitly recognized the im-

James Madison, Statement at the Virginia Ratifying Convention (June 12, 1788), *reprinted in* 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra*, at 328, 330 (citing the plurality of religions in the United States as a safeguard against religious tyranny, as part of a larger argument against a bill of rights); Theophilus Parsons, Statement at the Massachusetts Ratifying Convention (Jan. 23, 1788), *in* 2 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra*, at 88, 90 (“It has been objected that the Constitution provides no religious test by oath, and we may have in power unprincipled men, atheists and pagans. No man can wish more ardently . . . that all our public offices may be filled by men who fear God and hate wickedness; but it must be filled with the electors to give the government this security.”). For further discussion of the Federalist response in the state ratifying conventions, see Snee, *supra* note 106, at 373–77. The most well-known Federalist explanation of the Constitution’s lack of a bill of rights, of course, is offered by Alexander Hamilton in THE FEDERALIST No. 84. See also James Wilson, Statement at the Pennsylvania Ratifying Convention (Oct. 28, 1787), *reprinted in* 2 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra*, at 434, 435–37 (asserting that a bill of rights would interfere with the reservation of personal powers that ensures protection of rights).

¹⁷⁶ As his remarks continued, Iredell offered a second response characteristic of the Federalist argument contrasting the Constitution’s guarantee of a republican form of government with its absence of a guarantee of religious freedom:

It has been asked by that respectable gentleman (Mr. Abbot) what is the meaning of that part, where it is said that the United States shall *guaranty* to every state in the Union a republican form of government, and why a *guaranty* of religious freedom was not included. The meaning of the guaranty provided was this: There being thirteen governments confederated upon a republican principle, it was essential to the existence and harmony of the confederacy that each should be a republican government, and that no state should have a right to establish an aristocracy or monarchy. That clause was therefore inserted to prevent any state from establishing any government but a republican one. Every one must be convinced of the mischief that would ensue, if any state had a right to change its government to a monarchy. If a monarchy was established in any one state, it would endeavor to subvert the freedom of the others, and would, probably, by degrees succeed in it. . . . It is, then, necessary that the members of a confederacy should have similar governments. But consistently with this restriction, the states may make what change in their own governments they think proper. Had Congress undertaken to guaranty religious freedom, or any particular species of it, they would then have had a pretence to interfere in a subject they have nothing to do with. Each state, so far as the clause in question does not interfere, must be left to the operation of its own principles.

Iredell, Statement at the North Carolina Ratifying Convention (July 30, 1788), *supra* note 175, at 194–95.

¹⁷⁷ Those states are Massachusetts, South Carolina, New Hampshire, Virginia, New York, North Carolina, and Rhode Island.

licit limits of) congressional power, and declarations of personal rights. Every state that proposed alterations (except for New Hampshire, the first state to submit amendments) divided their proposals into two distinct lists, labeling those pertaining to structure, “amendments,” and labeling those pertaining to individual rights, “declaration of rights.”

Five states submitted alterations touching on religion.¹⁷⁸ Within its “declaration of rights” (the list of alterations relating to personal rights), Virginia proposed:

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.¹⁷⁹

North Carolina and Rhode Island repeated Virginia’s proposal in their “declarations of rights.”¹⁸⁰ New York’s ratifying convention declared: “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.”¹⁸¹ New Hampshire, which provided a single list of constitutional amendments, offered the following: “Congress shall make no laws touching religion, or to infringe the rights of conscience.”¹⁸²

¹⁷⁸ Those states are New Hampshire, Virginia, New York, North Carolina, and Rhode Island (belatedly). I omit from discussion South Carolina’s proposal, which sought to amend the no-religious-test clause in Article VI to read, “no *other* religious test shall ever be required.” JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES* 303 n.29 (2000) (emphasis added) (noting the irrelevance of South Carolina’s proposal as it “received no support each time it was raised”). In two other states (Pennsylvania and Maryland), the minority that lost the ratification fight outright published proposed amendments, though these lacked the states’ official sanctions. See *RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY* 79 (Michael S. Ariens & Robert A. Destro eds., 2d ed. 2002) (providing the proposed amendments concerning religion from the Pennsylvania and Maryland minorities).

¹⁷⁹ Proposed Amendments to the Constitution, Virginia Ratifying Convention (June 27, 1788), *reprinted in* THE FOUNDERS’ CONSTITUTION, *supra* note 77, at 15, 16 [hereinafter Virginia Ratifying Convention].

¹⁸⁰ See Declaration of Rights and Other Amendments, North Carolina Ratifying Convention (Aug. 1, 1788), *reprinted in* THE FOUNDERS’ CONSTITUTION, *supra* note 77, at 17, 18 (duplicating Virginia’s religion clause in North Carolina’s resolution of the Declaration of Rights).

¹⁸¹ New York Ratification of Constitution (July 26, 1788), *reprinted in* THE FOUNDERS’ CONSTITUTION, *supra* note 77, at 11, 12.

¹⁸² New Hampshire Ratification of the Constitution (June 21, 1788), *reprinted in* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 325, 326 (Jonathan Elliot ed., 2d ed., William S. Hein & Co., Inc. 1996) (1836) [hereinafter 1 DEBATES IN THE SEVERAL STATE CONVENTIONS].

The alterations proposed by the state ratifying conventions reflect two distinct approaches to address Anti-Federalist concerns. New Hampshire's proposal emphasized the limits on the new government's power by declaring Congress's lack of power to make "laws touching religion."¹⁸³ The blanket prohibition seems to have been intended to ensure that the states would retain plenary power over religious matters. The explicit use of the word "Congress" seems to have been intended to emphasize that body's limited powers and to reaffirm the federal character of the new nation. It clearly prohibited federal interference with state religious establishments or the lack thereof. New Hampshire's amendment also prohibited Congress from making laws that "infringe the rights of conscience,"¹⁸⁴ thus addressing the Anti-Federalist concern over the Constitution's lack of an explicit recognition of this fundamental personal right. Virginia's proposal stated similarly that "all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience,"¹⁸⁵ which was a modification of Article XVI of the Virginia Declaration of Rights.¹⁸⁶

Despite this similarity, a significant difference existed between the two states' proposals. Virginia's amendment was not explicitly federal. It aimed to regulate how Congress might exercise its power by including the following no-preference provision: "no particular religious sect or society ought to be favored or established, by law, in preference to others."¹⁸⁷ New York followed Virginia's lead and also proposed a no-preference amendment: "no religious sect or society ought to be favored or established by law in preference to others."¹⁸⁸ Whereas New Hampshire appears to have sought to recognize Congress's lack of power, Virginia and New York seem to have sought to regulate how Congress would exercise its expansive powers. That is, instead of reaffirming federalism and thereby denying Congress jurisdiction over church-state matters, Virginia and New York seem to have conceded that Congress likely would legislate on matters regarding religion and sought, therefore, to prevent the federal government from preferring one sect over others.¹⁸⁹

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Virginia Ratifying Convention, *supra* note 179, at 16.

¹⁸⁶ See Virginia Declaration of Rights, § 16 (June 12, 1776), *reprinted in* THE FOUNDERS' CONSTITUTION, *supra* note 77, at 70 (laying a foundation for the State's religion amendment that followed two years later).

¹⁸⁷ Virginia Ratifying Convention, *supra* note 179, at 16.

¹⁸⁸ New York Ratification of Constitution, *supra* note 181, at 12.

¹⁸⁹ See STORING, *supra* note 164, at 65 (noting that the Anti-Federalists' emphasis on the necessity of a bill of rights "reflects a failure of the Anti-Federalists" insofar as it "implied a fundamental acceptance of the 'consolidated' character of the new [federal] government").

The difference between New Hampshire's federal amendment and Virginia's no-preference proposal can be traced to Patrick Henry, a dominant figure in Virginia's Ratifying Convention and the probable author of Virginia's proposed amendment.¹⁹⁰ A vehement opponent of the proposed Constitution, Henry insisted that the new national government was not one of limited, delegated powers.¹⁹¹ Virginia's Federalists had argued that no amendment relating to religion was necessary because, in James Madison's words, "[t]here is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation."¹⁹² Henry thought such assurances were insufficient. To rebut the Federalists' delegated powers argument, he highlighted the explicit limitations on federal power listed in Article I, Section 9 of the Constitution.¹⁹³ Those reservations, Henry explained, were like a bill of rights; but that the Philadelphia Convention itself thought it necessary to protect some rights explicitly belied the Federalist argument that a bill of rights was not necessary.¹⁹⁴ The existence of stated reservations on Congress's power, "reverses the position of the friends of this Constitution, that every thing is retained which is not given up."¹⁹⁵ The inclusion of a minimal bill of rights reveals the truth of the matter: that "every thing which is not negated [sic] shall remain with Congress."¹⁹⁶ The inclusion of express reservation in Article I, Section 9 "destroys [the Federalists'] doctrine."¹⁹⁷ Disbelieving that the new national government's powers would remain limited, Henry argued that a bill of rights was absolutely necessary to protect religious freedom.¹⁹⁸

¹⁹⁰ See *infra* note 201 (discussing how Patrick Henry was likely responsible for Virginia's proposed religion amendment).

¹⁹¹ See, e.g., Patrick Henry, Statement at the Virginia Ratifying Convention (June 15, 1788), reprinted in 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 175, at 460, 461 (arguing that the explicit reservations of power in Article I, Section 9 of the Constitution implied that "every thing which is not negated [sic] shall remain with Congress").

¹⁹² Madison, Statement at the Virginia Ratifying Convention, *supra* note 175, at 330.

¹⁹³ See Henry, Statement at the Virginia Ratifying Convention, *supra* note 191, at 461-62 (arguing that the explicit reservations of power in Article I, Section 9 of the Constitution implied that those powers not expressly reserved were granted).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 461.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* On the same day, Governor Edmund Randolph offered the Federalist response to Henry's criticism, namely that "every exception [Article 1, Section 9] mentioned is an exception, not from general powers, but from the particular powers therein vested." Randolph, Statement at the Virginia Ratifying Convention (June 15, 1788), *supra* note 175, at 464.

¹⁹⁸ See Henry, Statement at the Virginia Ratifying Convention, *supra* note 191, at 462 ("My mind will not be quieted till [sic] I see something substantial come forth in the shape of a bill of rights.").

Henry and Virginia's Anti-Federalists sought, accordingly, to regulate how Congress would exercise power over religion. As mentioned above, the Virginia Ratifying Convention proposed a modified version of Section 16 of Article XVI of the Virginia Declaration of Rights. The modifications, excluding punctuation, were as follows (with additions in italics):

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 ~~are equally entitled~~ *have an equal, natural, and unalienable right* to the free exercise of religion, according to the dictates of conscience, and that ~~it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other~~ *no particular religious sect or society ought to be favored or established, by law, in preference to others.*¹⁹⁹

The inclusion of the adjectives “natural” and “unalienable” emphasized the fundamental nature of the right to religious free exercise. More significantly, Article XVI was rewritten to include the no-preference provision that “no particular religious sect or society ought to be favored or established, by law, in preference to others.”²⁰⁰ The introduction of the new concept of “no preference” suggests the author's deliberate intention to regulate congressional power over religion.²⁰¹

III. THE DRAFTING OF THE ESTABLISHMENT CLAUSE

When James Madison collected the various states' proposals for amendments to begin work on what would become the Bill of Rights, he must have noticed that a tension existed between New Hamp-

¹⁹⁹ Virginia's proposed religion amendment can be found in the Virginia Ratifying Convention, *supra* note 179. The original text of Article XVI of the Virginia Declaration of Rights can be found at THE FOUNDERS' CONSTITUTION, *supra* note 77, at 70.

²⁰⁰ Virginia Ratifying Convention, *supra* note 179, at 16.

²⁰¹ It appears that Patrick Henry was responsible for these revisions. On June 24, 1788, the day before the Virginia Convention voted in favor of ratification, Henry proposed a list of amendments to the Constitution. At this point, Elliot records the following:

Here Mr. Henry informed the committee that he had a resolution prepared, to refer a declaration of rights, with certain amendments to the most exceptionable parts of the Constitution, to the other states in the confederacy, for their consideration, previous to its ratification. The clerk than [sic] read the resolution, the declaration of rights, and amendments, which were nearly the same as those ultimately proposed by the Convention

³ DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 175, at 593. Henry, of course, supported non-preferential aid to religion and did not believe that non-preferential establishments violated an individual's liberty of conscience. In 1784, he had proposed the non-preferential general assessment in Virginia, which was defeated by a Madison-led coalition. *See supra* text accompanying note 132. Given Henry's leadership in the Virginia Ratifying Convention and the unmistakable parallel between the proposed amendment and his political record, all evidence points to Henry's authorship of Virginia's proposed religion amendment.

shire's and Virginia's proposed religion amendments. Whereas New Hampshire aimed to limit federal power, Virginia's proposal might be read to expand it.²⁰² Virginia's non-preferential language could be interpreted to imply that Congress possessed authority to pass religious legislation if it did so in a non-preferential manner. Virginia's Anti-Federalists, in their desire to control federal authority, proposed an amendment that could be read to increase the very power that they feared—the same power that New Hampshire's proposed amendment sought to limit.

One can only imagine Madison's frustration with Patrick Henry in particular and the Anti-Federalists in general. The important work of establishing the new national government was being sidetracked to address proposals like New Hampshire's, which Madison considered unnecessary, and a proposal like Virginia's, which was inconsistent with many of the Anti-Federalists' self-professed position.²⁰³ Nonetheless, Madison took charge of the amendment process in the First Federal Congress. One of his reasons for doing so is easy to understand. In the state ratifying conventions, Anti-Federalists exerted considerable influence; even with the promise of amendments, Virginia ratified the Constitution only by a vote of eighty-nine to seventy-nine.²⁰⁴ If a second constitutional convention was called, Anti-Federalists likely would play a significant role.²⁰⁵ Federalists, however, controlled the First Federal Congress.²⁰⁶ If the drafting of amendments stayed within Congress, they would shape the results. Proposing amendments thus became Madison's focus in the first months of the First Congress.²⁰⁷ Like almost all Federalists, he did not think amendments were necessary to correct flaws in the Constitution, but

²⁰² See *supra* notes 179–89 and accompanying text (discussing the difference between Virginia's no preference proposal and New Hampshire's federal amendment).

²⁰³ For Madison's original opposition to a bill of rights, see Madison, Statement at the Virginia Ratifying Convention, *supra* note 175. For a general discussion of how Madison came to champion the Bill of Rights, see GOLDWIN, *supra* note 157, at 75–82.

²⁰⁴ VA. COMM'N ON CONSTITUTIONAL GOV'T, *supra* note 156.

²⁰⁵ A second constitutional convention was a distinct possibility, and calls for one had started even before the Philadelphia Convention finished its work. GOLDWIN, *supra* note 157, at 23–26. During the Philadelphia Convention, Edmund Randolph repeatedly proposed a motion for a second convention. *Id.* On May 5, 1789, just four weeks into the first session of the First Congress, Theodore Bland, a congressman from Virginia, introduced a motion calling for a convention pursuant to Article V of the Constitution. *Id.* at 76. The next day, John Laurance of New York presented an application from the New York legislature for a second constitutional convention. *Id.* at 77.

²⁰⁶ See *id.* at 82 (identifying the Anti-Federalists as “the vocal minority” in the First House of Representatives). According to Thornton Anderson, Anti-Federalists occupied only ten seats in the House and two seats in the Senate in the First Federal Congress. See THORNTON ANDERSON, CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS 176 (1993) (“Only Virginia sent Antifederalists to the Senate, and a mere ten were elected to the House.”).

²⁰⁷ See GOLDWIN, *supra* note 157, at 80–82 (discussing Madison's strategy in changing his focus toward enacting a bill of rights).

he did see them as essential to quell fears excited by the Anti-Federalists.²⁰⁸

On June 8, 1789, Madison proposed the following as one of his amendments: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.”²⁰⁹ Madison did not propose language corresponding to his principle of “non-cognizance,” which he had set forth in his “Memorial and Remonstrance.”²¹⁰ Instead, he proposed text that directly targeted Anti-Federalist arguments. He specifically addressed the Anti-Federalists’ concern over a uniform national religion by prohibiting Congress from establishing one. Madison included a statement extending blanket protection to the rights of conscience and, moreover, he further specified that civil rights would not be abridged on account of religion.

Madison, furthermore, rejected Virginia’s no-preference approach, as can be seen by the omission in his text of anything like Virginia’s proposed no-preference provision.²¹¹ For the same reasons Madison led the opposition against Henry’s general assessment bill in Virginia, he presumably would have objected to a non-preferential legislation at the national level. Madison’s proposed text, however, most likely had nothing to do with prohibiting or allowing federal non-preferential aid to religion as such. As he made clear in the Virginia ratifying convention, because the national government possessed only the powers delegated to it, Madison believed there was “not a shadow of right in the general government to intermeddle with religion.”²¹² The national government’s “least interference” with religion, he declared, “would be a most flagrant usurpation.”²¹³ Since Madison did not think Congress possessed power to aid religion as such—whether in a non-preferential manner or not—he may have

²⁰⁸ See, e.g., McConnell, *supra* note 113, at 1476–77 (“Like other proponents of the Constitution of 1787, Madison initially lacked enthusiasm for adding a Bill of Rights, though he came to recognize the need for one to assuage the demands of the Antifederalist opposition.”).

²⁰⁹ 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1790).

²¹⁰ See, e.g., PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 105 (2002) (noting that Madison’s proposed 1789 constitutional amendments were “a far cry from Madison’s position in 1785 that religion was ‘wholly exempt’ from the cognizance of civil society”). Vincent Philip Muñoz sets forth Madison’s “non-cognizance” position in his article *James Madison’s Principle of Religious Liberty*, *supra* note 90. Muñoz defines Madison’s role in drafting the First Amendment at the First Federal Congress as influential, but restrained by the emphasis on compromise. *Id.* at 25–27. For a competing interpretation that views Madison as the driving force behind the drafting, see Irving Brant, *Madison: On the Separation of Church and State*, 8 WM. & MARY Q. 3, 14–15 (1951).

²¹¹ See *supra* text accompanying notes 187–89 (discussing Virginia’s proposed no-preference amendment).

²¹² James Madison, Statement at the Virginia Ratifying Convention, *supra* note 175, at 330.

²¹³ *Id.*

feared that no-preference text too easily could have been misconstrued to suggest that Congress possessed jurisdiction over religion. We ought to remember that although Madison was a nationalist in 1789, he would not remain one for long.²¹⁴ Whatever the reason, Madison did not introduce for congressional consideration anything like the no-preference text proposed by Virginia.

The House responded to Madison's proposal with irritation and opposition.²¹⁵ Most members did not want to be bothered with something they thought unnecessary and a waste of time.²¹⁶ Sensing that he would get nowhere with the full House, Madison managed to have consideration of amendments moved to committee.²¹⁷ In committee, his original text was modified to state: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed."²¹⁸

As described in the first section of this Article, the First Congress's debate over the text of what would become the Establishment Clause has received exhaustive academic and judicial scrutiny. The nature of that debate, however, has been completely misperceived. The debate was not between those who favored non-preferential aid on the one hand and those who opposed any government aid on the other. In fact, to use the term "debate" is something of a misnomer. The records of the First Congress would be described more accurately as a brief, Federalist-dominated discussion over how to phrase an amendment that would not alter Congress's power yet would satisfy the Constitution's critics.

After more pleading from Madison, the full House finally took up consideration of amendments on August 15, 1789. The committee's text met two immediate criticisms. Congressman Sylvester feared that the text might be misconstrued so as "to abolish religion alto-

²¹⁴ For a general discussion of the consistency and change in Madison's thought, see MARVIN MEYERS, *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* (1973).

²¹⁵ See GOLDWIN, *supra* note 157, at 77-78 (summarizing the reaction to Madison's attempt to introduce what would become the Bill of Rights as follows: "[Madison's] motion generated an immediate storm of complaint and opposition. One member after another rose to object to any delay of their important legislative business").

²¹⁶ Samuel Livermore, for example, objected that "he could not say what amendments were requisite, until the [new national] Government was organized." 1 ANNALS OF CONG. 465 (Joseph Gales ed., 1790). Roger Sherman claimed, "It seems to be the opinion of gentlemen generally, that this is not the time for entering upon the discussion of amendments: our only question therefore is, how to get rid of the subject." *Id.* at 466. John Vining repeated the standard Federalist argument "that a bill of rights was unnecessary in a Government deriving all its powers from the people." *Id.* at 467.

²¹⁷ See GOLDWIN, *supra* note 157, at 79 ("Madison . . . brought this heated procedural controversy to an abrupt end by simply ignoring it. He withdrew his motion to go into a committee of the whole, moved instead that a select committee be appointed . . .").

²¹⁸ 1 ANNALS OF CONG. 757 (Joseph Gales ed., 1790).

gether.”²¹⁹ Congressman Huntington, similarly, worried that it might “be extremely hurtful to the cause of religion.”²²⁰ Roger Sherman, on the other hand, “thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the [C]onstitution to make religious establishments.”²²¹ Madison’s response applied equally to both reservations. He is recorded as saying that

he apprehended the meaning of the words to be, that *Congress* should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions.²²²

Madison made clear that the purpose of his amendment was to recognize restrictions on congressional power. He meant to assure Sylvester and Huntington that the amendment would not abolish state establishments, which seems to have been their fear. Madison all but conceded Sherman’s point that, strictly speaking, the amendment is unnecessary, but he reminded his Federalist colleagues that it had been demanded along with ratification.²²³ Madison went on to suggest that reinserting the word “national” before religion (as he had originally proposed), would “point the amendment directly to the object it was intended to prevent,” namely that one or two sects might gain pre-eminence “and establish a religion to which they would compel others to conform.”²²⁴

Regardless of Madison’s specific intentions, at this point the First Congress made a decisive turn away from his proposed language. Samuel Livermore, who “did not wish them to dwell long on the subject,” proposed New Hampshire’s text: “Congress shall make no laws touching religion, or infringing the rights of conscience.”²²⁵ New Hampshire’s language more clearly acknowledged Congress’s lack of power to make a national establishment or to violate the rights of conscience and to recognize state sovereignty over establishments.²²⁶

²¹⁹ *Id.*

²²⁰ *Id.* at 758.

²²¹ *Id.* at 757.

²²² *Id.* at 758 (emphasis added).

²²³ See GOLDWIN, *supra* note 157, at 40 (concluding that the promise to consider amendments immediately after ratification “almost certainly saved the Constitution from ultimate defeat”).

²²⁴ 1 ANNALS OF CONG. 758–59 (Joseph Gales ed., 1790).

²²⁵ *Id.* at 759. Livermore was instrumental in bringing about New Hampshire’s ratification of the Constitution.

²²⁶ According to Justice Souter, “Livermore’s proposal would have forbidden laws having anything to do with religion and was thus not only far broader than Madison’s version, but broader even than the scope of the Establishment Clause as we now understand it.” *Lee v. Weisman*, 505 U.S. 577, 612–13 (1992) (Souter, J., concurring). Justice Souter seems not to have consid-

After an Anti-Federalist rant by Elbridge Gerry, New Hampshire's text was immediately adopted on August 15, 1789.²²⁷

Thereafter, no substantive discussion is found in the House records regarding the language that would become the Establishment Clause. On August 20, 1789, the text was altered to read, "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."²²⁸ The replacement of "establishing" for "touching" more clearly focused attention on establishments, but why the House made the change is not illuminated by the available record. Perhaps Congress was leery of "no laws touching religion" because such language conceivably could have been interpreted to reduce Congress's then-existing powers. Under Livermore's language, if Congress, pursuant to its Article I powers, passed a law that did not amount to an establishment but that "touched religion"—for example, a law exempting conscientious religious objectors from federal military service—the law's constitutionality conceivably could have been challenged. But whether any member of Congress voiced such a concern is a matter of speculation. More important to note is that the general structure of the text remained unchanged. The House followed New Hampshire's federal formulation, adopting text that recognized Congress's lack of power over religious establishments. It never considered anything like Virginia's "no preference" proposal because Madison dismissed it from the outset.

On September 3, 1789, the Senate began considering the language approved by the House.²²⁹ Inferences about senators' intentions must be drawn tentatively, because no record exists of their debate. It appears that the Senate engaged in deliberation over how extensively Congress's powers should be circumscribed. They immediately rejected three narrow alterations that would have limited Congress's power only to establish "one religious sect or society in preference to others," "establishing any religious sect or society," or "establishing any particular denomination of religion in preference to another."²³⁰ Each of these proposals was a version of Patrick Henry's Virginia submission. Each could have been interpreted to augment congressional power, implicitly allowing Congress to legislate on religious matters so long as it did so in a non-preferential

ered that federalism might relate to the original purpose of the Establishment Clause in general or Livermore's proposal in particular.

²²⁷ See 1 ANNALS OF CONG. 759 (Joseph Gales ed., 1790) ("[T]he question was then taken on Mr. Livermore's motion, and passed in the affirmative, thirty-one for, and twenty against it.").

²²⁸ *Id.* at 796.

²²⁹ 1 JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA 70 (Gales & Seaton 1820) (1789).

²³⁰ *Id.*

manner. In something of a reversal, on September 9, 1789, the Senate adopted language even narrower than that suggested by the Virginia Ratifying Convention: “Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion”²³¹ It sent this language back to the House.²³²

When the House received the Senate’s version, they called for a joint committee to resolve the differences between the House and Senate versions.²³³ Justice Souter, it will be recalled, bases his strict-separationist interpretation of the Establishment Clause in *Lee v. Weisman* on that committee’s rejection of the narrow Senate proposal.²³⁴ But Souter misconceives the nature of the alternatives faced by the joint committee. They did not, as he claims, face a choice between non-preferential language on the one hand and strict-separationism on the other. Rather, the committee had before them the two types of Anti-Federalist amendments that emerged from the state ratifying conventions: the House-proposed, New Hampshire-inspired federalism text and the Senate-proposed, Virginia-inspired regulation language. Congress faced the choice between adopting text that would recognize its lack of power (the House proposal) or language that would regulate its power and thereby, arguably, augment it (the Senate proposal).

No record exists of the joint committee’s deliberations, but the outcome speaks for itself. The committee adopted language that was unmistakably federal: “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise

²³¹ *Id.* at 77.

²³² Despite recognizing that “in many of the debates in the preconstitutional period, the concepts of ‘liberty of conscience’ and ‘free exercise of religion’ were used interchangeably,” Michael McConnell claims that the First Congress’s adoption of the latter over the former is “of utmost importance.” McConnell, *supra* note 113, at 1488–89. “Free exercise,” he claims, extends the First Amendment’s guarantees beyond “liberty of conscience” in three ways: (1) “free exercise” protects religiously-motivated conduct (in addition to belief); (2) it encompasses the corporate or institutional aspects of religious belief (in addition to individual judgment); and (3) it singles out religion alone (as opposed to non-religious, deeply held convictions) for special treatment. *Id.* at 1488–91. I believe that McConnell is mistaken to the extent that he ascribes such distinctions to the Framers of the First Amendment. From the Framers’ contemporaneous uses of the terms, no evidence exists to distinguish “liberty of conscience” or “rights of conscience” from “free exercise of religion.” The joint committee most likely employed the term “free exercise” instead of “liberty of conscience” or “rights of conscience” because the last formulation adopted by the Senate employed this phrase.

²³³ 1 ANNALS OF CONG. 939 (Joseph Gales ed., 1790).

²³⁴ See *Lee v. Weisman*, 505 U.S. 577, 614–15 (1992) (Souter, J., concurring) (“The House conferees [of the joint committee] ultimately won out, persuading the Senate to accept this as the final text of the Religion Clauses: ‘Congress shall make no law respecting an establishment of religion’ What is remarkable is that . . . [t]he Framers repeatedly considered and deliberately rejected . . . narrow language and instead expanded their prohibition to state support for ‘religion’ in general.”).

thereof”²³⁵ The key to unlocking the meaning of the Establishment Clause lies in understanding the words “respecting an,”²³⁶ which were added by the joint committee. Then, as now, the present participle “respecting” means “with reference to, [or] with regard to.”²³⁷ The added words reveal a precise intention—to indicate that Congress lacked power with reference or regard to a religious establishment. By adopting “respecting an,” the joint committee drafted a solution to the problem of how to craft language that would specify that Congress lacked power to legislate a national establishment or to interfere with existing state establishments (or lack thereof) without implicitly granting to Congress power to pass church-state legislation short of the stated prohibition.²³⁸ To restate the problem, if the committee drew a specific line that Congress could not pass (as proposed in the Senate), future congressional members might interpret their power to include everything short of that line. “Respecting an” offered a precise solution to this problem by indicating that Congress lacked power in the entire realm of religious establishments. Unlike the other First Amendment participles “prohibiting” and “abridging,” which regulate but do not categorically deny Congress power, “respecting” indicates Congress’s lack of jurisdictional authority over an entire subject matter. The Establishment Clause thus made clear that Congress lacked power to legislate a national establishment or to pass legislation directly regarding state establishments (or the lack thereof).²³⁹ Of course, Federalists in the First Congress, such as Roger Sherman, thought this was how the matter stood without an amendment.²⁴⁰ With the addition of “respecting an,” Congress found language that did not affect the existing power of Congress (from the

²³⁵ U.S. CONST. amend. I.

²³⁶ *Id.*

²³⁷ 2 NEW SHORTER OXFORD ENGLISH DICTIONARY 2565 (4th ed. 1993).

²³⁸ Noah Feldman claims that “there is no evidence in the debates that the last-minute change of language to ‘respecting an establishment of religion’ was intended to protect existing state establishments.” Feldman, *supra* note 15, at 407. Feldman does not comprehend, however, the political context that led to the Bill of Rights. Specifically, he fails to consider the Anti-Federalist criticisms that led to the drafting of the Establishment Clause. He thus also fails to understand why the drafters of the First Amendment sought to reaffirm the federal character of the Constitution regarding religious establishments.

²³⁹ See, e.g., Porth & George, *supra* note 106, at 136–37 (“The obvious meaning of ‘respecting an’ establishment of religion, then as now, is ‘regarding,’ or ‘having to do with,’ or ‘in reference to’ such an establishment. And these words are broad enough to cover both a possible national establishment and actual (and potential) state establishments. They call particular attention to the constitutional disentanglement of the federal government to make any law setting up an established church at the federal level or interfering with established churches (and the right of the people to opt to establish churches) at the state level.”).

²⁴⁰ See *supra* text accompanying note 221 (quoting Roger Sherman for the proposition that the First Amendment was unnecessary as Congress could only act where the Constitution delegated power).

Federalists' viewpoint) yet would satisfy the fears aroused by Anti-Federalist criticisms that the Constitution threatened religious freedom. It was a remarkable feat of constitutional craftsmanship.

IV. IMPLICATIONS OF THE ESTABLISHMENT CLAUSE'S ORIGINAL FEDERAL MEANING

A. *The Impossibility of Incorporating the Establishment Clause's Original Meaning*

The Framers adopted the precise wording “respecting an establishment”²⁴¹ to convey their intention of leaving the question of religious establishments to the states. With the Establishment Clause, the First Congress did not adopt a principled understanding of the proper relationship between church and state. It did not constitutionalize a personal right of “non-establishment.” The original meaning of the Establishment Clause, in fact, is neutral toward religious establishments as it protects state establishments (or lack thereof) while also acknowledging the lack of federal power over religion. When the *Everson* Court interpreted the Establishment Clause to erect a “wall of separation” between church and state, and applied that interpretation against the states,²⁴² it departed from the Founding Fathers' original meaning.

The *Everson* Court necessarily had to discard the Establishment Clause's original meaning to apply the provision against the states. Because the original meaning only recognizes a jurisdictional boundary that protects state authority, it cannot logically be incorporated to apply against state governments. The doctrine of “incorporation” set forth by Justice Benjamin Cardozo in *Palko v. Connecticut* holds that the “liberty” protected by the Due Process Clause of the Fourteenth Amendment protects those “fundamental” rights “implicit in the concept of ordered liberty.”²⁴³ No shortage of debate exists over the question of what rights are “fundamental” and “implicit in the concept of ordered liberty”; but for any provision of the Bill of Rights to be eligible for incorporation, it must protect a personal right—some

²⁴¹ U.S. CONST. amend. I.

²⁴² See *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (“Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups . . . [T]he clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.’” (citation omitted)).

²⁴³ 302 U.S. 319, 325 (1937). For a general overview of the concept of “incorporation,” including the various understandings of it, see HENRY J. ABRAHAM & BARBARA A. PERRY, *FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES* 47–91 (7th ed. 1998).

substantive right must exist that can be applied against the states.²⁴⁴ As adopted by the Framers, the Establishment Clause fails to meet this criterion because it does not protect a personal right of “non-establishment” or contain a substantive right to live under a government with the “separation of church from state.” In this way, the Framers’ Establishment Clause is different than the provisions of the First Amendment that protect the personal rights of freedom of speech and assembly. Like the Tenth Amendment, which reserves to the states and to the people the powers not delegated to the federal government, the Establishment Clause’s original meaning pertains to jurisdiction, and, therefore, cannot be applied against the states.

B. The Limited Relevance of the Founding Fathers for Incorporated Establishment Clause Jurisprudence

A construction of the Establishment Clause strictly faithful to its original meaning would require disincorporation and the overturning of nearly sixty years of “no-establishment” jurisprudence. Following the Framers’ intentions, the Establishment Clause only would prohibit the federal government from encroaching upon state authority to legislate on matters of religion. States would be free to aid or not to aid religion, subject only to their own constitutions and other incorporated provisions of the federal Constitution, including the First Amendment’s free exercise and free speech protections. Landmark cases that banned prayer in public schools,²⁴⁵ disallowed public funding of religious schools,²⁴⁶ and prohibited public religious displays²⁴⁷ (to take a few leading examples) could not be sustained as Establishment Clause violations.²⁴⁸ A disincorporated Establishment

²⁴⁴ For a discussion of this point specifically in reference to the jurisdictional character of the Establishment Clause, see SMITH, *supra* note 106, at 22–26.

²⁴⁵ See, e.g., *Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963) (holding that a state law mandating daily Bible reading in public schools violated the Establishment Clause).

²⁴⁶ See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 607 (1971) (striking down as unconstitutional two state statutes that provided financial support of private school teachers’ salaries and education supplies for the instruction of certain secular subjects).

²⁴⁷ See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 601–02 (1989) (prohibiting the display of a crèche during the holiday season in a county courthouse as violating the Establishment Clause).

²⁴⁸ Even though Akhil Amar finds that the Establishment Clause is not incorporable, he concludes that

it turns out that the question—should we incorporate the establishment clause?—may not matter all that much, because even if we did not [incorporate the Establishment Clause], principles of religious liberty and equality could be vindicated via the free exercise clause (whose text, history, and logic make it a paradigmatic case for incorporation) and the equal-protection clause (which frowns on state laws that unjustifiably single out some folks for special privileges and relegate others to second class status).

AMAR, *supra* note 106, at 254. Amar assumes that the principles of religious liberty and equality protected by the Free Exercise and Equal Protection Clauses are the same as those articulated

Clause would be jurisdictional, serving as a reminder that the federal government is one of limited, delegated powers, and that direct legislation on matters pertaining to religion is not one of those powers.

While disincorporation is logically possible, no sitting Supreme Court Justice, except Clarence Thomas,²⁴⁹ has suggested that he or she would entertain such a massive change in constitutional law. Incorporation has long been accepted and the sheer force of time would seem to ensure that the Establishment Clause will remain applicable against the states.²⁵⁰ The Supreme Court has failed to acknowledge, however, that incorporation necessarily means that the original meaning of the Establishment Clause cannot be applied to modern cases. With incorporation, an “originalist” approach to the Establishment Clause requires a partial or distorted recreation of history.

An “originalist” approach to an incorporated Establishment Clause, in fact, should lead inquiry away from the Founding Fathers and to the thoughts and intentions of those who drafted the Fourteenth Amendment. If the framers of the Fourteenth Amendment intended to apply the Establishment Clause against the states, then their understanding of what principle they incorporated becomes authoritative from an “originalist” perspective. Whether the framers of the Fourteenth Amendment did intend to incorporate any part of the Bill of Rights is a matter of long-running dispute that exceeds the scope of this Article.²⁵¹ With regard specifically to the Establishment

by the modern Supreme Court under its incorporated no-establishment jurisprudence. His breezy treatment of the matter, though, understates the significance of non-incorporability of the Establishment Clause. Amar’s conclusions should be compared to Andrew Koppelman’s, who discards as “unpersuasive” Amar’s conclusion that the non-incorporability of the Establishment Clause would not have significant implications for “no-establishment” jurisprudence. See Andrew Koppelman, *Akhil Amar and the Establishment Clause*, 33 U. RICH. L. REV. 393, 402, 404 (1999) (reviewing AMAR, *supra* note 106) (“[I]f Amar’s theory is accepted . . . , the present Establishment Clause constraints on the states must be abandoned. . . . A general problem with originalism [or] textualist [theories] . . . is that it may produce prescriptions that radically disrupt the status quo with no practical payoff other than greater fidelity to the theory. Amar’s theory, if taken as a complete theory of incorporation, would give no weight to the fact that . . . the law is well settled and nobody is particularly anxious to change it.”).

²⁴⁹ See *supra* Part I.C for a discussion of Justice Thomas’s federalist interpretation of the Establishment Clause.

²⁵⁰ On the settled nature of incorporation in general, see, for example, *Albright v. Oliver*, 510 U.S. 266, 275 (1994), in which Justice Scalia, in his concurrence, stated that incorporation is “an extension I accept because it is both long established and narrowly limited,” and ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 94 (1990), in which Bork conceded that “as a matter of judicial practice the issue [of incorporation] is settled.”

²⁵¹ See, e.g., RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 9–19 (1989) (discussing the “selective incorporation” of the Fourteenth Amendment and arguing that it was intended to be narrow in scope); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 167–70 (1986) (analyzing the claim that the Framers of the Fourteenth Amendment intended it to apply to the states and restrict

Clause, however, little evidence exists to suggest that they clearly did intend to apply a personal right of “non-establishment” against the states. During the period surrounding the adoption of the Fourteenth Amendment, the different congressmen who catalogued the personal rights protected by the First Amendment (and thus arguably by the Fourteenth Amendment) spoke only of “free exercise” or of “freedom of conscience;” none spoke of a personal right of “non-establishment.”²⁵² So even if the framers of the Fourteenth Amendment understood the “privileges and immunities” of United States citizenship (or “due process”) to include the personal rights protected by the Bill of Rights, it is not clear that they identified “non-establishment” as such a right.²⁵³

The proposal and rejection of the Blaine Amendment in 1875, moreover, further suggests that the Fourteenth Amendment was not understood to have incorporated the Establishment Clause. The amendment, which passed in the House but failed to win approval in the Senate, would have prohibited states from making any law “respecting an establishment of religion or prohibiting the free exercise thereof.”²⁵⁴ Such language would have been redundant if the Fourteenth Amendment had already applied the Establishment Clause

their action); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 86–87 (1949) (citing the actions of New Hampshire in an effort to analyze whether the Fourteenth Amendment was intended to incorporate the Bill of Rights).

²⁵² AMAR, *supra* note 106, at 253. Akhil Reed Amar provides the following endnote to support his statement that the congressmen spoke only of “free exercise” and “freedom of conscience” and failed to discuss “nonestablishment”:

CONG. GLOBE, 36th Cong., 1st Sess. 198 app. (1860) (remarks of Rep. W.E. Simms); CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (remarks of Rep. James Wilson); CONG. GLOBE, 39th Cong., 1st Sess. 105–58, 1072, 1629 (1866) (remarks of Rep. John Bingham, Sen. James Nye, and Rep. Roswell Hart); CONG. GLOBE, 42nd Cong., 1st Sess. 84–85 app., 475 (1871) (citing the remarks of Reps. John Bingham and Henry Dawes); *see also* M. CURTIS, *supra* note 9, at 135, 139–40 (quoting similar speeches outside of Congress by Judge Lorenzo Sherwood and Judge Preston Davis); *United States v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (No. 15,282) (Woods, J.) (stressing speech, press, assembly, and free exercise rights as Fourteenth Amendment privileges and immunities while omitting mention of establishment clause).

Id. at 385 n.91; *see also* Lash, *Rise of the Nonestablishment Principle*, *supra* note 106, at 1146–49 (arguing that suggested amendments spoke of the friction between Catholic and Protestant religions rather than the issue of incorporation against the states).

²⁵³ *But c.f.* Lash, *Rise of the Nonestablishment Principle*, *supra* note 106, at 1088 (arguing that the Framers of the Fourteenth Amendment did intend to incorporate the Establishment Clause and meant for it to prohibit any government from either supporting or suppressing religion as religion).

²⁵⁴ The text of the Blaine Amendment read in full:

No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

H.R. Res. 1, 44th Cong. (1875).

against the states.²⁵⁵ The Blaine Amendment, furthermore, was debated in Congress only seven years after the ratification of the Fourteenth Amendment. The Congress that debated it included twenty-three members of the Congress that had approved the Fourteenth Amendment (including Blaine himself), two members who had been on the committee that drafted the Fourteenth Amendment,²⁵⁶ and more than fifty members who had served in the legislatures of the states that considered the Fourteenth Amendment in 1867 and 1868.²⁵⁷ This overlap suggests that, at a minimum, a significant portion of those who drafted and ratified the Fourteenth Amendment did not understand it to incorporate the Establishment Clause.

If the framers of the Fourteenth Amendment did not intend to apply the Establishment Clause against the states, then no legislative intention or original meaning exists that an “originalist” approach can adopt for incorporated “no-establishment” jurisprudence. Stated differently, if it is impossible to deduce a non-jurisdictional principle of “no-establishment” associated with either the original meaning of

²⁵⁵ The significance of the Blaine Amendment for the general debate over incorporation has been exhaustively treated elsewhere. See CURTIS, *supra* note 251, at 169–70 (critiquing scholars’ claims that the Framers of the Fourteenth Amendment failed to intend for the amendment to require the Bill of Rights to apply against the states); Raoul Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis’ Response*, 44 OHIO ST. L.J. 1, 16–17 (1983) (“The Blaine Amendment constitutes striking, contemporary testimony that the fourteenth amendment was not considered to embrace the Bill of Rights.”); Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435, 464–65 (1981) (discussing how the proposal of the Blaine Amendment served as the “clincher” in proving that the Framers of the Fourteenth Amendment did not intend it to incorporate the Bill of Rights); Raoul Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 NW. U. L. REV. 311, 346–47 (1979) (claiming that the Blaine Amendment served as proof that Justice Black’s interpretation of incorporation was “not generally shared and w[as] untenable”); Michael Kent Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89, 114–15 (1982) (arguing that the Blaine Amendment does not prove a consensus among the Fourteenth Amendment Framers on the incorporation debate); Lash, *Rise of the Nonestablishment Principle*, *supra* note 106, at 1145–50 (arguing that the Blaine Amendment’s rejection serves as only weak evidence against incorporation, but rather that “it is questionable that the Blaine Amendment had anything to do with the principles of nonestablishment or Free Exercise”); Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939, 941 (1951) (discussing the importance of the Blaine Amendment in discrediting the idea that the Fourteenth Amendment was intended to incorporate religious provisions of the First Amendment); F. William O’Brien, *The Blaine Amendment 1875–1876*, 41 U. DET. L.J. 137, 195–205 (1963) (providing an extensive analysis of the Blaine Amendment and its history); Note, *Rethinking the Incorporation of the Establishment Clause*, *supra* note 106, at 1713 (stating that “[i]f the Fourteenth Amendment had incorporated the Establishment Clause, the Blaine Amendment would have been superfluous” and, therefore, its defeat “casts considerable doubt upon the proposition that the Fourteenth Amendment was intended to incorporate the Establishment Clause”).

²⁵⁶ See Meyer, *supra* note 255, at 941 n.14 (listing the members of the Congress).

²⁵⁷ See F. William O’Brien, *The States and “No Establishment”: Proposed Amendments to the Constitution Since 1798*, 4 WASHBURN L.J. 183, 208 n.105 (1965) (noting that many of the legislators who had voted on the Blaine Amendment had also debated ratification of the Fourteenth Amendment).

the First Amendment or the adoption of the Fourteenth Amendment, an “originalist” approach to the incorporated Establishment Clause becomes impossible.

Such a historical lacuna, ironically, could lead “no-establishment” jurisprudence back to the Founding Fathers. Incorporation requires the construction of a judicial principle of “no-establishment.” Given that the Founders were immersed in the task of Constitution writing and that they extensively debated the proper relationship between church and state, they might be considered a natural place to begin the sustained reflection necessary to construct a sound constitutional principle of church-state relations. A return to the Founders, however, could only begin—not end—deliberation. As discussed above, leading Founders disagreed over the proper relationship between church and state. Some founders, like George Washington and Patrick Henry, defended non-sectarian support of religion of the sort that was adopted in the Massachusetts Constitution of 1780.²⁵⁸ Other founders, like Thomas Jefferson and James Madison, railed against state support of religion as such.²⁵⁹ So if the Founding Fathers are consulted and a Washingtonian or Madisonian approach to church-state questions is adopted, it would not and could not reflect the Establishment Clause’s original meaning or the intentions of those who adopted the text. Incorporation, accordingly, strips the Founders of their special authorial status; with incorporation the original meaning of the Establishment Clause cannot be adopted.

CONCLUSION

Justice William Brennan once criticized “originalism” as “little more than arrogance cloaked as humility.”²⁶⁰ While not directed at Establishment Clause jurisprudence specifically, his criticism accurately describes the Supreme Court’s twentieth century “originalist” Establishment Clause jurisprudence. The precise and clear intention and meaning of those who drafted the Establishment Clause has been lost on the modern Supreme Court, which, with the recent exception of Justice Thomas, has failed to appreciate the Founders’ original concern with federalism.²⁶¹ The modern Court’s “originalist” failures

²⁵⁸ See, e.g., text accompanying notes 116, 119–21, 132 (discussing Washington’s and Henry’s views that religion ought to receive government support).

²⁵⁹ See, e.g., text accompanying notes 136–48 (noting Jefferson’s and Madison’s efforts to end state involvement in religion).

²⁶⁰ William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 23, 25 (Jack N. Rakove ed., 1990).

²⁶¹ It should be noted that Justice Potter Stewart, in a short dissenting opinion that did not attempt to elaborate fully the Establishment Clause’s original meaning, also recognized the

can be traced in part to the Justices' lack of attention to basic facts from the history of the American founding. Aside from Justice Thomas's *Newdow* concurrence, every significant "originalist" church-state opinion has assumed that the Framers shared a uniform principle of "no establishment" or "separation" and that they set forth this principle in the Establishment Clause.²⁶² The Court has ignored the historical context that led to the adoption of the Bill of Rights, which has led it to overlook the Founders' concern with federalism.

Perhaps the most distressing implication of uncovering the Founders' concern with federalism is that it reveals the modern Supreme Court's alarming misuse of history. In *Everson*, the Court assumed, seemingly without consideration, that the Establishment Clause could be incorporated to apply against the states.²⁶³ Nothing in that case indicates that Justices Black or Rutledge paused to consider that the framers of the First Amendment might have been primarily concerned with federalism.²⁶⁴ The unreflective manner by which the *Everson* Court incorporated the Establishment Clause is illustrated by Justice Black's deficient historical analysis.²⁶⁵ He mistakenly asserted that Jefferson played a leading role in the drafting and adoption of

Framers' concern with federalism: "[T]he Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments." *Sch. Dist. v. Schempp*, 374 U.S. 203, 309–10 (1963) (Stewart, J., dissenting).

²⁶² See *supra* Part I.

²⁶³ See Glendon & Yanes, *supra* note 106, at 481 ("As a matter of judicial craftsmanship, it is striking in retrospect to observe how little intellectual curiosity the members of the Court demonstrated in the challenge presented by the task of adapting, for application to the states, language that had long served to protect the states against the federal government.").

²⁶⁴ See Esbeck, *supra* note 104, at 1576 ("Scholars delight in pointing out this [federalism] purpose, for it is an embarrassment to the U.S. Supreme Court, which completely overlooked this federalism feature in deciding *Everson v. Board of Education*. The no-establishment restraint was said by the *Everson* Court to be applicable to state and local governments under the Due Process Clause of the Fourteenth Amendment, a complete inversion of this first purpose of the Establishment Clause."); Glendon & Yanes, *supra* note 106, at 491–92 ("With hindsight, incorporation in the 1940s posed formidable legal-political challenges that should have called forth every ounce of energy, wit, technical skill, and legal imagination available to the Court. Yet it is hard to escape the impression in reading the decisions of that era that—regardless of outcomes—serious issues were overlooked, important claims and arguments were rather lightly dismissed, and practical implications for the lives of countless Americans were regularly ignored. The Court skipped carelessly over formidable problems of interpretation that required sustained attention to the language, history, and purposes of the original Constitution, the Bill of Rights, the Fourteenth Amendment, and the relation among them in the modern regulatory state.").

²⁶⁵ See, e.g., SMITH, *supra* note 106, at 5 (referring to the Court's "dismal historical performance" in *Everson*). According to Hugo Black's biographer, Justice Black did not peruse the proceedings of the First Congress until "[a]fter *Everson* was decided." ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 365 (1994).

the First Amendment.²⁶⁶ He failed, moreover, to provide any evidence for the linchpin of his opinion—that the First Federal Congress intended to provide the same protection of religious liberty as Jefferson’s Virginia Statute.²⁶⁷ Justice Rutledge compounded Justice Black’s errors by his interpretation of “respecting an.” He missed the federal meaning of the phrase, interpreting it instead to mean that “not simply an established church, but any law respecting an establishment of religion is forbidden.”²⁶⁸ Justice Rutledge thus transformed a statement of federalism into an expansive principle of separation.

On the contemporary Court, Justice Souter has accepted *Everson’s* incorporation framework, and, to that extent, his Establishment Clause opinions suffer from the same fatal misconceptions as Justices Black’s and Rutledge’s. To his credit, Justice Souter has made a serious attempt to ground his interpretations in the historical record, but he has approached that record in light of the late twentieth-century “strict-separationist”/“non-preferentialist” paradigm. As such, he distorts the Framers’ intentions, fitting their positions into modern-day jurisprudential categories with which the First Congress was ultimately unconcerned. Perhaps because he has become aware of the problems with his earlier historical claims, Justice Souter in the 2005 Ten Commandments case, *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, depicted his “neutrality” interpretation of the Establishment Clause as only reflecting “[a] sense of the past,” not as capturing the text’s original meaning simply.²⁶⁹

Like Justice Souter, Justice Rehnquist never reconsidered *Everson’s* primary assumption that the Establishment Clause contains within it a principle of “no establishment.” Thus, he too failed to set forth an interpretation that accurately reflects the Founders’ federal intentions. Justice Thomas alone has approached the Establishment Clause with historical accuracy, although he has not offered an ade-

²⁶⁶ See *Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1947) (noting that “Jefferson played [a] leading role[]” in the drafting and adoption of the First Amendment).

²⁶⁷ Justice Black applied, furthermore, an interpretation of Jefferson’s “wall of separation” metaphor that has been undermined by recent historical scholarship. See, e.g., DREISBACH, *supra* note 106, at 56 (arguing that the “wall” was intended to create two distinct separations: one between the federal government and religious institutions, and another between federal and state governments on matters concerning religion and thereby preventing federal influence on religious practices endorsed by state governments); Daniel Dreisbach, *Another Look at Jefferson’s Wall of Separation: A Jurisdictional Interpretation of the “Wall” Metaphor* (2000), available at <http://www.frc.org/get.cfm?i=WT00G4> (“Jefferson’s ‘wall’ was a metaphoric construction of the First Amendment, which governed relations between religion and the national government. His ‘wall,’ therefore, did not specifically address relations between religion and state authorities.”).

²⁶⁸ *Everson*, 330 U.S. at 31 (Rutledge, J., dissenting).

²⁶⁹ *McCreary County v. ACLU*, 125 S. Ct. 2722, 2742 (2005).

quate account as to why the Framers were concerned with federalism. Justice Thomas's *Newdow* opinion, moreover, fails to address the sweeping implications of what a return to the Founders' intentions would require for Establishment Clause jurisprudence.

A jurisprudence that seeks to return to the original meaning of the Establishment Clause requires the disincorporation of the provision. Barring this, the Founding Fathers cannot be cited authoritatively for an "originalist" approach to the First Amendment's Establishment Clause.

