2022

Back to the Sources? What's Clear and Not So Clear About the Original Intent of the First Amendment

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INTRODUCTION

"Back to the sources!" has been a common cry for many human rights movements over the centuries. The papal revolutionaries of

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the twelfth and thirteenth centuries appealed to the Church Fathers to press their case for "freedom of the church."[1] The fifteenth-century Renaissance humanists returned to the pristine sources of ancient Greece and Rome to revive Europe's flagging "human spirit."[2] The sixteenth-century Protestant reformers called for a return to the Bible in arguing for the "Freedom of a Christian."[3] Early modern English jurists turned to their Anglo-Saxon constitutions, French jurists to their Salic law, and German jurists to their ancient constitutional charters to ground their revolutions in the name of human rights and liberties.[4] The eighteenth-century American revolutionaries appealed to the Magna Carta and its natural law foundations to argue for their "unalienable rights of life, liberty and the pursuit of happiness."[5] The nineteenth-century abolitionists and suffragists adduced the Bible, natural law, and the American Declaration of Independence to call for the rights of slaves, women, and racial minorities.[6] Martin Luther King, Jr. appealed to all these sources and others to ground his call for

1. HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983); RENAISSANCE AND RENEWAL IN THE TWELFTH CENTURY (Robert L. Benson, Giles Constable & Carol D. Lanham eds., 1982).

2. JOHAN HUIZINGA, THE WANING OF THE MIDDLE AGES (photo. reprt. 1968) (1924); ERNST CASSIER, AN ESSAY ON MAN: AN INTRODUCTION TO A PHILOSOPHY OF HUMAN CULTURE (1944).

3. JOHN WITTE, JR., LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION 1 (2002); JOHN WITTE, JR., THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM (2007) [hereinafter WITTE, REFORMATION OF RIGHTS].

4. *See* DONALD R. KELLEY, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION 10 (1990).

5. JAMES MULDOON, JOHN ADAMS AND THE CONSTITUTIONAL HISTORY OF THE MEDIEVAL BRITISH EMPIRE (2018); JOHN PHILLIP REID, THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY (2005); DAVID J. BEDERMAN, THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION: PREVAILING WISDOM (2008); JOHN WITTE, JR., THE BLESSINGS OF LIBERTY: HUMAN RIGHTS AND RELIGIOUS FREEDOM IN THE WESTERN LEGAL TRADITION 45–75 (2021).

6. See detailed discussions and sources in John Witte, Jr. & Justin J. Latterell, *Between Martin Luther and Martin Luther King: James Pennington's Struggle for "Sacred Human Rights" Against Slavery*, 31 YALE J.L. & HUMAN. 205, 221–28, 252, 259–68 (2020); Elizabeth Battelle Clark, The Politics of God and the Woman's Vote: Religion in the American Suffrage Movement, 1848–1895, at 47–79, 340–54 (1989) (Ph.D. dissertation, Princeton University) (on file with the Betsy Clark Living Archive, Boston University School of Law); HELEN LAKELLY HUNT, AND THE SPIRIT MOVED THEM: THE LOST RADICAL HISTORY OF AMERICA'S FIRST FEMINISTS (2017).

freedom for "all of God's children."[7] This *ad fontes* appeal, this call to return to the urtexts and the precedents of the tradition to ground revolutionary rights movements is a perennial and prominent feature of Western law and theology.

"Back to the sources" is not only the common *cri de couer* of revolutionaries. It is also, ironically, the common mantra of the conservative American constitutional philosophy of "originalism," sometimes called "textualism."[8] "Originalism" is a canopy term that covers a wide range of views of scholars and judges who encourage interpretation of the United States Constitution in accordance with the original "intent," "meaning," or "understanding" of the eighteenth-century American founders or framers who drafted and ratified the text, and put it into operation after ratification.[9] Originalists and their critics dispute whether "the framers themselves . . . believe[d] such an interpretive strategy to be appropriate."[10] They dispute which founders and which historical texts should be included among the founders and when the American founding era began and ended.[11] They dispute whether the proper focus should be on the final constitutional text alone or (also) on the public meaning and legal uses and applications of the text in the years after its ratification.[12] And they dispute whether the founders' original intent—however determined—governs, constrains, and binds modern judges or only guides, informs, and inspires them in adjudicating

7. JACQUELINE A. BALL, MARTIN LUTHER KING, JR.: I HAVE A DREAM (2006); ROBERT M. FRANKLIN, LIBERATING VISIONS: HUMAN FULFILLMENT AND SOCIAL JUSTICE IN AFRICAN-AMERICAN THOUGHT (1990).

8. Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 545–47 (2006). *See generally* ERIC J. SEGALL, ORIGINALISM AS FAITH (2018).

9. *See generally* DENNIS J. GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM (2005); Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97 (2016); Randy E. Barnett, *An Originalism for Nonoriginalists,* 45 LOY. L. REV. 611 (1999).

10. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 885 (1985); *see also* Mitchell N. Berman, *Originalism is Bunk,* 84 N.Y.U. L. REV. 1 (2009).

11. *See generally* Powell, *supra* note 10, at 885; ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE (2011); FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM (2013); Lawrence B. Solum, *Originalism and Constitutional Construction,* 82 FORDHAM L. REV. 453 (2013); Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate,* 113 NW. L. REV. 1243 (2019).

12. *See* NATHAN S. CHAPMAN & MICHAEL W. MCCONNELL, AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE (forthcoming 2022).

constitutional cases.[13] But here, too, the originalists appeal to the original constitutional text and its framers' aims to ground and legitimize arguments about the rule of constitutional law.

I come to this topic not as a constitutional lawyer but as a legal historian interested in the development of human rights in the West and in understanding key historical human rights texts in their original context.[14] This Article focuses on the urtext of American religious freedom, namely, the First Amendment to the United States Constitution. My goal here is not to press an originalist argument for any particular modern interpretation or school of thought about the First Amendment.[15] It is rather to present the historical data that any originalist has to work with in pressing their interpretation. I focus on where the First Amendment came from, not what it became in the hands of later interpreters. I want to see what is clear, and what is not so clear about the sixteen words that comprise the First Amendment guarantee of religious freedom: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[16]

These First Amendment guarantees of no establishment and free exercise of religion were created by the First Congress in 1789 and ratified by the states in 1791.[17] The final text is clear on some points (like its focus on "*Congress*") but not on others (what does "*respecting an establishment of religion*" mean?). The Congressional record of the debates on these religion clauses is very slender—a mere three pages, as we will see in full below—and we have no record of the debates during the crucial final stages of drafting.[18] We learn some more from the state ratification debates about religious freedom—first in the states' response to the 1787 draft Constitution, then in their debates about the 1789 proposed Bill of

13. *See generally* Powell, *supra* note 10; JACK M. BALKIN, LIVING ORIGINALISM (2011); BRADLEY C. S. WATSON, OURSELVES AND OUR POSTERITY: ESSAYS IN CONSTITUTIONAL ORIGINALISM (2009); DAVID A. STRAUSS, THE LIVING CONSTITUTION 8–31 (2010).

14. *See, e.g.*, WITTE, *supra* note 5; JOHN WITTE, JR., FAITH, FREEDOM, AND FAMILY: NEW ESSAYS ON LAW AND RELIGION (Norman Doe & Gary S. Hauk eds., 2021); WITTE, REFORMATION OF RIGHTS, *supra* note 3; CHRISTIANITY AND HUMAN RIGHTS (John Witte, Jr. & Frank S. Alexander eds., 2010); RELIGION AND HUMAN RIGHTS (John Witte, Jr. & M. Christian Green eds., 2012).

15. For one such recent effort, see DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT (2010); DONALD L. DRAKEMAN, THE HOLLOW CORE OF CONSTITUTIONAL THEORY: WHY WE NEED THE FRAMERS (2020).

16. U.S. CONST. amend. I.

17. *See infra* notes 158–77 and accompanying text.

18. *See infra* note 158 and accompanying text.

Rights, which includes the First Amendment.[19] We learn as well from the eleven states that had already drafted, debated, and ratified their own state constitutional texts on religious freedom by 1784, which were important precedents adduced during the First Amendment discussions.[20] And we learn from the broader discussions of religious freedom among the politicians, preachers, and pamphleteers of the founding generation.

This Article peels through these layers of founding documents before exploring the final sixteen words of the First Amendment religion clauses. Part I explores the founding generation's main teachings on religious freedom, identifying the major principles that they held in common. Part II sets out a few representative state constitutional provisions on religious freedom created from 1776 to 1784. Part III reviews briefly the actions by the Continental Congress on religion and religious freedom issued between 1774 and 1789. Part IV touches on the deprecated place of religious freedom in the drafting of the 1787 United States Constitution. Part V reviews the state ratification debates about the 1787 Constitution and introduces the religious freedom amendments that they proposed to the First Congress tasked with drafting new federal rights language. Part VI combs through all the surviving records of the First Congress' drafts and debates on what became the First Amendment. Part VII parses the final sixteen words of the religion clauses and sifts through what's clear and not so clear about the final words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[21] The Conclusion distills my main findings about the original understanding of the First Amendment and their implications for originalists today.

19. *See infra* notes 142–57 and accompanying text. James Madison urged that the original intent of the Bill of Rights should be sought in "the text itself . . . [and] the sense attached to it by the people in their respective State Conventions, where it recd. all the authority which it possesses." James Madison, *From James Madison to Thomas Richie (September 15, 1821)*, NATIONAL ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/04-02-02-0321 (last visited Feb. 15, 2022). See also the quote from Madison in 5 ANNALS OF CONG. 776 (Gales & Seaton eds., 1855) ("As the instrument came from [the drafter] it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through their several State conventions.") [hereinafter ANNALS].

20. *See infra* notes 78–89 and accompanying text.

21. U.S. CONST. amend. I.

I. FOUNDING PRINCIPLES OF RELIGIOUS FREEDOM

Religious freedom was a common topic of discussion and debate in the American founding era from ca. 1770 to ca. 1800. No one figure or school of thought dominated the founders' discussions. A variety of voices weighed in—federalists and anti-federalists, liberals and republicans, slave-holders and abolitionists, statesmen and philosophers, and churchmen from many denominations: Puritans, Presbyterians, Anglicans, Baptists, Methodists, Quakers, Moravians, and Catholics, most prominently.

Despite their ample differences, these diverse American founders adopted and advocated six common principles of religious freedom: (1) liberty of conscience; (2) free exercise of religion; (3) religious pluralism; (4) religious equality; (5) separation of church and state; and (6) no establishment of a national religion. These six principles—some ancient, some new—appeared regularly in the founders' debates over religious liberty and religion-state relations, although with varying definitions and priorities. They were also commonly incorporated into the original state constitutions, and they helped to shape the First Amendment to the United States Constitution. They remain at the heart of the American experiment today—as central commandments of the American constitutional order and as cardinal axioms of a distinct American logic of religious liberty.[22] A few features of each principle are worth highlighting.

First, the founders embraced the ancient Western principle of liberty or freedom of conscience. For them, liberty of conscience protected religious voluntarism—the "unalienable right of private judgment in matters of religion," the freedom to choose, change, or discard one's religious beliefs, practices, or associations.[23] Faith was not something inherited, predestined, or predetermined by birth, status, or caste, the founders insisted. It was something to be chosen and fashioned by each person using their reason, will, heart, and experience. "The Religion . . . of every man must be left to the

22. JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 24–63 (4th ed. 2016).

23. ELISHA WILLIAMS, THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS 42 (Boston 1744), Evans Early Am. Imprint Collection, https://quod.lib.umich.edu/e/evans/N04455.0001.001?rgn=main;view=fulltext. *See generally* HUGH FISHER, THE DIVINE RIGHT OF PRIVATE JUDGMENT: SET IN A TRUE LIGHT (1731).

conviction and conscience of every man," James Madison wrote, "and it is the right of every man to exercise it as these may dictate."[24]

For the founders, the constitutional guarantee of freedom of conscience protected believers not only from traditional forms of torture, inquisitions, pogroms, imprisonment, heresy trials, and other such forms of "soule rape," in Roger Williams' pungent phrase.[25] It also protected them from official or popular coercion, pressure, or inducements to accept certain religious beliefs or practices or face penalties and deprivations for choosing another.[26] In addition, this guarantee permitted persons to claim exemptions and accommodations from military conscription orders, oath-swearing requirements, state-collected church taxes, or comparable general laws that conflicted with their core claims of conscience.[27] As George Washington put it: "[T]he conscientious scruples of all men should be treated with great delicacy and tenderness" and "as extensively accommodated" as "the protection and essential interests of the nation may justify and permit."[28]

Second, the principle of free exercise of religion was the right to act publicly and peaceably on one's conscientious beliefs. Quaker founder William Penn had already linked these two guarantees, arguing that religious liberty requires "not only a mere Liberty of the Mind, in believing or disbelieving" but equally "the Free and Uninterrupted Exercise of our Consciences, in that Way of Worship, we are most clearly pers[u]aded, God requires us to serve Him . . . ."[29] Alongside freedoms of worship and religious

24. James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 8 THE PAPERS OF JAMES MADISON 295, 299 (Robert A. Rutland, William M. E. Rachal, Barbara D. Ripel & Fredrika J. Teute eds., 1973) [hereinafter Madison, *Memorial and Remonstrance*].

25. 3 ROGER WILLIAMS, THE COMPLETE WRITINGS OF ROGER WILLIAMS 220 (2007) (1963).

26. WITTE & NICHOLS, *supra* note 22, at 41–45.

27. *See generally* ISAAC BACKUS, AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY, AGAINST THE OPPRESSIONS OF THE PRESENT DAY (Boston 1773), Evans Early Am. Imprint Collection, https://quod.lib.umich.edu/e/evans/N09952.0001.001?rgn=main;view=fulltext; JONATHAN PARSONS, FREEDOM FROM CIVIL AND ECCLESIASTICAL SLAVERY, THE PURCHASE OF CHRIST (New Bury-port 1774), Evans Early Am. Imprint Collection, https://quod.lib.umich.edu/e/evans/N10662.0001.001?rgn=main;view=fulltext; Thomas Jefferson, *Draft of Bill Exempting Dissenters from Contributing to the Support of the Church, 30 Nov. 1776, in* 5 THE FOUNDERS' CONSTITUTION 74–75 (Philip B. Kurland & Ralph Lerner eds., 1987).

28. George Washington, *Letter to the Religious Society Called Quakers, October, 1789, in* 30 THE WRITINGS OF GEORGE WASHINGTON 416 (John C. Fitzpatrick ed., 1931). *See also* GEORGE WASHINGTON ON RELIGIOUS LIBERTY AND MUTUAL UNDERSTANDING: SELECTIONS FROM WASHINGTON'S LETTERS (Edward F. Humphrey ed., 1932).

29. William Penn, *The Great Case of Liberty of Conscience Once More Briefly Debated and Defended, by the Authority of Reason, Scripture, and Antiquity* (1670), *reprinted in* THE POLITICAL

assembly, most founders included protections for the freedoms of religious speech, publication, education, charity, mission work, pilgrimage, and more. They also called for religious groups "to have the full enjoyment and free exercise of those purely spiritual powers . . . as may be consistent with the civil rights of society," and to enjoy rights to religious property, polity, incorporation, ecclesiastical discipline, and property tax exemption (and sometimes state-collected tithes, too).[30]

Third, the founders regarded religious pluralism as an important and independent principle of religious liberty, and not just a sociological reality. Rather than having one established faith per territory with separate classes of establishment conformists and

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WRITINGS OF WILLIAM PENN 79, 82, 85 (Andrew R. Murphy ed., 2002) (emphasis omitted). Presciently, a Dutch pamphleteer in 1584 had argued that true religious freedom requires freedom of conscience as well as freedom of worship, speech, association, and education:

> I know that they promise freedom of conscience provided there is no public worship and no offence is given, but this is only to trap and ensnare us. For it is well known that conscience which resides in people's minds, is always free and cannot be examined by other men and still less be put under their control or command. And in fact, no one has ever been executed or harassed merely on grounds of conscience, but always for having committed some public act or demonstration, either in words, which are said to be an offence, or in acts which are described as exercise of religion. There is no difference between so-called freedom of conscience without public worship, and the old rigour of the edicts and inquisition of Spain. . . . How is it then possible to grant freedom of conscience without exercise of religion? For what are the consequences for people who wish to enjoy the benefit of this freedom? If they have no ceremonies at all and do not invoke God to testify to the piety and reverence they bear Him, they are in fact left without any religion and without fear of God. . . . And I have not even mentioned that one will not of course be allowed to state what one thinks; any one who says any word detrimental to the dignity of the ecclesiastical state or the Roman religion will be accused of acting scandalously or of desecrating human and divine majesty. But this is only the start. The authorities will go further and search books and cabinets and coffers, they will eavesdrop on private conversation, a father will not be allowed to teach his children how to call on God, nor will we be allowed to use our mother-tongue in our prayers. Soon, as I have said before, it will be thought necessary to restore the edicts and the inquisition in their full severity everywhere . . ..

Discourse of a Nobleman, a Patriot Partial to Public Peace, upon Peace and War in These Low Countries, (1584), *reprinted in* TEXTS CONCERNING THE REVOLT OF THE NETHERLANDS 264, 265–66 (E.H. Kossmann & A.F. Mellink eds., 1974); *see also* WITTE, REFORMATION OF RIGHTS, *supra* note 3, at 149–50.

30. LEVI HART, LIBERTY DESCRIBED AND RECOMMENDED 14 (1774), Evans Early Am. Imprint Collection, https://quod.lib.umich.edu/e/evans/N11133.0001.001?rgn=main;view=fulltext. *See generally* Isaac Backus, *Government and Liberty Described; and Ecclesiastical Tyranny Exposed* (1778), *in* ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM, PAMPHLETS, 1754–1789, at 349 (William G. McLoughlin ed., 1968); 1 ANSON P. STOKES, CHURCH AND STATE IN THE UNITED STATES 740–42 (1950) (quoting *A Declaration of Certain Fundamental Rights and Liberties of the Protestant Episcopal Church in Maryland*).

dissenting non-conformists, the founders called for a plurality of forms of religious belief and worship, each equal before the law. They also called for a plurality of religious forums that deserved free exercise protection—sanctuaries, schools, charities, publishing houses, Bible societies, missionary groups, and other such "little platoons" of religion.[31] Part of their argument for religious pluralism was theological. As Baptist preacher Isaac Backus argued, it was God's "sole prerogative" to decide which forms and forums of religion should flourish and which should fade, without influence or interference by state, church, or anyone else.[32] "God's truth is great, and in the end He will allow it to prevail."[33] Part of their argument was political. Madison put it crisply in *Federalist Paper No. 51*: "In a free government, the security for civil rights must be the same as that for religious rights; it consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects."[34] "Checks and ballances [sic]" are as important in religion as in politics, John Adams concurred. They "are our only Security, for the progress of Mind, as well as the Security of Body. Every Species of these Christians would persecute Deists, as [much] as either Sect would persecute another, if it had unchecked and unballanced [sic] Power . . . . Know thyself, Human Nature!"[35]

Fourth, these principles of liberty of conscience, free exercise of religion, and religious pluralism depended on a guarantee of equality of all peaceable religions before the law. For the state to single out specific persons, groups, or religious practices for preferential benefits or discriminatory burdens would skew the choices of conscience, encumber the free exercise of religion, and

31. *See* Benjamin Rush, *Letter to John Armstrong (March 19, 1783), in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 27, at 78–79. The phrase "little platoon" was made popular by EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 68 (9th ed. 1791). *See also* WITTE, *supra* note 5, at 196–226 (documenting the range of religious properties and organizations that received tax exemptions and other state benefits); Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause,* 162 U. PA. L. REV. 111, 150–68 (2020) (documenting the range of religious properties and organizations that received tax exemptions and other state benefits with added focus on tax and legal treatment of religious schools in the founding era).

32. BACKUS, *supra* note 30, at 317.

33. *Id.*; *see also* Washington, *supra* note 28; THE FREEMAN'S REMONSTRANCE AGAINST AN ECCLESIASTICAL ESTABLISHMENT 13 (1777).

34. THE FEDERALIST NO. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961).

35. John Adams, *Letter to Thomas Jefferson, June 25, 1813*, *in* THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 333, 334 (Lester J. Cappon ed., 1988).

upset the natural plurality of forms and forums of faith. Many of the founders therefore called for equality of all peaceable religions before the law.[36] Madison captured the prevailing sentiment: "A just Government . . . will be best supported by protecting every Citizen in the enjoyment of his religion with the same equal hand which protects his person and property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another."[37]

The founders invoked this principle especially to fight against religious-test oaths and loyalty oaths that were traditionally imposed as a condition for political office and various state benefits and had long contributed to the religious divisions of society and politics.[38] They also pressed this principle of equality to challenge traditional state practices of discriminating in decisions about tax exemption, religious incorporation, licenses for teachers, schools, charities, missionary societies, and similar state-based benefits.[39]

Most founders called for religious equality of all peaceable theistic religions, usually mentioning Christians and Jews, and sometimes Muslims and Hindus, too, although they paid little heed to the many Native American and African American religions of the day.[40] A few founders pressed for the legal equality of the religious and nonreligious, too. Jefferson put it memorably: "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg."[41] Such passages were unusual. Most of the founders were concerned about the equality of peaceable theistic religions before the law, not equality between religion and nonreligion, which has become the norm in our day.

Fifth, the founders invoked the ancient Western principle of separation of church and state, or what Saint Paul had already called "a wall of separation."[42] This institutional separation served

36. WITTE & NICHOLS, *supra* note 22, at 49–52.

37. Madison, *supra* note 24, at 302.

38. *See* WITTE, *supra* note 5, at 105–37 (providing a case study of religious establishment practices in Massachusetts before 1833).

39. *Id.*

40. WITTE & NICHOLS, *supra* note 22, at 47–51.

41. Thomas Jefferson, *Query XVII: The Different Religions Received into That State*, *in* THE COMPLETE JEFFERSON 673, 675 (Saul K. Padover ed., 1943).

42. *Ephesians* 2:14. On the history of this concept, see JOHN WITTE, JR., GOD'S JOUST, GOD'S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION 207–42 (2007).

to keep church and state officials and their operations free and focused on their core missions of soulcraft and statecraft, undistracted and well protected from the encroachments or privations of the other. "Religion and government are equally necessary, but their interests should be kept separate and distinct," wrote Jeffersonian pamphleteer Tunis Wortman.[43] "Upon no plan, no system, can they become united, without endangering the purity and usefulness of both—the church will corrupt the state, and the state pollute the church."[44] John Dickinson of Pennsylvania argued similarly that when church and state "are kept distinct and apart, the Peace and Welfare of Society is [sic] preserved, and the Ends of both answered. But by mixing them together, Feuds, Animosities and Persecutions have been raised, which have deluged the World in Blood, and disgraced human Nature."[45] This understanding of separation of church and state helped to inform the movement in some states to exclude clergy and other religious officials from holding political office or exercising political power.[46]

Some founders also called for separation of church and state in order to protect the individual's liberty of conscience.[47] Madison warned that church and state officials must not "be suffered to overleap the great Barrier [between them] which defends the rights of the people" to hold the religious beliefs and practices they choose.[48] Jefferson tied the "wall of separation" metaphor directly to protection of liberty of conscience:

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

43. Tunis Wortman, *A Solemn Address to Christians and Patriots* (1800), *in* POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730-1805, at 1477, 1488 (Ellis Sandoz ed., 2000).

44. *Id.*

45. John Dickinson, *Centinel Number VIII*, *in* THE CENTINEL: WARNINGS OF A REVOLUTION 126, 128 (Elizabeth I. Nybakken ed., 1980).

46. WITTE & NICHOLS, *supra* note 22, at 55.

47. *Id.* at 55–56.

48. Madison, *supra* note 24, at 299.

> of those sentiments which tend to *restore to man all his natural rights,* convinced he has no natural right in opposition to his social duties.[49]

In Jefferson's formulation, separation of church and state assured individuals of their natural, inalienable right of conscience, which could be exercised freely and fully up to the point of breaching the peace or shirking their social duties. Jefferson was not speaking here of separating politics and religion altogether. Indeed, in the next paragraph of his letter, President Jefferson performed an avowedly religious act of offering prayers on behalf of his Baptist correspondents: "I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man."[50]

Sixth, some founders also called for the disestablishment of religion. This was the most novel and controversial principle in the day.[51] Seven of the original states and the four counties of New York City insisted on retaining their own state religious establishment even while calling for no national establishment of religion by the emerging federal government.[52] Though local establishment practices varied, these states exercised some control over religious doctrine, governance, clergy, and other personnel.[53] They required church attendance of all citizens, albeit at a church of their choice.[54] They collected tithes for support of the church that the tithe-payer attended, and often gave state money, tax exemptions, and other privileges preferentially to one favored religion.[55] They imposed burdensome restrictions on education, voting, and political involvement of religious dissenters.[56] They

49. 8 THE WRITINGS OF THOMAS JEFFERSON 113 (H.A. Washington ed., 1854) (emphasis added). This Washington edition of the letter inaccurately transcribes "legitimate" as "legislative." See a more accurate transcription in DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 148 (2003).

50. THE WRITINGS OF THOMAS JEFFERSON, *supra* note 49.

51. NO ESTABLISHMENT OF RELIGION: AMERICA'S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY (T. Jeremy Gunn & John Witte, Jr. eds., 2012) [hereinafter NO ESTABLISHMENT]; WITTE & NICHOLS, *supra* note 22, at 7–9, 57–62.

52. Michael W. McConnell, *Establishment at the Founding*, *in* NO ESTABLISHMENT, *supra* note 51, at 45–69; WITTE, *supra* note 5, at 105–37, 196–226. For earlier summaries see SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY (1968); STOKES, *supra* note 30; THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986).

53. *See supra* note 52 and accompanying text.

54. *Id.*

55. *Id.*

56. *Id.*

obstructed the organization, education, and worship activities of dissenting churches, particularly Catholics and Quakers.[57] They conscripted established church institutions and their clergy for weddings, education, poor relief, political rallies, and distribution of state literature.[58] They often administered religious test oaths for political officials, and sometimes even for lower state bureaucrats and employees, too.[59]

But disestablishment movements were gaining rapid support throughout the young American republic.[60] Roger Williams founded Rhode Island in 1662[61] and William Penn founded Pennsylvania in 1682 on the principle of no establishment of religion.[62] After the American Revolution, four more states disestablished religion—New York, North and South Carolina, and Virginia.[63] Over the next fifty years, all thirteen original states adopted disestablishment policies, with Massachusetts holding out the longest until 1833.[64] All new states beyond the thirteen founding states adopted the principle of non-establishment of religion, although de facto establishment practices continued into the twentieth century.[65]

Disestablishment of religion, the founders argued, was the best way to integrate and protect all the other principles of religious liberty. Disestablishment protected the principles of liberty of conscience and free exercise of religion by foreclosing government from coercively mandating or symbolically favoring certain forms of religious belief, doctrine, and practice and skewing each person's choices and changes of faith and religious affiliation.[66] As the Delaware constitution stated: "[N]o authority can or ought to be vested in, or assumed by any power whatever that shall in any case

57. *Id.*

58. *Id.*

59. *Id.*

60. DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES 1776–1833 (Carl H. Esbeck & Jonathan J. Den Hartog eds., 2019).

61. *Id.* at 55–70.

62. *Id.* at 71–96.

63. *Id.* at 97–202.

64. *Id.* at 399–425.

65. *Id.*; Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War,* 162 U. PA. L. REV. 307 (2014).

66. WITTE & NICHOLS, *supra* note 22, at 59–60.

interfere with, or in any manner controul [sic] the right of conscience in the free exercise of religious worship."[67]

Disestablishment of religion further protected the principles of religious equality and pluralism by preventing government from singling out certain religious beliefs and bodies for preferential treatment, or favoring or privileging certain clerics, sanctuaries, or forms of worship to the inevitable deprecation of all others.[68] Virginia's conventioneers called for government to "prevent the establishment of any one sect in prejudice, to the rest, and will forever oppose all attempts to infringe religious liberty."[69] Several early state constitutions provided "there shall be no establishment of any one religious sect . . . in preference to another . . . ."[70]

Finally, disestablishment of religion served to protect the principle of separation of church and state.[71] As Jefferson wrote, it prohibited government

> from intermedling [sic] with religious institutions, their doctrines, discipline, or exercises [and from] . . . the power of effecting any uniformity of time or matter among them. Fasting & prayer are religious exercises. the [sic] enjoining them is an act of discipline, every religious society has a right to determine for itself the times for these exercises & the objects proper for them according to their own peculiar tenets.[72]

To allow government to establish or even meddle in the internal affairs of religious bodies would inflate the competence of government, Madison added.

> [It] implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ religion as an engine of

67. DEL. CONST., DECLARATION OF RIGHTS § 2; *see also* PA. CONST., DECLARATION OF RIGHTS § 2 (1776). See *18th Century Documents: 1700–1799*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR., https://avalon.law.yale.edu/subject_menus/18th.asp (last visited Jan. 15, 2022), for the original state constitutions quoted here and below. See also the collection in 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 (Francis Thorpe ed., 1909) [hereinafter Thorpe].

68. WITTE & NICHOLS, *supra* note 22, at 60.

69. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 208 (Jonathan Elliot ed., 1836) [hereinafter Elliot, DEBATES]; *see also id.* at 330, 431, 645–46.

70. *See, e.g.*, N.J. CONST. art. XIX.

71. WITTE & NICHOLS, *supra* note 22, at 60–62.

72. Thomas Jefferson, *Letter to Rev. Samuel Miller* (1808), *in* THE FOUNDERS' CONSTITUTION, *supra* note 27, at 5:98–99.

> Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.[73]

The question that remained controversial in the founding era as much as in our own was whether more gentle and generic forms of governmental support for religion could be countenanced.[74] Did disestablishment of religion prohibit all such support—mandating "a high and impregnable . . . wall of separation between church and state," as the Supreme Court later put it, quoting Jefferson[75]—or did it simply require that such governmental support be distributed non-preferentially among all religions? Some founders viewed the principle of no establishment as a firm ban on all state financial and other support for religious beliefs, believers, and bodies, including traditional indirect forms of support like religious tax exemptions and religious corporations.[76] Others viewed this principle more narrowly as a prohibition against direct financial support of one preferred religion, but regarded non-preferential forms of state funding and land grants for all religious schools, charities, publishers, missionaries, military chaplains and the like as not only permissible under a no-establishment policy, but necessary for good governance.[77]

II. RELIGIOUS FREEDOM IN THE FIRST STATE CONSTITUTIONS

Liberty of conscience, free exercise of religion, religious pluralism, religious equality, separation of church and state, and disestablishment of (at least a national) religion: These six religious freedom principles circulated in the founding era, and they helped to shape the first state constitutions as well as the First Amendment to the United States Constitution.

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73. Madison, *supra* note 24, at 301.

74. WITTE & NICHOLS, *supra* note 22, at 61–62.

75. Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 17 (1947) ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.").

76. WITTE & NICHOLS, *supra* note 22, at 62.

77. See the collection of quotations from the founders in JAMES H. HUTSON, FORGOTTEN FEATURES OF THE FOUNDING: THE RECOVERY OF RELIGIOUS THEMES IN THE EARLY AMERICAN REPUBLIC 1–44 (2003); VINCENT P. MUÑOZ, GOD AND THE FOUNDERS: MADISON, WASHINGTON AND JEFFERSON (2009); *see also* NO ESTABLISHMENT, *supra* note 51.

Eleven of the thirteen original states issued new constitutions between 1776 and 1784; Connecticut and Rhode Island retained their colonial charters until 1819 and 1843, respectively.[78] The Virginia Bill of Rights of 1776 set the tone for the southern and mid-Atlantic colonies, just as the Massachusetts Constitution of 1780 shaped the constitutionalism of New England states.[79] These original state constitutions incorporated the founding principles of religious freedom in various forms.

Virginia's influential Bill of Rights of 1776 set its religious freedom provisions in a basic natural rights and social contract framework, but also grounded its guarantees of religious rights and liberties on correlative moral duties and social virtues of "Christian forbearance, love, and charity":

> I. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety . . . .
>
> XV. That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles.
>
> XVI. That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed by reason and conviction, not by force or violence; and therefore, all men are equally entitled 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.[80]

Pennsylvania opened its 1776 Constitution with the same social contract and natural rights language, but focused more singly on freedom of conscience and free exercise of all theistic religions:

78. *See* 18TH CENTURY DOCUMENTS (The Avalon Project), https://avalon.law.yale.edu/subject_menus/18th.asp; *see also* CHESTER J. ANTIEAU, PHILLIP M. CARROLL & THOMAS C. BURKE, RELIGION UNDER THE STATE CONSTITUTIONS (1965); Vincent Philip Muñoz, *Church and State in the Founding-Era Constitutions,* 4 AM. POL. THOUGHT 1 (2015).

79. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 29–93 (1998).

80. VIRGINIA DECLARATION OF RIGHTS (The Avalon Project) (1776), https://avalon.law.yale.edu/18th_century/virginia.asp.

> II. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner control, the right of conscience in the free exercise of religious worship.[81]

The 1776 Constitution of New Jersey provided comparable protections for freedom of conscience and free exercise of religion against religious coercion and discrimination, and then spoke against traditional Protestant religious establishments:

> XIX. That there shall be no establishment of any one religious sect in this Province, in preference to another; and that no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect. who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature, and shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects.[82]

The 1776 Constitution of Maryland was expansive in its protection of religious conscience, free exercise of religion, and equality of peaceable Christian believers, including explicit protections for Quakers, Baptists ("Dunkers"), and Mennonites who were conscientiously opposed to oath-swearing and military service. Maryland also banned religious test oaths for political office. Nonetheless, the new constitution allowed for state collection of religious taxes to be directed to the taxpayer's preferred congregation. It vested the historically established Anglican church in its expansive property holdings—quite unlike

81. CONSTITUTION OF PENNSYLVANIA (The Avalon Project) (1776), https://avalon.law.yale.edu/18th_century/pa08.asp.

82. CONSTITUTION OF NEW JERSEY (The Avalon Project) (1776), https://avalon.law.yale.edu/18th_century/nj15.asp.

neighboring Virginia that was calling for the dissolution of such Anglican church property.[83] At the same time, however, the Maryland constitution put severe limits on new private donations of property to all other religious groups:

> XXXIII. That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights; nor ought any person to be compelled to frequent or maintain, or contribute, unless on contract, to maintain any particular place of worship, or any particular ministry; yet the Legislature may, in their discretion, lay a general and equal tax for the support of the Christian religion; leaving to each individual the power of appointing the payment over of the money, collected from him, to the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general of any particular county: but the churches, chapels, globes, and all other property now belonging to the church of England, ought to remain to the church of England forever. And all acts of Assembly, lately passed, for collecting monies for building or repairing particular churches or chapels of ease, shall continue in force, and be executed, unless the Legislature shall, by act, supersede or repeal the same . . . .
>
> XXXIV. That every gift, sale, or devise of lands, to any minister, public teacher, or preacher of the gospel, as such, or to any religious sect, order or denomination, or to or for the support, use or benefit of, or in trust for, any minister, public teacher, or preacher of the gospel, as such, or any religious sect, order or denomination-and every gift or sale of good-e, or chattels, to go in succession, or to take place after the death of the seller or donor, or to or for such support, use or benefit-and also every devise of goods or chattels to or for the support, use or benefit of any

83. THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787 (1977); THOMAS E. BUCKLEY, ESTABLISHING RELIGIOUS FREEDOM: JEFFERSON'S STATUTE IN VIRGINIA (2013). In *Terrett v. Taylor*, 13 U.S. 43 (1815), the United States Supreme Court outlawed the dissolution of the Anglican Church's corporation and properties in Virginia. *See also* Michael W. McConnell, *The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic,* 37 TULSA L. REV. 7 (2001).

> minister, public teacher, or preacher of the gospel, as such, or any religious sect, order, or denomination, without the leave of the Legislature, shall be void; except always any sale, gift, lease or devise of any quantity of land, not exceeding two acres, for a church, meeting, or other house of worship, and for a burying-ground, which shall be improved, enjoyed or used only for such purpose-or such sale, gift, lease, or devise, shall be void.
>
> XXXV. That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of support and fidelity to this State, and such oath of office, as shall be directed by this Convention or the Legislature of this State, and a declaration of a belief in the Christian religion.
>
> XXXVI. That the manner of administering an oath to any person, ought to be such, as those of the religious persuasion, profession, or denomination, of which such person is one, generally esteem the most effectual confirmation, by the attestation of the Divine Being. And that the people called Quakers, those called Dunkers, and those called Menonists [sic], holding it unlawful to take an oath on any occasion, ought to be allowed to make their solemn affirmation, in the manner that Quakers have been heretofore allowed to affirm; and to be of the same avail as an oath, in all such cases, as the affirmation of Quakers hath been allowed and accepted within this State, instead of an oath. And further, on such affirmation, warrants to search for stolen goods, or for the apprehension or commitment of offenders, ought to be granted, or security for the peace awarded, and Quakers, Dunkers or Menonists [sic] ought also, on their solemn affirmation as aforesaid, to be admitted as witnesses, in all criminal cases not capital.[84]

The Constitution of New York (1777) set out its religious freedom provisions in loftier language that was deeply critical of traditional religious persecution brought on by the conflation of religious and political authorities and accordingly called for the separation of church and state officials:

> XXXVIII. And 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

84. CONSTITUTION OF MARYLAND (The Avalon Project) (1776), https://avalon.law.yale.edu/17th_century/ma02.asp.

> doth . . . 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.
>
> XXXIX. And whereas the ministers of the gospel are, by their profession, dedicated to the service of God and the care of souls, and ought not to be diverted from the great duties of their function; therefore, no minister of the gospel, or priest of any denomination whatsoever, shall, at any time hereafter, under any presence or description whatever, be eligible to, or capable of holding, any civil or military office or place within this State.
>
> XL. And whereas it is of the utmost importance to the safety of every State that it should always be in a condition of defence [sic]; and it is the duty of every man who enjoys the protection of society to be prepared and willing to defend it . . . . [But] all such of the inhabitants of this State being of the people called Quakers as, from scruples of conscience, may be averse to the bearing of arms, be therefrom excused by the legislature; and do pay to the State such sums of money, in lieu of their personal service, as the same; may, in the judgment of the legislature, be worth.[85]

These early state constitutions formed the constitutional backbone of religious freedom in the United States for the first 150 years of the republic. State constitution-making and enforcement remained a complex and shifting legal business throughout this period. Only Massachusetts and New Hampshire retained their original constitutions of 1780 and 1784, respectively, albeit with many amendments. Each of the other original states created at least one new constitution after 1787—Georgia leading the way with ten new constitutions, the last ratified in 1983.[86] Thirty-seven new states joined the union, each adding its own new constitution, half of them adopting at least one replacement constitution before 1947—Louisiana leading the way with ten, the last ratified in 1921.[87]

85. CONSTITUTION OF NEW YORK (The Avalon Project) (1776), https://avalon.law.yale.edu/18th_century/ny01.asp.

86. *See* Thorpe, *supra* note 67, at 777–876.

87. *Id.*; *see* CYNTHIA E. BROWNE, STATE CONSTITUTIONAL CONVENTIONS, at xxviii–xxix (1973) (offering convenient tables); Thorpe, *supra* note 67 (offering multiple versions of each state constitution).

Religious freedom figured prominently in almost all these state constitutions, with the founding principles of religious freedom coming to varying forms of expression.[88] The state constitutions empowered state courts to hear constitutional cases from their own citizens or subjects, notably including religious freedom claims. These state cases, together with state legislative acts, helped translate the founding principles of religious freedom into a rich latticework of specific precepts, practices, and policies concerning religion.[89] Long before the First Amendment religion clauses were contemplated, let alone crafted, these state constitutional laboratories were actively involved in leading the American experiment in religious freedom.

III. RELIGION AND THE CONTINENTAL CONGRESS

Alongside these early states was the budding national government, called the Continental Congress. It began its work already on the eve of the American Revolution. It was comprised of delegates from the thirteen colonies, who met for the first time on September 5, 1774, to respond to the increasingly harsh economic and legal measures imposed on the colonies by the English mother country.[90] Its second session, commencing on May 10, 1775, was devoted to coordinating the Revolutionary War against Great Britain. It was during this session that the Congress began to take on the role as the provisional federal government of a budding nation, a status later confirmed by the Articles of Confederation (1781) that continued in force (albeit with decreasing effectiveness) until 1789.

The Continental Congress's principal mandate was to deal with pressing issues of the military, interstate relationships, national commerce, foreign diplomacy, and the like. But in the course of its work from 1774 to 1789, the Continental Congress issued a number of acts touching religion that are worth noting, since they came up during the debates about the First Amendment.

88. WITTE & NICHOLS, *supra* note 22, at 98–116, 299–302 (providing examples of the expression of each principle in state constitutions from 1791–1947).

89. *See id.* at 98–116 (providing summaries and sources).

90. *See* DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS: CONTRIBUTIONS TO ORIGINAL INTENT (2000); JAMES HUTSON, CHURCH AND STATE IN AMERICA: THE FIRST TWO CENTURIES 95–138 (2008); MICHAEL I. MEYERSON, ENDOWED BY OUR CREATOR: THE BIRTH OF RELIGIOUS FREEDOM IN AMERICA 43–66 (2012). For the record, see JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 (Worthington C. Ford et al. eds., 1904–1937).

On the second day of its first session, September 6, 1774, the Continental Congress resolved, after some vigorous debate, to open its daily sessions with prayer. An Anglican priest began offering these prayers the next morning, along with Bible reading.[91] He was, according to one representative, "a Gentleman of Sense and Piety, and a warm Advocate for the religious and civil Rights of America."[92] During the second session, on December 21, 1776, the Congress appointed two legislative chaplains, an Anglican priest and Presbyterian pastor, who served until 1784, until replaced by two other chaplains appointed by the Congress.[93]

On July 29, 1775, the Congress created the Chaplain Corps of the Continental Army and appointed and paid chaplains to serve in it.[94] Both as General and as first President, George Washington was a firm supporter of these military chaplains and issued several calls for Congress to increase the number of chaplains that served and sent out several orders for military personnel to make ample use of these chaplains' services.[95]

In the summer of 1775, the Continental Congress vetted the "Plan of Accommodation with the Parent State," a proposed negotiated compromise with Great Britain. It included this provision: "No earthly legislature or tribunal ought or can of Right interfere or interpose in any wise howsoever in the religion and ecclesiastical concerns of the Colonies."[96]

On June 12, 1775, Congress issued the first of its four fast-day proclamations. It urged the colonists to observe a "day of public humiliation, fasting and prayer; that we may, with united hearts and voices, unfeignedly confess and deplore our many sins"; that we may "be ever under the care and protection of a kind Providence, and be prospered"; and "that virtue and true religion may revive and flourish throughout our land."[97] On November 1, 1777, the Congress issued its first of what would become annual

91. DAVIS, *supra* note 90, at 73–75.

92. *Id.*; *Letter from Samuel Adams to Joseph Warren*, 1 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 26–27 (Sept. 9, 1774) (Edmund C. Burnett ed., 1921–1936).

93. JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 90, at 1:76.

94. *Id.* at 2:220; DAVIS, *supra* note 90, at 80–83.

95. DAVIS, *supra* note 90, at 80–83.

96. "[Letter of] the New York Delegates to the Provincial Congress" (July 6, 1775), *in* JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 90, at 1:155–56 (referencing and quoting from this "Plan of Accommodation" in its P.S.).

97. *Id.* at 2:87–88.

Thanksgiving Day proclamations. This first proclamation was an overtly Trinitarian Christian statement, providing that

> it is the indispensable Duty of all Men to adore the superintending Providence of Almighty God; to acknowledge with Gratitude their Obligation to him for Benefits received, and to implore such farther Blessings as they stand in Need of . . . for the Defense and Establishment of our Inalienable Rights and Liberties.[98]

The proclamation set aside a day each year for the confession of sins and "solemn thanksgiving and praise":

> that with one heart and one voice the good people may express the grateful feelings of their hearts, and consecrate themselves to the service of their divine benefactor; and that, together with their sincere acknowledgements and offerings, they may join the penitent confession of their manifold sins, whereby they had forfeited every favor, and their humble and earnest supplication that it may please God through the merits of Jesus Christ, mercifully to forgive and blot them out of remembrance: that it may please him graciously to afford his blessing on the governments of these states respectively, and prosper the public council of the whole; to inspire our commanders, both by land and sea, and all under them, with that wisdom and fortitude which may render them fit instruments, under the providence of Almighty God, to secure for these United States, the greatest of all human blessings, independence and peace; that it may please him, to prosper the trade and manufactures of the People, and the labour of the husbandman, that our land may yield its increase; to take schools and seminaries of education, so necessary for cultivating the principles of true liberty, virtue and piety, under his nurturing hand; and to prosper the means of religion, for the promotion and enlargement of that Kingdom, which consisteth "in righteousness, peace, and joy, in the Holy Ghost."[99]

Beyond issuing thanksgiving proclamations and prayers, the Continental Congress took further steps to cultivate both the moral and religious sentiments of the budding nation. In 1774, for example, Congress resolved to "encourage frugality, economy, and industry, and . . . discountenance and discourage every species of

98. *Id.* at 9:854–55 (using the online Law Library Microform Collection, which has modernized the capitalization and punctuation).

99. *Id.* at 9:855. (using the online Law Library Microform Collection, which has modernized the capitalization and punctuation).

extravagance and dissipation, especially all horse-racing, and all kinds of gaming, cockfighting, exhibition of shews, plays, and other expensive diversions and entertainments . . . ."[100] All these worldly activities were thought to detract from religion, piety, virtue, and morality.

During the Revolutionary War against Great Britain, the Continental Congress passed a resolution to protect pacifists' conscientious objections to participation in war. Various religious groups in the colonies—especially, Quakers, Mennonites, Shakers, and Brethren—had professed pacifist scruples.[101] The Congress accommodated them in a resolution of 1775 and urged them to assume non-combat duties instead:

> As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend [sic] no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and do all other services to their oppressed Country, which they can consistently [do] with their religious principles.[102]

The Continental Congress was deeply concerned, however, about Great Britain's accommodation of Catholics north of the border, in Quebec. In 1763, after the British-French war, Quebec had become a British colony. In the Quebec Act of 1774, the British Parliament had guaranteed to these new subjects "free exercise of the religion of the Church of Rome, subject to the king's Supremacy."[103] The Congress denounced this act as tantamount to "establishing the Roman Catholick religion" in a manner which is "dangerous in an extreme degree to the Protestant religion and to the civil rights and liberties of all America." It expressed "astonishment that a British Parliament should ever consent to *establish* in that country a religion that has deluged your island in blood, and dispersed impiety, bigotry, persecution, murder and rebellion through every part of the world." All such acts "are impolitic, unjust, and cruel, as well unconstitutional, and most

100. *Id.* at 1:78.; *see also* DAVIS, *supra* note 90, at 67, 175–98.

101. LIBERTY AND CONSCIENCE: A DOCUMENTARY HISTORY OF CONSCIENTIOUS OBJECTORS IN AMERICA THROUGH THE CIVIL WAR (Peter Brock ed., 2002).

102. JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 90, at 2:189.

103. The Quebec Act of 1774, 14 Geo. III c.83, § 5 (Eng.), https://avalon.law.yale.edu/18th_century/quebec_act_1774.asp.

dangerous and destructive of American rights."[104] If this new religious establishment in Quebec became subject to "the designs of an ambitious and wicked minister," Alexander Hamilton declared breathlessly, "we may see an Inquisition erected in Canada, and priestly tyranny may hereafter find as propitious a soil in America as it ever has in Spain or Portugal."[105] It is hard to read from the historical record whether this anti-Catholic tirade was genuine religious sentiment or instead political concern about America's vulnerability to its strong Catholic neighbors in the French north and the Spanish south.

The Congress abruptly softened its posture toward French-Canadian Catholics during the Revolutionary War with Britain, now for obvious political reasons. George Washington, the new commander of the Continental Army, set the tone with an early instruction to his troops traveling to Quebec,

> to avoid all Disrespect or Contempt of the Religion of the Country and its Ceremonies—Prudence, Policy, and a true Christian Spirit will lead us to look with compassion upon their Errors without insulting them—While we are Contending for our own Liberty, we should be very cautious of violating the Rights of Conscience in others; ever considering that God alone is the Judge of the Hearts of Men and to him only in this Case they are answerable.[106]

Congress echoed these sentiments in two letters to their counterparts in Quebec. They urged them to cede from the British and join the American cause, enticing them with guarantees of religious freedom. To press their case, Congress also sent a distinguished delegation to the north with this instruction:

> You are further to declare, that we hold sacred the rights of conscience, and may promise to the whole people, solemnly in our name, the free and undisturbed exercise of their religion; and, to the clergy, the full, perfect, and peaceable possession and enjoyment of all their estates; that the government of everything relating to their religion and clergy, shall be left entirely in the hands of the good people of that province, and such legislature as

104. JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 90, at 1:34–35, 66, 72, 88; *see* T. JEREMY GUNN, A STANDARD FOR REPAIR: THE ESTABLISHMENT CLAUSE, EQUALITY, AND NATURAL RIGHTS 72–78 (1992).

105. 1 THE WORKS OF ALEXANDER HAMILTON 184–85 (Henry Cabot Lodge ed., 1904).

106. Letter from George Washington to Colonel Benedict Arnold (Sept. 14, 1775), *in* 1 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES, JUNE–SEPTEMBER 1775, at 456 (P.D. Chase et al. eds., 1985–2010).

> they shall constitute; Provided, however, that all other denominations of Christians be equally entitled to hold offices, and enjoy civil privileges, and the free exercise of their religion, and be totally exempt from the payment of any tythes [sic] or taxes for the support of any religion.[107]

Also during the Revolutionary War, the Congress sought to encourage defection of German mercenaries who were fighting for Great Britain. It offered would-be defectors guarantees of liberty, security, and property.[108] It also ordered all states to receive these soldiers and ensure that they "be protected in the free exercise of their respective religions."[109]

On September 11, 1777, a narrow majority of the Congress voted to import 20,000 Bibles for distribution in the new states.[110] No federal action of the sort was ever taken, however, largely due to funding. Instead, the Congress resolved tepidly on October 26, 1780:

> That it be recommended to such of the States who may think it convenient for them that they take proper measures to procure one or more new and correct editions of the old and new testament [sic] to be printed and that such states regulate their printers by law so as to secure effectually the said books from being misprinted.[111]

Thereafter, the Congress also endorsed a privately funded translation of the Bible, directed the legislative and military chaplains to make use of it, and recommended "this edition of the Bible to the inhabitants of the United States . . . ."[112]

On July 9, 1778, the Congress approved the Articles of Confederation, which came into effect in 1781.[113] A prior draft of the Articles, prepared principally by John Dickinson, a Pennsylvania Quaker, had included a rather lengthy provision on religious liberty designed to bind the individual colonies and states:

107. JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 90, at 4:217.

108. *Id.* at 5:654.

109. *Id.*

110. *Id.* at 8:733–34.

111. *Id.* at 18:979.

112. *Id.* at 23:574.

113. *Id.* at 11:677–78; *see also id.* at 19:213–24; ARTICLES OF CONFEDERATION (The Avalon Project) (Mar. 1, 1781), https://avalon.law.yale.edu/18th_century/artconf.asp.

> No person in any Colony living peaceably under the Civil Government, shall be molested or prejudiced in his or her person or Estate for his or her religious persuasion, Profession or practice, nor be compelled to frequent or maintain or contribute to maintain any religious Worship, Place of Worship, or Ministry, contrary to his or her Mind, by any Law or ordinance hereafter to be made in any Colony different from the usual Laws & Customs subsisting at the Commencement of this War—provided, that such person frequents regularly some place of religious Worship on the Sabbath; & no religious Persuasion or practice [sic] for the Profession or Exercise of which, persons are not disqualified by the present Laws of the said Colonies respectively, from holding any offices Civil or military, shall by any Law or Ordinance hereafter to be made in any Colony, be rendered a Disqualification of any persons profession or exercising the same from holding such offices, as fully as they might have done heretofore: Nor shall any further Tests or Qualifications concerning religious persuasion, Profession or Practise [sic], than such have been usually administered in the said Colonies respectively, be imposed by any Law or Ordinance hereafter to be made in any Colony; and whenever on Election or Appointment to any Offices, or any other occasions, the Affirmation of persons conscientiously scrupulous of taking an Oath, hath been admitted in any Colony or Colonies, no Oath shall in any such Cases be hereafter imposed by any Law or Ordinance in any such Colony or Colonies, it being the full Intent of these united Colonies that all the Inhabitants thereof respectively of every Sect, Society or religious Denomination shall enjoy under this Confederation, all the Liberties and Priviledges [sic] which they have heretofore enjoyed without the least abridgement of their civil Rights for or on Account of their religious Persuasion, profession or practice [sic].[114]

Had this article been enacted, it would have been a remarkable step on the path toward creating a national law on religious liberty. The Congress, however, rejected this article as too intrusive on local state regulation of religion. Thus, a few scant words on religion were all that remained in the Articles of Confederation: the final Article III bound the states to "assist each other, against all force

114. JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 90, at 5:547, referencing Josiah Bartlett's and John Dickinson's Draft Articles of Confederation (June 17, 1776), *in* 4 LETTERS OF DELEGATES TO CONGRESS 1774–1789, at 233, 234–35 (Paul H. Smith ed., 1976–2000); *see also* quote in DAVIS, *supra* note 90, at 160–61.

offered to, or attacks made upon them, or any of them, on account of religion . . . ."[115]

Four treaties adopted by the Congress included religious liberty clauses. The Treaty with the Netherlands (1782) provided that "[t]here shall be an entire and perfect liberty of conscience allowed to the subjects and inhabitants of each party, and to their families, and no one shall be molested in regard to his worship, provided he submits as to the public demonstration of it, to the laws of the country . . . ."[116] The language recurred almost verbatim in a treaty with Sweden (1783).[117] A 1785 treaty with Prussia provided: "The most perfect freedom of conscience and of worship, is granted to the citizens or subjects of either party, within the jurisdiction of the other, without being liable to molestation in that respect for any cause other than an insult on the religion of others."[118] The final peace treaty with England (1783) was also made "[i]n the name of the Most Holy and Undivided Trinity."[119]

The 1787 Northwest Ordinance, establishing a new territorial government for the midwestern frontier, set forth various "fundamental principles of civil and religious liberty," including: "No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments"; and "Religion, [m]orality and knowledge being necessary to good government and the happiness of mankind, [s]chools and the means of education shall forever be encouraged."[120]

The record of the Continental Congress also includes other scattered acknowledgments and endorsements of public worship, Christian thanksgiving, Sunday observance, and confession of sin. The record is also amply peppered with genial references to Christianity and invocations of God. The most famous of these divine invocations was the Declaration of Independence of 1776,

115. JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 90, at 19:214.

116. *Id.* at 24:67–80; *see* Madison, *Memorial and Remonstrance*, *supra* note 24, at 6:57–60 (shows Madison's influence on this formulation).

117. *See* JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 90, at 24:457.

118. *Id.* at 30:275.

119. Definitive Treaty of Peace Between the United States of America and His Britannic Majesty (September 3, 1783), *United States Statutes at Large* (8 Stat. 80).

120. JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 90, at 32:340. On various earlier drafts of the Northwest Ordinance, with more expansive language on religious liberty, see EDWIN S. GAUSTAD, FAITH OF THE FOUNDERS: RELIGION AND THE NEW NATION, 1776–1826, at 115–17, 151–56 (2d ed. 2004).

with its references to "the Laws of Nature and Nature's God," "the Creator," "the Supreme Judge of the world," and "a firm reliance on the protection of Divine Providence."[121]

IV. RELIGION AND THE 1787 CONSTITUTIONAL CONVENTION

The Continental Congress waned in power and influence after the Revolutionary War had ended. Lacking the power to tax and lacking a federal judiciary, the Congress depended too heavily upon the cooperation and comity of increasingly antagonistic states. By 1787, the states agreed to call a federal constitutional convention to create a more robust national government. The convention met from May 25 to September 17, 1787, to hammer out a draft constitution.

The United States Constitution is largely silent on questions of religion and religious freedom. The preamble to the Constitution speaks generically of the "Blessings of Liberty."[122] Article I, section 7 recognizes the Christian Sabbath: "If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law."[123] Article VI provides "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[124] A reference to "the Year of our Lord" sneaks into the dating of the instrument.[125] But nothing more.

The seeming impiety of the work of the 1787 Constitutional Convention must be understood in political context. It was commonly assumed at the convention that questions of religious liberty were for the states and the people to resolve, not the budding federal government. The mandate of the 1787 convention was to create a new national sovereign with enumerated powers and delineated procedures. Whatever was not specifically given to this new federal sovereign was to be retained by the sovereign states and the sovereign people. Federal power over religion, beyond the incidental religious acts of the Continental Congress, was simply not considered part of this new constitutional calculus. As James Madison put it to the Virginia Ratification Convention:

121. See various examples in DAVIS, *supra* note 90, at 57–72, 95–116.

122. U.S. CONST. pmbl.

123. *Id.* art. I, § 7.

124. *Id.* art. VI.

125. *Id.* art. VII.

"There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation."[126] James Iredell concurred in the North Carolina Ratification Convention, arguing that the federal branches of government "certainly have no authority to interfere in the establishment of any religion whatsoever, and I am astonished that any gentleman should conceive they have."[127]

Federal protection of religion was also considered unnecessary or beyond the mandate of the 1787 convention. Both the natural checks and balances inherent in the nation's religious pluralism and the new religious liberty provisions of the state constitutions were considered to be sufficient protection.[128] It was thought unnecessary, even dangerous, for the emerging federal constitution to guarantee religious and civil rights. James Wilson famously insisted in the Pennsylvania Ratification Convention that "a bill of rights is neither an essential nor a necessary instrument in framing a system of government, since liberty may exist and be as well secured without it."[129] Similarly, Alexander Hamilton warned in *Federalist Paper No. 84* that to specify federal rights was:

> not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?[130]

Accordingly, the three weak attempts to introduce federal protections of religion and religious liberty into the new constitution did not succeed. Early in the convention debates, on May 29, 1787, Charles Pinckney of South Carolina submitted to the convention a draft constitution that included a religion clause: "The Legislature of the United States shall pass no Law on the subject of Religion."[131] Although many of Pinckney's proposed provisions

126. ELLIOT, DEBATES, *supra* note 69, at 3:314–18, 330; *see also* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS 66 (2d. ed. Neil Cogan ed., 2015).

127. ELLIOT, DEBATES, *supra* note 69, at 4:194.

128. *See id.* at 3:207–08, 313, 431.

129. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 143-44 (Max Farrand ed., 1911) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

130. CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER, 1787 (1966).

131. RECORDS OF THE FEDERAL CONVENTION, *supra* note 129, at 1:23; 3:599.

(including against religious oaths) helped to shape the debates and the final form of the Constitution, his religious liberty clause was passed over without recorded comment and evidently died silently. On September 12, five days before the conclusion of the convention, George Mason and Elbridge Gerry moved to designate a committee to attach a bill of rights to the largely completed Constitution. The motion failed 10–0.[132] And, on September 14 James Madison joined Pinckney in proposing that Congress be given power "to establish an [sic] University, in which no preferences or distinctions should be allowed on account of religion."[133] The motion failed 6–4.

Even Benjamin Franklin's motion to have the convention sessions open with prayer—as the Continental Congress did—garnered virtually no support. On June 28 the elderly Franklin, exasperated by the casuistic debates in the convention to date, had issued a short sermon to his fellow delegates on the importance
of prayer:

> [W]e have not hitherto once thought of humbly applying to the Father of lights to illuminate our understandings? In the beginning of the Contest with G. Britain, when we were sensible of danger we had daily prayer in this room for the divine protection . . . . And have we now forgotten that powerful friend? or do we imagine that we no longer need his assistance? I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth—*that God governs in the affairs of men.* And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid? We have been assured, Sir, in the sacred writings, that "except the Lord build the House they labour in vain that build it." I firmly believe this; and I also believe that without his concurring aid we shall succeed in this political building no better than the Builders of Babel[.][134]

Franklin's motion failed, the record reads, for fear it might "1. bring on it some disagreeable animadversions. & 2. lead the public to believe that the embarrassments and dissentions within the

132. *Id.* at 2:587–88.

133. *Id.* at 2:616.

134. *Id.* at 1:451–52 (footnote omitted). For recollections of this speech by other convention members, see *id.* at 3:471–72, 479, 499, 531. *See also id.* at 3:296–97 (Franklin's own reflections on this motion).

convention, had suggested this measure."[135] Moreover, another delegate pointed out, there were no funds to pay a chaplain to pray.[136]

The only proposal about religion to receive support was Charles Pinckney's proposal that religion not be considered a condition for federal office. On August 20 Pinckney had proposed a freestanding provision in the Constitution prohibiting religious tests or qualifications for federal office.[137] On August 30 he moved to amend a clause specifying the oath of office with the words that would eventually find their way into Article VI of the Constitution: "but no religious test shall ever be required as a qualification to any office or public trust under the authority of the U. States."[138] Only one delegate objected to the motion—not because he favored religious test oaths, but because he thought "it unnecessary, the prevailing liberality being a sufficient security [against] such tests." Pinckney's motion, however, was seconded and passed, with one dissent.[139]

During the ratification debates and thereafter, the no-religious-test provision of Article VI was sometimes denounced as an invitation to "Papists" and "Mahometans," and even "infidels," "atheists," and "pagans," to hold federal office.[140] It was defended, as we saw, on principles both of liberty of conscience and equality of faiths before the federal law.[141] But in the 1787 convention itself, the almost casual passage of the prohibition against religious tests for federal office was testimony to the commonality of the assumption that religion and religious liberty were beyond the pale of federal authority.

135. *Id.* at 1:451–52.

136. *Id.*

137. *See id.* at 2:340–342.

138. *Id.* at 2:468; *see also* US. CONST. art. VI.

139. RECORDS OF THE FEDERAL CONVENTION, *supra* note 129, at 2:468.

140. *See* ELLIOT, DEBATES, *supra* note 69, at 2:44, 119, 148–49, 199, 215; 3:207–08; 4:195–99.

141. *See id.*

V. RATIFICATION AND PROPOSED RELIGIOUS FREEDOM AMENDMENTS

In these state ratification debates about the draft Constitution, the absence of a bill of rights—particularly the lack of a religious liberty guarantee—was a point of considerable controversy. Thomas Tredwell's reservations, stated in the 1788 New York Ratification Convention, were typical: "I could have wished also that sufficient caution had been used to secure to us our religious liberties, and to have prevented the general government from tyrannizing over our consciences by a religious establishment."[142] Despite the repeated assurances of the federalists that Congress could not and would not exercise power over subjects like religion that were not specifically enumerated in the Constitution, only four states would ratify the instrument without a federal bill of rights. The remaining states ratified the Constitution only on the condition that the First Session of Congress would prepare a bill of rights to amend the Constitution. These states discussed and proposed provisions to be included in a federal bill of rights, including various religious liberty clauses.[143] Below, I have put these proposals in bold and numbered them in the order of their appearance for easier reference in the analysis that follows.

In early December 1787 the Pennsylvania ratification convention repeatedly discussed a proposed amendment on religious liberty. A strong federalist, Benjamin Rush, thought the Constitution was fine as written and was even a miracle: "the hand of God was employed in this work, as that God had divided the Red Sea to give passage to the children of Israel, or had fulminated [sic] the Ten Commandments from Mount Sinai."[144] A strong anti-federalist, William Findley, however, pressed for a strong religious liberty amendment to the federal constitution. On December 15, 1787, he proposed:

142. *Id.* at 2:399 (Intervention on July 1, 1788).

143. I omit the repeated attempt of South Carolina, in the ratification and congressional debates, to have Article VI amended to read "no other religious test shall ever be required." *See id.* at 1:325. Such an amendment would have allowed for introduction of religious oaths through the prior clause of Article VI binding all federal officials "by Oath or Affirmation, to support this Constitution." *See* U.S. CONST. art. VI. The proposal received no support each time it was raised. *See* ELLIOT, DEBATES, *supra* note 69, at 1:325; ANNALS, *supra* note 19, at 1:807; S. JOURNAL, 1st Cong., 1st Sess., at 1:122 (1789).

144. 3 COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE 47 (John P. Kaminski et al. eds., 1984).

> [1] The rights of conscience shall be held inviolable; and neither the legislative, executive nor judicial powers of the United States, shall have authority to alter, abrogate, or infringe any part of the constitution[s] of the several States, which provide the preservation of liberty in matters of religion.[145]

The Pennsylvania convention ultimately did not propose this draft to the First Congress, but Findley, in his capacity as an elected Representative to the First Congress, discussed it with fellow Representatives.[146]

On February 6, 1788, a minority faction of the Massachusetts ratifying convention proposed the following amendment, introducing the principle of the freedom of conscience:

> [2] [T]hat the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience.[147]

On April 21, 1788, a minority group in the Maryland ratification convention proposed two religious liberty amendments, neither of which was ultimately recommended by that convention, although again these views were known to the First Congress. Their concerns were for the principles of conscience (now for pacificists), religious equality, and no national establishment:

> [3] That no persons conscientiously scrupulous of bearing arms, in any case, shall be compelled personally to serve as a soldier.
>
> [4] That there be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty.[148]

145. 7 THE FREEMAN'S JOURNAL OR THE NORTH-AMERICAN INTELLIGENCER 348, Dec. 19, 1787, at 1, https://www.newspapers.com/paper/the-freemans-journal-or-the-north-american/1238/ [hereinafter THE FREEMAN'S JOURNAL]; *see also* 25 PROVIDENCE GAZETTE AND COUNTRY JOURNAL 1255, Jan. 19, 1788, at 1 [hereinafter PROVIDENCE GAZETTE].

146. Only Findley's recollections serve as records of such discussions. *See generally* WILLIAM FINDLEY, OBSERVATIONS ON "THE TWO SONS OF OIL": CONTAINING A VINDICATION OF THE AMERICAN CONSTITUTIONS, AND DEFENDING THE BLESSINGS OF RELIGIOUS LIBERTY AND TOLERATION AGAINST THE ILLIBERAL STRICTURES OF THE REV. SAMUEL B. WYLIE (1812). *See also* OWEN S. IRELAND, RELIGION, ETHNICITY, AND POLITICS: RATIFYING THE CONSTITUTION IN PENNSYLVANIA (1995) (alteration in original).

147. Reprinted in THE SACRED RIGHTS OF CONSCIENCE: SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING 415–16 (Daniel L. Dreisbach & Mark David Hall eds., 2009).

148. ELLIOT, DEBATES, *supra* note 69, at 1:553.

A majority of the Maryland ratification convention did accept the recommendation of a third proposal that protected the rights of conscience in oath swearing:

> [5] That all warrants without oath, or affirmation of a person conscientiously scrupulous of taking an oath, to search suspected places, or to seize any person or his property, are grievous and oppressive . . . .[149]

On June 21, 1788, New Hampshire proposed the following religious liberty amendment focused for the first time on limiting "Congress" alone, and now prohibiting any laws about religion or infringing on conscience:

> [6] Congress shall make no laws touching religion, or to infringe the rights of conscience.[150]

On June 26, 1788, Virginia—stating its concern "that no right, of any denomination" may be violated and "among other essential rights, the liberty of conscience, and of the press, cannot be cancelled, abridged, restrained, or modified, by any authority of the United States"[151]—proposed the following amendments:

> [7] [A]ll warrants . . . to search suspected places, or seize any freeman, his papers or property, without information upon oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive . . . and ought not to be granted.[152]

Virginia's further proposal integrated several of the founders' principles of religious freedom, further making clear that religion was theistic and involved both rights and duties, reason and faith:

> [8] 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.[153]

149. *Id.* at 551.
150. *Id.* at 1:326.
151. *Id.* at 1:327.
152. *Id.* at 3:593.
153. *Id.* at 1:594.

On July 26, 1788, New York's proposal efficiently interlinked the principles of freedom of conscience, free exercise of religion, religious equality, and no preferential religious establishment:

> [9] 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 favoured or established by Law in preference to others.[154]

On August 1, 1788, North Carolina—after resolving to protect the "great principles of civil and religious liberty" and expressing its concern that "the general government may not make laws infringing their religious liberties"[155]—repeated the Virginia provision (with only cosmetic changes in punctuation), and prefaced it by a conscientious objection clause for pacifists:

> [10] That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.[156]

Rhode Island repeated in full North Carolina's language in its proposed amendment, belatedly tendered on June 16, 1790, after the Congress had already prepared the Bill of Rights and sent it to the states for ratification.[157]

VI. DRAFTING THE FIRST AMENDMENT RELIGIOUS CLAUSES

It was up to the First Congress to cull from these proposals, and the broader perspectives that they represented, a suitable amendment on religious rights and liberties to include in the Bill of Rights. The record of the Congress's effort is disappointingly slim, given the importance of the moment. There is no official record of proceedings of either the House or the Senate in that first year. Instead, the Senate met in closed session and merely kept a journal of very brief minutes of its resolutions. The House debates were sometimes open to visitors and thus some discussion is preserved. But much of what appears in the *Annals of Congress* for the First

154. *Id.* at 1:328.

155. *Id.* at 4:191–92 (This is the language from the intervention by Henry Abbot about religious test oaths on July 30, 1788.).

156. *See id.* at 1:331–32; 4:243–44.

157. *Id.* at 1:333–35. The Avalon Project collection of documents dates this ratification as May 29, 1790. *See generally* The Avalon Project, *Ratification of the Constitution by the State of Rhode Island; May 29, 1790*, avalon.law.yale.edu/ 18th_century/ratri.asp (last visited Feb. 14, 2022).

House Session of 1789 is drawn from the inexactly taken and transcribed notes of newspaper reporter Thomas Lloyd.[158] These minutes and notes do include several proposed drafts of the religion clauses that were considered intermittently between June 8 and September 26, 1789. They also include summaries and paraphrases of a few of the House debates on August 15, 17, and 20. But for the critical stages of deliberation in late August and September 1789, when these various drafts and speeches were pressed into the final text of the First Amendment, the record is exceedingly cryptic and conclusory—leaving courts and commentators ever since with ample room for speculation and interpolation. The pages below reproduce all the surviving data from these debates, with the proposed drafts again numbered and highlighted, to set up the detailed analysis of the next section.

On June 8, 1789, James Madison, representing Virginia in the House, now took up the call to help prepare a bill of rights to the United States Constitution. He had reduced the multiple state proposals for religious rights provisions into two religion clauses. These he put to the House for consideration:

> [11] The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or any pretext, infringed.
>
> [12] No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.[159]

The House agreed to consider Madison's proposals in due course. But debate was postponed for several weeks as Congress devoted itself to the immediate task of organizing the new government.[160]

On July 21, again prompted by Madison, the House finally turned to Madison's proposals and appointed a committee comprised of one representative of each state represented in the First Congress.[161] Madison, representing Virginia, was included.

158. *See* Marion Tinling, *Thomas Lloyd's Reports of the First Federal Congress*, 18 WM. & MARY Q. 519 (1961); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986).

159. ANNALS, *supra* note 19, at 1:451–52.

160. *See id.* at 1:468.

161. *Id.* at 1:685–86. The committee included John Vining of Delaware, Abraham Baldwin of Georgia, Roger Sherman of Connecticut, Aedanus Burke of South Carolina, Nicholas Gilman of New Hampshire, George Clymer of Pennsylvania, Elias Boudinot of New Jersey, and George Gales of Maryland.

This committee of eleven put forward its proposed rights provisions on July 28, including three separate provisions on religion:

> [13] no religion shall be established by law, nor shall the equal rights of conscience be infringed.
>
> [14] no person religiously scrupulous shall be compelled to bear arms.
>
> [15] no State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases.[162]

The committee's report was tabled without any recorded discussion. On August 13, the House, sitting as a committee of the whole, took up the report, one provision at a time.

On August 15, the House reached the first of the three committee provisions on religion: "no religion shall be established by law, nor shall the equal rights of conscience be infringed." The House ultimately approved an amended version of the same. The full record of this debate (concluding with a modified provision) reads thus:

> Mr. SYLVESTER had some doubts of the propriety of the mode of expression used in this paragraph. He apprehended that it was liable to a construction different from what had been made by the committee. He feared it might be thought to have a tendency to abolish religion altogether.
>
> Mr. VINING suggested the propriety of transposing the two members of the sentence.
>
> Mr. GERRY said it would read better if it was, that no religious doctrine shall be established by law.
>
> Mr. SHERMAN thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the constitution to make religious establishments; he would, therefore, move to have it struck out.
>
> Mr. [Daniel] CARROLL.—As the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand; and as many sects have concurred in opinion that they are not well secured under the present

162. ANNALS, *supra* note 19, at 1:757, 778, 783; *see also* THE FOUNDERS' CONSTITUTION, *supra* note 27, at 5:92–93.

constitution, he said he was much in favor of adopting the words. He thought it would tend more towards conciliating the minds of the people to the Government than almost any other amendment he had heard proposed. He would not contend with gentlemen about the phraseology, his object was to secure the substance in such a manner as to satisfy the wishes of the honest part of the community.

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

Mr. HUNTINGTON said that he feared, with the gentleman first up on this subject, that the words might be taken in such latitude as to be extremely hurtful to the cause of religion. He understood the amendment to mean what had been expressed by the gentleman from Virginia; but others might find it convenient to put another construction upon it. The ministers of their congregations to the Eastward were maintained by the contributions of those who belonged to their society; the expense of building meetinghouses was contributed in the same manner. These things were regulated by by-laws. If an action was brought before a Federal Court on any of these cases, the person who had neglected to perform his engagements could not be compelled to do it; for a support of ministers, or building of places of worship might be construed into a religious establishment.

By the charter of Rhode Island, no religion could be established by law; he could give a history of the effects of such a regulation; indeed the people were now enjoying the blessed fruits of it. He hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all.

> Mr. MADISON thought, if the word national was inserted before religion, it would satisfy the minds of honorable gentlemen. He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word national was introduced, it would point the amendment directly to the object it was intended to prevent.
>
> Mr. LIVERMORE was not satisfied with that amendment; but he did not wish them to dwell long on the subject. He thought it would be better if it was altered, and made to read in this manner, that [16] Congress shall make no laws touching religion, or infringing[163] the rights of conscience.
>
> Mr. GERRY did not like the term national, proposed by the gentleman from Virginia, and he hoped it would not be adopted by the House. It brought to his mind some observations that had taken place in the conventions at the time they were considering the present constitution. It had been insisted upon by those who were called antifederalists, that this form of Government consolidated the Union; the honorable gentleman's motion shows that he considers it in the same light. Those who were called antifederalists at that time complained that they had injustice done them by the title, because they were in favor of a Federal Government, and the others were in favor of a national one; the federalists were for ratifying the constitution as it stood, and the others not until amendments were made. Their names then ought not to have been distinguished by federalists and antifederalists, but rats and antirats.
>
> Mr. MADISON withdrew his motion, but observed that the words "no national religion shall be established by law," did not imply that the Government was a national one; the question was then taken on Mr. Livermore's motion [16 above], and passed in the affirmative, thirty-one for, and twenty against it.[164]

On August 17, the House came to the second provision on religion in the committee report: "no person religiously scrupulous shall be compelled to bear arms." The record of their debate, which ended inconclusively, reads thus:

163. THE CONNECTICUT JOURNAL, Aug. 26, 1789, at 3; MASSACHUSETTS SPY, OR THE WORCESTER MAGAZINE 855, Aug. 27, 1789, at 2. Both report Livermore's motion thus, without the word "infringing": "The Congress shall make no laws touching the rights of religion, or the rights of conscience."

164. ANNALS, *supra* note 19, at 1:757–59.

Mr. GERRY—This declaration of rights, I take it, is intended to secure the people against the mal-administration of the Government; if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed. Now, I am apprehensive, sir, that this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms.

. . . .

. . . Now, if we give a discretionary power to exclude those from militia duty who have religious scruples, we may as well make no provision on this head. For this reason, he wished the words to be altered so as to be confined to persons belonging to a religious sect scrupulous of bearing arms.

Mr. JACKSON did not expect that all the people of the United States would turn Quakers or Moravians; consequently, one part would have to defend the other in case of invasion. Now this, in his opinion, was unjust, unless the constitution secured an equivalent: for this reason he moved to amend the clause, by inserting at the end of it, "upon paying an equivalent, to be established by law."

Mr. SMITH, of South Carolina, inquired what were the words used by the conventions respecting this amendment. If the gentleman would conform to what was proposed by Virginia and Carolina, he would second him. He thought they were to be excused provided they found a substitute.

Mr. JACKSON was willing to accommodate. He thought the expression was, "No one, religiously scrupulous of bearing arms, shall be compelled to render military service, in person, upon paying an equivalent."

Mr. SHERMAN conceived it difficult to modify the clause and make it better. It is well known that those who are religiously scrupulous of bearing arms are equally scrupulous of getting substitutes or paying an equivalent. Many of them would rather die than do either one or the other; but he did not see an absolute necessity for a clause of this kind. We do not live under an arbitrary Government, said he, and the States, respectively, will have the government of the militia, unless when called into actual service; besides, it would not do to alter it so as to exclude the whole of any sect, because there are men amongst the Quakers who will turn out, notwithstanding the religious principles of the society, and defend the cause of their country. Certainly it will be

> improper to prevent the exercise of such favorable dispositions, at least whilst it is the practice of nations to determine their contests by the slaughter of their citizens and subjects.
>
> Mr. VINING hoped the clause would be suffered to remain as it stood, because he saw no use in it if it was amended so as to compel a man to find a substitute, which, with respect to the Government, was the same as if the person himself turned out to fight.
>
> Mr. STONE inquired what the words "religiously scrupulous" had reference to: was it of bearing arms? If it was, it ought so to be expressed.
>
> Mr. BENSON moved to have the words "but no person religiously scrupulous shall be compelled to bear arms," struck out. He would always leave it to the benevolence of the Legislature, for, modify it as you please, it will be impossible to express it in such a manner as to clear it from ambiguity. No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government. If this stands part of the constitution, it will be a question before the Judiciary on every regulation you make with respect to the organization of the militia, whether it comports with this declaration or not. It is extremely injudicious to intermix matters of doubt with fundamentals.
>
> I have no reason to believe but that the Legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of; but they ought to be left for their discretion.
>
> The motion for striking out the whole clause being seconded, was put, and decided in the negative—22 members voting for it, and 24 against it.[165]

Later that same day of August 17, the House debated the third of the provisions recommended by the committee: "no State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases." It approved a slightly amended version:

> Mr. TUCKER.—This is offered, I presume, as an amendment to the constitution of the United States, but it goes only to the alteration of the constitutions of particular States. It will be much

165. *Id.* at 1:778–80.

> better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do; and that is thought by many to be rather too much. I therefore move, sir, to strike out these words.
>
> Mr. MADISON conceived this to be the most valuable amendment in the whole list. If there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments. He thought that if they provided against the one, it was as necessary to provide against the other, and was satisfied that it would be equally grateful to the people.
>
> Mr. LIVERMORE had no great objection to the sentiment, but he thought it not well expressed. He wished to make it an affirmative proposition; **[17] "the equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed by any State."**
>
> This transposition being agreed to, and Mr. TUCKER's motion being rejected, the clause was adopted.[166]

Up to this point, the House had considered its rights amendments as individual provisions to be inserted at appropriate places in the body of the Constitution. On August 20, the House agreed to consolidate these multiple rights provisions, including those on religion, into a more systematic and uniform "supplement" to the Constitution—a separate bill of rights.[167] The three provisions on religion discussed to date were distilled into two provisions. The record of the debate (on August 20) on these two provisions is quite brief:

> On motion of Mr. AMES, the fourth amendment was altered so as to read: [18] "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." This being adopted, the first proposition was agreed to.
>
> Mr. SCOTT objected to the clause in the sixth amendment, "No person religiously scrupulous shall be compelled to bear arms." He observed that if this becomes part of the constitution, such persons can neither be called upon for their services, nor can an equivalent be demanded; it is also attended with still further

166. *Id.* at 1:783–84.

167. *See id.* at 1:795–96.

> difficulties, for a militia can never be depended upon. This would lead to the violation of another article in the constitution, which secures to the people the right of keeping arms, and in this case recourse must be had to a standing army. I conceive it, said he, to be a legislative right altogether. There are many sects I know, who are religiously scrupulous in this respect; I do not mean to deprive them of any indulgence the law affords; my design is to guard against those who are of no religion. It has been urged that religion is on the decline; if so, the argument is more strong in my favor, for when the time comes that religion shall be discarded, the generality of persons will have recourse to these pretexts to get excused from bearing arms.
>
> Mr. BOUDINOT thought the provision in the clause, or something similar to it, was necessary. Can any dependence, said he, be placed in men who are conscientious in this respect? or what justice can there be in compelling them to bear arms, when, according to their religious principles, they would rather die than use them? He adverted to several instances of oppression on this point, that occurred during the war. In forming a militia, an effectual defence ought to be calculated, and no characters of this religious description ought to be compelled to take up arms. I hope that in establishing this Government, we may show the world that proper care is taken that the Government may not interfere with the religious sentiments of any person. Now, by striking out the clause, people may be led to believe that there is an intention in the General Government to compel all its citizens to bear arms.
>
> Some further desultory conversation arose, and it was agreed to insert the words "in person" to the end of the clause; after which it was adopted . . . . [This yielded [19] "No person religiously scrupulous shall be compelled to bear arms in person."][168]

On August 22, these two provisions on religion, along with other amendments, were referred to a House style committee.[169] Two days later, the committee issued its final report. The report included a slightly revised version of the first provision on religion, which had been introduced by Fisher Ames on August 20. It omitted the second provision altogether without explanation. This final House version was sent on August 25 to the Senate for consideration. It read: [20] "**Congress shall make no law**

168. *See id.* at 1:796.

169. *See id.* at 1:808.

establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."[170]

On September 3, the Senate took up debate of this religious liberty provision clause proposed by the House. No record of the Senate debate survives. The *Journal of the Senate* reports that a motion to adopt the House provision on religion was defeated, as was a later motion to strike it.[171] The *Journal* then reports that three alternative drafts of the religion clauses were proposed and defeated. These read seriatim:

> [21] Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed.[172]
>
> [22] Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society.[173]
>
> [23] Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.[174]

Although none of these versions passed, the Senate did agree on a fourth proposal on September 3:

> [24] Congress shall make no law establishing religion, or prohibiting the free exercise thereof.[175]

Agreement on this clause, however, was short-lived. On September 9, the Senate passed a rather different version of the religion clause, now combined with clauses on free speech, press, and assembly.

> [25] Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the government for the redress of grievances.[176]

170. *See* 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 159 (Linda DePauw et al. eds., 1977).

171. *See* S. JOURNAL., 1st Cong., 1st Sess., at 1:70 (1789).

172. *See id.*

173. *Id.*

174. *Id.*

175. *See id.*

176. *Id.* at 1:77.

That same day, September 9, the Senate sent this final version to the House for approval. After the House rejected this version, a joint committee, comprised of three representatives and three senators was appointed to forge a consensus draft. Representing the House were three members of the original committee of eleven that had prepared the draft religion clauses of July 28—Madison; Roger Sherman, a Puritan from Connecticut; and John Vining, a Republican from Delaware. Representing the Senate were Oliver Ellsworth, a Connecticut Republican; William Patterson, an Evangelical from New Jersey; and Charles Carroll, a Catholic from Maryland. No record of their debate survives.

On September 24, 1789, the joint committee reported the final text that came to be the First Amendment:

> [26] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.[177]

On September 25, the Senate concurred in the House resolution to send the draft bill of rights, including this provision on religion, to President Washington. It was sent the following day, and the President sent it to the states for ratification. The final vote needed for ratification, from Virginia, was recorded on December 15, 1791, rendering the amendments effective from that day forward.

VII. "ORIGINAL INTENT": INTERPRETING THE FINAL TEXT

We are now in position to see the challenge facing interpreters: What is the original understanding or intent of the First Amendment religion clauses? Is there only one correct or plausible interpretation, or many? The final text of the First Amendment itself has no plain meaning. The congressional record, such as it is, holds no Rosetta Stone for easy interpretation and no "smoking gun" that puts all evidentiary disputes to rest. Congress considered twenty-five separate drafts of the religion clauses—ten drafts tendered by the states, ten debated in the House, five more debated in the Senate, and then the final draft forged by the joint committee of the House and Senate. The congressional record holds no conclusive argument against any one of the drafts and few clear clues on why the sixteen words that comprise the final First Amendment text were chosen.

177. *Id.* at 1:86-87; *see also* ANNALS, *supra* note 19, at 1:948.

An originalist approach to these historical sources could offer either a "thinner" or "thicker" reading of the First Amendment religious freedom guarantee.[178] By "thinner" reading, I mean making a gestalt judgment about what the final sixteen words together mean at minimum, given the various earlier drafts and the surviving political debates about them. By "thicker" reading, I mean judging each word or phrase of the final First Amendment text and setting out the range of possible, plausible, and likely meanings that the drafters and ratifiers might have had in mind, drawing on contemporaneous data so much as possible. The two subparts that follow set out the evidence and arguments for these thinner and thicker readings.

A. A Thinner Reading

A thinner reading is that the final text of the religion clauses is a compromise agreement only on the outer boundaries of appropriate congressional action on religion. The First Amendment sets clear outer limits to Congress's actions toward religion. Congress may not establish or prescribe religion; nor may Congress prohibit or proscribe religion. Nothing more, nothing less.

While that might sound minimalist to modern ears, this was already a marked departure from the common practice of most European national governments at the close of the eighteenth century. England, for example, still made communicant status in the Anglican Church a condition for national citizenship and for many positions and privileges in state and society.[179] Protestants were only tolerated by the state, and with substantial limits on their freedom.[180] Catholics and Jews remained formally banned from the

178. *See* MICHAEL WALZER, THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD (1994); SETH D. KAPLAN, HUMAN RIGHTS IN THICK AND THIN SOCIETIES: UNIVERSALITY WITHOUT UNIFORMITY (2018).

179. See detailed contemporaneous discussion in RICHARD BURN, THE ECCLESIASTICAL LAW (6th ed. 1797). Relevant statutes are included in JOHN GODOLPHIN, REPERTORIUM CANONICUM; OR, AN ABRIDGMENT OF THE ECCLESIASTICAL LAWS OF THIS REALM CONSISTENT WITH THE TEMPORAL: WHEREIN THE MOST MATERIAL POINTS RELATING TO SUCH PERSONS AND THINGS, AS COME WITHIN THE COGNIZANCE THEREOF ARE SUCCINCTLY TREATED. WHEREUNTO IS ADDED AN APPENDIX (1680).

180. *See* 1 Will & Mary c. 18 (1689); *see also* various other acts collected in SOURCES OF ENGLISH CONSTITUTIONAL HISTORY: A SELECTION OF DOCUMENTS FROM A.D. 600 TO THE PRESENT 607–79 (Carl Stephenson & Frederick George Marcham eds. & trans., 1937).

land until the Emancipation Acts of 1829 and 1858, respectively.[181] Similarly, just as the First Amendment was being crafted and ratified, French authorities were ransacking the Catholic Church and its vast properties, literature, and artwork, and murdering hundreds of its clergy, monks, and congregants with reckless abandon,[182] having done the same to French Calvinists a century earlier.[183] The First Amendment clearly commanded the new Congress of the United States to do nothing of the sort.

On this thinner reading, the First Amendment leaves open to later discussion and development which governmental bodies, besides Congress, might be bound by its terms. Earlier drafts of the First Amendment proposed by the state ratification conventions or debated in the first Congress had sought to bind "the national government" and even "the legislative, executive, and judicial powers of the United States" (Draft Nos. 1, 4, 11). Other drafts had tried to bind the states by name: "no state may infringe [or "violate"] the equal rights of conscience" (Nos. 12, 15, 17). Other drafts had been written in the passive voice and were thus potentially applicable to all government officials: "no religion shall be established by law, nor shall the equal rights of conscience be infringed"; "the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion according to the dictates of conscience" (Nos. 1, 4, 8–11, 13, 14, 19). But in several earlier drafts (Nos. 2, 6, 16, 18, 20–25) and in the final text, "Congress" alone was singled out for special limitations on issues of religion in a way that no other Amendment in the Bill of Rights seeks to do. Nothing is said about what state governments or the executive or judicial branch of the federal government can do. That

181. Catholic Emancipation Act, 10 Geo. 4 c. 7 (1829); Jewish Relief Act 21 & 22 Vict. c. 49 (1858). An 1833 Jewish Emancipation Act passed the House of Commons but was blocked in the House of Lords. *See generally* H.S.Q. HENRIQUES, THE JEWS AND THE ENGLISH LAW (1908); U. R. Q. Henriques, *The Jewish Emancipation Controversy in Nineteenth-Century England,* 40 PAST & PRESENT 126–46 (1968).

182. See documents in CHURCH AND STATE IN THE MODERN AGE: A DOCUMENTARY HISTORY 75–118 (John F. Maclear ed., 1995); CHURCH AND STATE THROUGH THE CENTURIES: A COLLECTION OF HISTORIC DOCUMENTS WITH COMMENTARIES 201–13, 234–49, 355–71 (Sidney Z. Ehler & John B. Morrall eds. & trans., 1954); with discussion in NIGEL ASTON, THE END OF AN ELITE: THE FRENCH BISHOPS AND THE COMING OF THE REVOLUTION 1786–1790 (1992); DONALD GREER, THE INCIDENCE OF THE TERROR DURING THE FRENCH REVOLUTION A STATISTICAL INTERPRETATION 37–107 (1937); FRANÇOIS SOUCHAL, LE VANDALISME DE LA RÉVOLUTION (1993).

183. ELISABETH ISRAELS PERRY, FROM THEOLOGY TO HISTORY: FRENCH RELIGIOUS CONTROVERSY AND THE REVOCATION OF THE EDICT OF NANTES (1973).

can be read as a deferral of the question of whether the states and other branches of the federal government can be bound by the religion clauses. Or it can be read as a settlement of the question: the use of the clear and certain language of "Congress" necessarily *excluded* other branches and levels of government from the limits imposed by the First Amendment.

On this thinner reading, the First Amendment also leaves open to later discussion and development what government laws short of prescribing or proscribing religion are forbidden. Earlier drafts of the establishment clause had included much more sweeping and exact language: Congress was not to "touch" or "favor" religion; not to give "preference" to any religious sect, society, or denomination; not to "establish" any articles of faith or mode of worship (Nos. 6, 8–10, 16, 21–23, 25). Such provisions were left aside for the blunter provision that Congress could simply not do anything that would point to or come too close to ("respect") an establishment of religion. It was left an open question whether the First Amendment outlaws congressional conduct that favors religion but is not necessarily of a sort traditionally associated with or close to becoming an established religion.

Likewise, the various drafts of the free exercise clause had included much more sweeping guarantees: Congress was not to "touch," "infringe," "abridge," "violate," "compel," or "prevent" the exercise of religion or the rights and freedom of conscience (Nos. 2, 6, 11–13, 15–18, 20–23). Again, such provisions were left aside for the blunter provision: Congress could simply not "prohibit" the free exercise of religion. It was left an open question whether the First Amendment forbids government laws and conduct that fall short of outright prohibition of religious exercise.

Such a thin reading of the religion clauses comports with the eighteenth-century ideal that the new Constitution was to be a basic blueprint of government, not a comprehensive code of governmental conduct. The First Amendment simply sets the outer boundaries to appropriate congressional action—no prescription and no proscription of religion. But it leaves the middle way between these outer boundaries open to legislative and judicial discussion and development. The founders knew that this middle way was not uncharted and that the discussion was not unprincipled. After all, the twenty-five earlier drafts of the religion clauses included five of the six main principles of religious liberty regularly discussed in the founding era. Concern for the liberty (or

rights or scruples) of conscience appears in twenty drafts. Free exercise appears in nine drafts, religious equality in ten, religious pluralism in six, and disestablishment in thirteen. (Conspicuously absent from all the drafts is the phrase, "separation of church and state.")

B. A Thicker Reading

The record of the debates over the religion clauses can also support somewhat more nuanced interpretations that seek to unpack the possible, plausible, and likely meanings of each word or phrase in the final text. The temptation to self-serving present-mindedness increases, of course, as one thickens the interpretation. But even a cautious reading of the spare record of the formation of the First Amendment, viewed in contemporaneous context, suggests a bit more about the original understanding of at least some of the words and phrases.

1. "Congress"

The specification of "Congress" underscored the founders' general agreement that the religion clauses were binding not on the states but on the most dangerous branch of the new federal government, the Congress. This was the strong sentiment already in the Continental Congress, and it continued in the 1787 Constitutional Convention and the state ratification debates. It was repeated in the surviving speeches of Roger Sherman, Samuel Livermore, Eldridge Gerry, and Roger Tucker in the House, which we quoted above.[184]

Three of the draft religion clauses submitted by the state ratification conventions had specified "Congress" (Nos. 1, 2, and 6). Six other state drafts submitted in the summer of 1788 included various guarantees of religious liberty, written in the passive voice, that could be read to bind both federal and state governments (Nos. 3, 5–10). In his June 8, 1789, consolidated draft, Madison had sought to accommodate both readings by outlawing a "national" establishment and by prohibiting states from infringing the rights of conscience (Nos. 11, 12). This construction failed, despite Madison's two arguments for it in the August 15 debate.[185] The

184. ANNALS, *supra* note 19, at 1:778–80, 783–84.

185. *Id.* at 1:757–59.

original focus on "Congress" became the norm, with the original New Hampshire version (No. 6) successfully reintroduced in the House by Charles Livermore of New Hampshire (No. 16) as the template.

In his same June 8 draft, Madison had also included generic guarantees of religious liberty without specifying the government entity bound thereby—"the full and equal rights of conscience shall not be infringed," and "the civil rights of none shall be abridged on account of religion" (No. 11). Such provisions, too, died without explanation. By August 20, Fisher Ames's draft (No. 18) specified Congress alone, and the Senate held to this. The First Amendment's focus on "Congress" is clear.

2. "Shall make no law"

The phrase "shall make no law" is rather distinctive—written in a future active imperative voice, as our grammar teachers would say. In eighteenth-century parlance, "shall," as opposed to "will," is an imperative;[186] it is an order, rather than a prediction, about what Congress does in the future. "Shall" is so used fifteen times in the Bill of Rights alone, in such provisions as: "No Soldier *shall*, in time of peace be quartered in any house, without the consent of the Owner;"[187] "nor *shall* private property be taken for public use, without just compensation;"[188] "Excessive bail *shall* not be required"[189] and the like. But why the construction "*shall* make no law," which is a phrasing unique to the First Amendment? Could it be that Congress could make no new laws on religion but could confirm laws that had already been made—before the First Amendment was passed, or by the Continental Congress before it?

Such a reading seems fanciful until one notes the exchange in the House on September 25, 1789, the very day the House approved the final text of the religion clauses. Elias Boudinot of New Jersey, who chaired the recorded House debates on the religion clauses, announced that "he could not think of letting the session pass over

186. See entries under "shall" and "will" in JOHN ANDREWS, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1789); JOHN ASH, A NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773); WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY (1st Am. ed. 1788); A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789).

187. U.S. CONST. amend. III.

188. *Id.* amend. V.

189. *Id.* amend. VIII.

without offering an opportunity to all the citizens of the United States of joining, with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured down upon them."[190] He then moved that both houses of Congress request the President to set aside a day of "public thanksgiving and prayer, to be observed by acknowledging . . . the many signal favors of Almighty God."[191] Aedanus Burke of South Carolina thought this too redolent of a European military custom, which made "a mere mockery of thanksgiving."[192] Thomas Tucker, also of South Carolina, objected:

> [I]t is a business with which Congress ha[s] nothing to do; it is a religious matter, and, as such, is proscribed to us. If a day of thanksgiving must take place, let it be done by the authority of the several States; they know best what reason their constituents have to be pleased with the establishment of the Constitution.[193]

Roger Sherman countered that the tradition of offering such public prayers was "laudable" and after citing a few biblical precedents for it, declared the practice "worthy of Christian imitation on the present occasion."[194] Boudinot defended his motion on grounds that it was "a measure both prudent and just" and quoted "further precedents from the practice of the late [Continental] Congress" to drive home his point. The motion passed in the House and later also in the Senate.[195] President Washington set aside a Thanksgiving Day and gave a robust proclamation on October 3, 1789.[196]

This was not the only such inherited tradition touching religion that the First Congress confirmed and continued. On April 15, 1789, before deliberating the religion clauses, the Congress voted to appoint "two Chaplains of different denominations" to serve Congress, one in each house.[197] On April 27 the Congress ordered,

190. ANNALS, *supra* note 19, at 1:949–50.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 1:958–59.

196. *Thanksgiving Proclamation of 1789*, GEORGE WASHINGTON'S MOUNT VERNON, https://www.mountvernon.org/education/primary-sources-2/article/thanksgiving-proclamation-of-1789/ (last visited Mar. 21, 2022).

197. ANNALS, *supra* note 19, at 1:19–20 (reporting that the Senate voted for its chaplain on April 25, 1789); *id.* at 1:241–42 (recording that the House voted for its chaplain on May 1, 1789).

relevant to the pending inauguration of President Washington: "That after the oath shall have been administered to the President, he, attended by the Vice President, and members of the Senate, and House of Representatives, proceed to St. Paul's Chapel, to hear divine service, to be performed by the Chaplain of Congress already appointed."[198] These chaplains served the Congress throughout the period of the debates on the religion clauses. On September 22, 1789, just as the joint committee was polishing the final draft of the religion clauses, Congress passed an act confirming their appointment and stipulating that the chaplains were to be paid a salary of $500 per annum.[199] Similarly, on August 7, 1789, after the committee of eleven had put to the House its three proposed religion clauses (Nos. 13–15), the Congress reenacted without issue the Northwest Ordinance, with its two religion clauses: "No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments"; and "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[200]

The First Congress thus did "make" laws on religion, but almost all these "new" laws echoed the old laws of the Continental Congress. Perhaps it was just political inertia or nostalgia that guided Congress. Perhaps it was a conscious desire to maintain a few of the settled national traditions that had kept the fragile country together over the prior fifteen tumultuous years. Perhaps the new Congress was simply repeating what many new state legislatures had done immediately after their new state constitutions were in place—to confirm that their colonial legal traditions and their English antecedents would all continue to be in effect with presumptively constitutionality, unless they were explicitly outlawed by the new state constitutional text or outlawed by subsequent legislation or judicial interpretation.[201] It is notable,

198. *Id.* at 1:25. A slightly reworded version was passed in the House on April 29, 1789. *Id.* at 1:241.

199. First Cong., Sess. 1, ch. 13, 71 § 4 (1789).

200. DOCUMENTS OF AMERICAN HISTORY 130, 131 (Henry Steele Commager ed., 5th ed. 1949). However, this does not appear in the ANNALS for August 7, 1789. *See* ANNALS, *supra* note 19, at 1:59–62, 710–14.

201. *See, e.g.*, DEL. CONST. of 1776, art. 25 ("The common law of England, as well as so much of the statute law as has been heretofore adopted in practice in this state, shall remain in force unless they shall be altered by a future law of the Legislature, such parts only

as we saw, that when the first federal congressmen in 1789 raised constitutional objections to supporting chaplains, prayers, Thanksgiving proclamations, and religious education,[202] the majority argued successfully that these were simply continuations of old laws and policies on religion, not the creation of new ones. These measures thus evidently did not violate the First Amendment command that "Congress shall make no law respecting" religion.

One cannot lean too heavily on this construction and application of the phrase "shall make no law." First, the congressional record is too cryptic to decide whether such a subtle play on words was deliberate. Second, it must be remembered that the First Congress served as both a legislature and a constitutional drafter in 1789. Its legislative acts were driven by the fleeting necessities of the time, its constitutional amendments by the enduring needs of the nation. The two kinds of acts should not be conflated. Nonetheless, the First Congress seemed to have had little compunction about confirming and continuing the Continental Congress's tradition of supporting chaplains, prayers, Thanksgiving Day proclamations, and religious education. And, in later sessions in the 1790s and 1800s, the Congress also continued the Continental Congress's practice of including religion clauses in its treaties, condoning the preparation of an American edition of the Bible, funding chaplains in the military, and celebrating religious services officiated by congressional chaplains—all with very little dissent or debate.[203] The ease with which Congress passed such laws does give some guidance on what forms of religious support the First Congress might have condoned.

excepted as are repugnant to the rights and privileges contained in this Constitution and the declaration of rights, &c., agreed by this convention."); MASS. CONST. of 1780, ch. 6, art. 6 ("All the laws which have heretofore been adopted, used, and approved in the Province, Colony, or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution.") See further examples of such early reception statutes here: https://www.iuslaw.org/common-law-reception-statutes/(last visited Feb. 2, 2022).

202. *See supra* note 200.

203. Nathan S. Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause,* 96 NOTRE DAME L. REV. 677 (2020); Storslee, *supra* note 31.

3. "Respecting an establishment of religion"

This phrase is remarkably unclear, particularly the word "respecting." Thirteen drafts of the religion clauses included references to the "establishment" of religion, but the only debate that has survived is the brief and inconclusive discussion of August 15 on the draft: "no religion shall be established by law" (No. 13). In eighteenth-century dictionaries, to "establish" something meant "to settle firmly," "to fix unalterably," "to make firm," "to ratify," "to ordain," "to enact," "to set up," to "build firmly."[204] On this dictionary definition, then, Congress was not permitted to "settle," "fix," "define," "ordain," "enact," or "set up" the nation's religious doctrines and liturgies, clergy and property, which Parliament had done for England and its colonies—and seven of the new American states were still doing per their own state constitutions.

No founder publicly supported the idea of Congress "establishing" a single national religion that "fixed," "defined," and "settled" by law the doctrine, liturgy, worship, religious canon, and other traditional features of established Christianity. The new American nation wanted no royal or presidential Supreme Head of a national Church of America like the Crown and Church of England; no bench of bishops sitting in Congress; no prescribed *Book of Common Prayer* that set the nation's liturgy, lectionary, and religious calendars; no mandated King James Version of the Bible; no church courts with jurisdiction over family, charity, education, inheritance, defamation, and the like.[205] Those prevailing English establishment and ecclesiastical law patterns were all well beyond the pale for the young American republic.

But the final text of the First Amendment does not simply state that "Congress shall not establish religion" or "make laws establishing religion" or generically outlaw "a national establishment of religion"—as earlier drafts had done. The final wording is more ambiguous: "Congress shall make no law *respecting* an establishment of religion." The important new word is "respecting." It appears nowhere in any of the twenty-five drafts of the First Amendment, but emerged, without explanation, in the final draft from the joint House-Senate committee. We have no

204. See entries under "establish" and "establishment" in Andrews, *supra* note 186; Ash, *supra* note 186; Johnson, *supra* note 186; Perry, *supra* note 186; and THE OXFORD ENGLISH DICTIONARY (1884–1928).

205. *See* BURN, *supra* note 179; GODOLPHIN, *supra* note 179.

record of any debate regarding this word, and "respecting" is a studiously ambiguous term. It is variously defined in eighteenth-century dictionaries as: "to look at, regard, or consider"; to "heed or pay attention to"; "to regard with deference, esteem, or honor"; and to "expect, anticipate, look toward."[206]

There are three plausible readings of the final text, which might overlap.[207] The first is that Congress shall make no laws "respecting" a *state establishment* of religion. That is, Congress could make no law that "looked at," "regarded," or "paid attention to" a state establishment of religion—whether favorably or unfavorably. This would make the First Amendment a complement to the Tenth Amendment, which reserved to the states any powers not explicitly given to the Congress.[208] In 1789, after all, several states still had some form of religious establishment, which both their state legislatures and constitutional conventions defined and defended, often against strong opposition from religious dissenters. Moreover, Virginia had just passed Jefferson's ironically titled bill "for the *establishment* of religious freedom," also against firm opposition but now by defenders of the traditional establishment of Anglicanism.[209] Having just defended their state establishments (of whatever sort) at home, the new members of Congress were not about to relinquish control of them to the new federal government.

The first minority proposal from Pennsylvania stated that federalist concern directly: "neither the legislative, executive, nor judicial powers of the United States, shall have authority to alter, abrogate, or infringe any part of the constitutions of the several States, which provide the preservation of liberty in matter[s] of religion" (No. 1). North Carolina, too, stated its concern that "the general government may not make laws infringing their religious

206. See entries under "respect" and "respecting" in Andrews, *supra* note 186; Ash, *supra* note 186; Johnson, *supra* note 186; Perry, *supra* note 186; and THE OXFORD ENGLISH DICTIONARY (1884–1928).

207. *See, e.g.*, Chapman & McConnell, *supra* note 12; Richard H. Fallon, Jr., *Tiers for the Establishment Clause* 166 U. PENN. L. REV. 59 (2017).

208. U.S. CONST. amend. X.

209. THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619 (William Waller Hening ed., 1823); *see* THOMAS E. BUCKLEY, ESTABLISHING RELIGIOUS FREEDOM: JEFFERSON'S STATUTE IN VIRGINIA (2013).

liberties."[210] Both Massachusetts and New Hampshire zeroed in on Congress, the dangerous new law-making body, with the latter stating simply: "Congress shall make no laws touching religion" (Nos. 2 and 6).

This federalist concern continued in the House debates. Several House members said they feared that Congress might pass laws that interfered in religious matters—particularly through the "necessary and proper clause" of Article I, which Madison had signaled as the danger point during the August 15 debate.[211] There was also some concern—reflected both in Huntington's second intervention on August 15[212] and in Benson's intervention on August 17[213]—about state actions on religion being adjudicated in the federal courts. Madison, we saw, argued that his provision prohibiting a "national" establishment would allay all these fears so that no "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform."[214] But he got nowhere with this argument. Gerry thought the matter should be dropped.[215] Livermore thought it better to say simply: "Congress shall make no laws touching religion, or infringing the rights of conscience."[216] That language was provisionally passed, and the focus on "Congress" persisted in the House and later Senate debates.

To be sure, the First Congress had already quite explicitly rejected those drafts of the religion clauses that bound the states directly and also rejected those that were cast in more general terms or in passive voice (not merely directed at "Congress") and thus potentially binding on the states (Nos. 1, 4, 8–15, 17, and 19). And to be sure, the Tenth Amendment (which was under discussion in the Congress at the same time) guaranteed generally: "The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people."[217] But perhaps on so sensitive an issue as religion, it was best to be triply sure—and

210. *See* Draft No. 10, *supra* text accompanying note 156. This is the language from the intervention by Henry Abbot about religious test oaths on July 30, 1788, in ANNALS, *supra* note 19, at 4:191–92.

211. ANNALS, *supra* note 19, at 1:757–59.

212. *Id.*

213. *Id.* at 1:778–80.

214. *Id.* at 1:757–59.

215. *Id.*

216. *Id.*

217. U.S. CONST. amend. X.

explicitly outlaw any congressional interference in the states' establishments of religion or provisions for religious freedom. Perhaps, in the final House-Senate committee of six, it was the hard political issue of federal versus state power that was resolved by adding the curious phrase "respecting an establishment."

It would be considerably easier to press this first reading of the "respecting" language if the final draft said "a *state* establishment," rather than "*an establishment.*" But since reference to "state establishments" had not appeared before in the twenty-five earlier drafts, perhaps the final committee thought it prudent to avoid introducing a new contested term so late in the debate—particularly given the squabbling over the term "*national* establishment" in the August 15 House debate. This federalist reading is how the language was sometimes defended in the state ratification debates over the draft Bill of Rights. As James Iredell put it to his fellow conventioneers in North Carolina: "Each state . . . must be left to the operation of its own principles" when it comes to religion.[218]

A second plausible reading of the "respecting" text is that Congress could neither establish religion outright nor make laws that would "point toward," "anticipate," or "reflect" such an establishment. On this reading, Congress could not pass a comprehensive new law on religion defining the texts, doctrines, and liturgies of the nation's faith and/or governing religious polity, clergy, and property. Such a law, redolent of the Anglican establishments that prevailed on the American Revolution, would clearly be unconstitutional, and no founder argued for this national establishment policy. But that was not the founders' real fear, according to this reading. They also feared stepping on a slippery slope or introducing "the nose of the camel in the tent."[219] Thus they prohibited Congress from making more discrete laws that might "respect"—that is, point toward, anticipate, or move in the direction of—such an establishment. The First Congress's concern was to prevent not only a single comprehensive law that established a national religion but also piecemeal laws that would move incrementally toward the same.

The establishment clause, on this reading, was not necessarily a prohibition against all laws "touching" religion, as some earlier drafts had indicated (No. 6 and 16). After all, the new Congress,

218. ELLIOT, DEBATES, *supra* note 69, at 4:195.

219. Walz v. Tax Commission, 397 U.S. 664, 678 (1970).

echoing the Continental Congress, had already passed several such laws—supporting chaplains, prayers, religious education, and Thanksgiving Day proclamations.[220] Such laws presumably did not point or move toward an established religion but simply reflected commonplaces of the day about what was proper for the young nation. But the establishment clause was a rather firm barrier against a large number of laws touching religion that might move toward an establishment.

This second reading turns on a crucial judgment about why the First Congress had rejected earlier drafts that were more specific about defining a religious establishment. On August 15, the House debated whether to outlaw "religious establishment" per se (No. 13). There seemed to be consensus on this, as Roger Sherman said early in the debate.[221] The moment that the representatives began to specify what they meant by religious establishment, however, the conversation broke down: Elbridge Gerry was concerned about establishing religious doctrines,[222] Benjamin Huntington about forced payments of religious tithes,[223] James Madison about compulsory worship of God and giving preeminence to one sect[224]—all of which were features of a traditional establishment of religion. The initial compromise was Samuel Livermore's clause that insisted the Congress make "no law touching religion" at all (No. 16). By August 20, the House had returned to the language that opened the August 15 debate: "Congress shall make no law establishing religion" (No. 18). That was the language sent to the Senate. The Senate also could not nuance this "no establishment" formulation—failing to reach agreement on drafts that would outlaw the establishment of "one Religious Sect or Society" or of "articles of faith or a mode of worship" or that would outlaw the preference of one religious sect, society, or denomination (Nos. 21–23, 25). On this second reading of the establishment clause, the word "respecting," therefore, becomes something of an umbrella term for these and other features of a religious establishment. Congress could not agree on what specifics of religious establishment to outlaw—and so they simply outlawed the

220. *See supra* text accompanying notes 92–95, 97–99, 111–12.

221. ANNALS, *supra* note 19, at 1:778–80.

222. *Id.* at 1:757–59.

223. *Id.*

224. *Id.*

establishment of religion altogether and anything that "reflected," "pointed to," or "moved toward" the same.

On the first reading of the "respecting" language, the establishment clause is a limited prohibition against congressional interference with state controls of religion. Read as a federalism clause, it leaves little guidance for what Congress might do at the federal level respecting (an establishment of) religion. On the second reading, the establishment clause is a comprehensive prohibition against any congressional inclination toward establishing religion. This leaves some room for Congress to pass laws "touching religion," but not much—save maybe those earlier actions by the Continental Congress. These two prominent readings of the phrase "respecting an establishment of religion" do not exhaust the possibilities, but they set the sharpest contrasts on an interpretive spectrum that offers a host of alternatives.

This leads to consideration of a third reading that splits the difference. The establishment clause, on this third reading, simply outlaws preferential support for a "national religion," but allows for "nonpreferential" support for multiple religions. On this reading, the feature of "establishment" that concerned Congress most was not to outlaw a grand establishment scheme but to avoid official "preferences" for one religious sect, denomination, doctrine, or mode of worship that "reflected" (that sense of "respecting") the old religious establishments which allowed one faith per territory, with mere toleration at best of some other religions.

This reading emphasizes the principles of religious pluralism and religious equality over the "preferentialism" of traditional religious establishments. Seven drafts of the religion clauses, including the penultimate one, sought to formulate the establishment clause this way by outlawing various types of "preferential" establishments by name (Nos. 8–10, 21–23, 25). All of these drafts failed. But, the argument goes, Congress accomplished its goal of outlawing preferential support more efficiently by simply prohibiting laws against "an" establishment of this sort—rather than prohibiting laws against "the" establishment of religion altogether. On this formulation, Congress could certainly "touch religion"—rather generously in fact—so long as it did so in a way that did not prefer one religious sect or society above another. And Congress demonstrated what such nonpreferential support meant by appointing and funding chaplains from different

denominations, supporting general "religious education," and condoning pious but nondenominational prayers and Thanksgiving Day proclamations.

This "nonpreferential" reading of the establishment clause, while plausible, relies heavily on Madison's rejected concern about "national establishment."[225] Moreover, it does rather little to explain the insertion of the curious word "respecting" and uses a tertiary dictionary definition of "reflecting." It also relies heavily on a clever linguistic distinction between "*an*" and "*the*" establishment of religion—words on which the sloppy congressional record slipped more than once.[226]

4. "Or"

Some modern judges and jurists are still debating whether there is one religion clause or two—and whether these should actually be called "clauses" (given that they have no subjects or predicates) or more properly "guarantees."[227] They further debate whether there is a necessary tension between the two phrases. The argument for tension runs like this: any time government establishes or favors one religion, it of necessity impinges the freedom of all other religions to exercise their faith. And, in turn, anytime government gives special support to the free exercise of (one) religion, it of necessity has moved toward ("respected") the establishment of that (one) religion. The argument against tension runs like this: the no establishment of religion guarantee means that government may not evaluate, approve, or disapprove any religion, and the free exercise of religion guarantee means that individuals and groups are free to practice whatever religion they choose. The point of both "clauses" (to use the conventional language) is to leave the field of religion entirely free—to view it as a structural constraint on the Congress.[228]

225. *Id.*

226. See *id.* at 1:948, transcribing the final Senate version of the free exercise clause: "prohibiting a free exercise thereof." *See also id.* at 1:451, 778–80, variously quoting Madison's call for disestablishment of "any" and "a" religion.

227. *See, e.g.*, Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise,* 90 MICH. L. REV. 477 (1991).

228. *See* Carl Esbeck, *The First Federal Congress and the Formation of the Establishment Clause of the First Amendment, in* NO ESTABLISHMENT, *supra* note 51, at 208–51; IRA C. LUPU & ROBERT W. TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE 3–73 (2014); Glendon & Yanes, *supra* note 227, at 477–550.

Little in the final text of the First Amendment or in the debates surrounding its formation resolves these modern controversies. But some of the modern controversy turns on how to read the word "or" that separates the establishment and free exercise language in the First Amendment. Is this a disjunctive "or" or a conjunctive "or"? And is the "or" directed at "Congress" or at the "no law" part of the phrase: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." And then, what does the comma between "religion" and "or" signify?

Two interpretations are equally plausible under this close linguistic parsing. If it is read as a disjunctive "or" then the emphasis is on two separate guarantees: Congress shall make no law that establishes religion, and Congress shall make no law that prohibits religion. It is two separate clauses guaranteeing religious liberty with the "or" modifying "Congress" and with the comma dividing what Congress may not do. If it is read as a conjunctive "or" then the emphasis is on the single guarantee that Congress may not make laws on (or "touching") religion. These laws may not establish religion or prohibit its exercise, and *a fortiori* everything in between. It is one clause guaranteeing religious liberty, with the "or" modifying the "law" that Congress is not empowered to make and the comma separating the two extreme kinds of laws that are forbidden.[229]

This might appear like hopelessly casuistic hairsplitting. But these are common questions for modern textual interpretation in the law, and both judges and jurists sometimes employ this heavy hermeneutical machinery on the First Amendment. The original text and the First Congressional debates and subsequent state ratification debates about this text do not dispose of these questions.

5. "Prohibiting the free exercise thereof"

Although the origins of the establishment clause have long occupied commentators, the origins of the free exercise clause have only recently come into prominent discussion. As with the establishment clause, the historical record regarding the free exercise clause does not resolve all modern questions. Indeed, in

229. See further parsing of "or" and "respecting" in Esbeck, *supra* note 228, at 232–42.

the case of the free exercise clause, the congressional record seems to raise as many questions as it answers.

First, as we noted in the "thinner" reading above, the free exercise clause merely outlaws congressional acts that "prohibit" the free exercise of religion. Earlier drafts had included much more robust protections for free exercise by disallowing laws that would "touch," "infringe," "abridge," "violate," "compel," or "prevent" the same (Nos. 2, 6, 11–13, 15–18, 20–23). All these suggestions were replaced by the seemingly minimalist guarantee that Congress not "prohibit" the free exercise of religion.

Second, the free exercise clause is not matched by an explicit liberty of conscience clause. Twenty drafts of the religion clauses had included a provision protecting the liberty or rights of conscience—sometimes generally, and sometimes in protecting religious scruples against bearing arms (or swearing oaths). The final recorded House debates on August 20 show agreement on both such protections: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to *infringe the rights of conscience*" (No. 18; emphasis added). And again, "no person *religiously scrupulous* shall be compelled to bear arms in person" (No. 19; emphasis added). The Senate included a guarantee to avoid infringing the rights of conscience in its first three drafts but then abruptly and permanently dropped any reference to rights of conscience at the end of September 3 (No. 24). That leaves the final, spare free exercise clause.

Third, while it was creating the religious freedom clauses, Congress was simultaneously formulating and debating the free speech, free press, and free assembly clauses. The House had combined the speech, press, and religion clauses already on July 28 (Nos. 15, 17). The Senate combined these with the assembly clause on September 9 (No. 25), and thereafter they were all considered together. The House debates on these other First Amendment provisions make rather clear that religious speech, religious press, and religious assembly were included in the guarantees of these three clauses.[230] Surely the free exercise clause was not intended to be merely redundant of these attendant clauses. But that leaves open the question: What independent content is protected by the free exercise clause beyond free religious speech, free religious press, and free religious assembly?

230. THE FOUNDERS' CONSTITUTION, *supra* note 27, at 5:111–208.

Too minimal a reading of the free exercise clause is hard to square with the widespread solicitude for rights of conscience and free exercise reflected in the First Congress's debates. Every one of the ten state drafts of the religion clauses included such protections. For example, the Virginia and North Carolina drafts, as we saw, went on at length:

> 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 (No. 8).

New York's draft was also effusive: "That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience" (No. 9).

The August House debates that have survived echo a hearty support for the rights of conscience and free exercise. As we saw, Daniel Carroll spoke eloquently that "the rights of conscience are, in their nature of such peculiar delicacy, and will little bear the gentlest touch of government."[231] Benjamin Huntington warned against anything "hurtful to religion" and hoped the "amendment would be made in such a way as to secure the rights of conscience and a free exercise of the right of religion."[232] Elias Boudinot gave the final resounding word of the House on August 20: "I hope that in establishing this Government, we may show the world that proper care is taken that the Government may not interfere with the religious sentiments of any person."[233]

How does this enthusiasm for the rights of conscience and freedom of exercise from the states and First Congress square with what seems like a textually meager guarantee that "Congress shall make no law . . . prohibiting the free exercise" of religion?

One response is that the free exercise clause is somewhat less meager when read in eighteenth-century terms, rather than ours. The word "prohibiting," in eighteenth-century parlance, was as much a synonym as a substitute for the terms "infringing," "restraining," or "abridging" used in earlier drafts.[234] As Michael McConnell has shown, both dictionaries and political tracts of the

231. ANNALS, *supra* note 19, at 1:757–59.

232. *Id.*

233. *Id.* at 1:796.

234. *See* dictionaries *supra* note 186, under "prohibit" and "prohibiting."

day conflated these terms. To flip from one to the other, particularly in the charged political rhetoric of the First Congress, could easily have been driven more by aesthetics and taste than by substantive calculation.[235] One can see this conflation of terms in the original draft submitted by the Virginia ratification convention in the summer of 1788. In the preface to its proffered amendments, the Virginia convention cited its main concern—that "essential rights, the liberty of conscience, and of the press, cannot be cancelled, abridged, restrained, *or* modified, by any authority . . . ."[236] Commenting on this passage in 1800, Madison argued that the point of listing all these verbs was simply to underscore "that the liberty of conscience and the freedom of press were equally and completely exempted from all authority whatever of the United States."[237] Such rights, in Madison's view, were equally and completely protected by the First Amendment, despite its use of the alternative terms, "prohibiting" (free exercise) and "abridging" (free speech, press, etc.). To read the First Amendment otherwise would lead to silly results:

> [I]f Congress may regulate the freedom of the press, provided they do not abridge it, because it is said only "they shall not abridge it," and is not said, "they shall make no law respecting it," the analogy of reasoning is conclusive that Congress may regulate and even abridge the free exercise of religion, provided they do not prohibit it; because it is said only "they shall not prohibit it," and is not said "they shall make no law respecting, or no law abridging it."[238]

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

Moreover, the phrase "free exercise" itself, in eighteenth-century parlance, was both a source and a summary of a whole range of principles of religious freedom. "Free exercise" did have a

235. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1486–88 (1990).

236. ELLIOT, DEBATES, *supra* note 69, at 1:360 (emphasis added).

237. Report on the Virginia Resolutions (January, 1800), *in* THE FOUNDERS' CONSTITUTION, *supra* note 27, at 5:141, 146–47.

238. *Id.*

distinct meaning in the eighteenth century, as we saw.[239] It was conventionally understood to protect the religious speech, press, assembly, and other activities of individuals, and the actions respecting the discipline, clergy, property, and polity of religious groups.[240] But, as we also saw, "free exercise" was just as much an umbrella term that connoted protections of liberty of conscience, religious equality and pluralism, and (in some formulations) separation of church and state. In earlier drafts of the religion clauses, Congress sought to spell out these various principles separately—listing liberty of conscience twenty times, religious equality ten times, and religious pluralism six times. Perhaps in an attempt to avoid giving priority to any particular construction, Congress thought it best to use the generic term "free exercise" and leave its specific content open to ongoing constitutional development and application. This is a speculative reading, but certainly a plausible one even on the thin congressional record.

The record of the First Congress does give a better indication of why a specific clause on conscientious objection to bearing arms might have been excluded from the First Amendment. The Continental Congress had included such a provision in its legislation, as we saw,[241] and several state constitutions and legislatures did so as well.[242] The Maryland and North Carolina ratification conventions had advocated that such a provision be included in a federal bill of rights (Nos. 3 and 10). The House committee of eleven had repeated it on July 28 (No. 14). The House debated the conscientious objection clause on August 17 and 20. It was clearly controversial—passing only 24–22 in the full House on August 20 before being silently dropped by the House style committee four days later.[243] House Representatives Gerry and

239. *See supra* text accompanying notes 23-40.

240. The Congressional Record of 1790 includes an instructive anecdote illustrating the Congress's presumption of the free exercise rights of the church and clergy. Medieval canon law had granted to clergy "privilege of forum" or "benefit of clergy"—the right of an ordained cleric to have any criminal case against him heard in a church court, rather than in a civil court. This practice continued after the Reformation, in Catholic and in many Protestant polities alike, and was a familiar feature of American colonial law. *See* BURN, *supra* note 179, at 1:185–92; GEORGE W. DALZELL, BENEFIT OF CLERGY IN AMERICA AND RELATED MATTERS (1955). In an act of 1790, Congress provided: "That the benefit of clergy shall not be used or allowed, upon conviction of any crime, for which, by any statute of the United States, the punishment is, or shall be declared to be, death." STOKES, *supra* note 30, at 1:492.

241. *See supra* text accompanying notes 101–02.

242. *See supra* text accompanying notes 148, 156.

243. *See supra* text accompanying note 165.

Scott both objected because such an open-ended clause might well be abused, with the military and the nation thereby imperiled.[244] Representatives Scott and Jackson thought it unfair that "one part" of the nation "would have to defend the other in case of invasion."[245] Chairman Boudinot ultimately carried the slender majority at that time with an impassioned speech: "[W]hat justice can there be in compelling them to bear arms, when, according to their religious principles, they would rather die than use them?"[246]

The clause itself quietly disappeared after August 20, however—and this may be linked to the suggestions by three of the representatives that conscientious objection was better left to the legislature. Sherman hinted at this by saying the clause was not "altogether unnecessary."[247] Scott said more explicitly that conscientious objection status was not a constitutional but a "legislative right."[248] Benson elaborated this view, advising that such questions be left "to the benevolence of the Legislature" and to the "discretion of the Government."[249] "If this stands part of the constitution," Benson reasoned, "it will be a question before the Judiciary on every regulation you make with respect to the organization of the militia[.]"[250] Ever since, the contentious issue of conscientious objection status in the military has remained almost consistently sub-constitutional—handled by statute and regulation rather than by direct free exercise inquiry.[251]

Conscientious objection to military service was only one application of the broader principle of liberty of conscience, however. Another was the conscientious objection to oath swearing that was included in the Maryland and Virginia draft proposals (Nos. 5, 7). This concern received no attention in the surviving Congressional debates on the First Amendment. Perhaps the founders thought conscience claims concerning oaths were better left to Article VI of the Constitution, which explicitly outlawed religious test oaths for religious office.[252] Or perhaps they thought

244. ANNALS, *supra* note 19, at 1:796–97.
245. *Id.* at 1:778–80.
246. *Id.* at 1:796.
247. *Id.* at 1:757–59.
248. *Id.* at 1:796.
249. *Id.* at 1:778–80.
250. *Id.*
251. WITTE & NICHOLS, *supra* note 22, at 129–32.
252. U.S. CONST. art. VI.

this so obvious an application of liberty of conscience embedded within the notion of free exercise that it warranted no specific additional text of its own. These, too, are plausible readings but nothing in the surviving record confirms that this was their intent.

Even if these two specific concerns about liberty of conscience—military service and oath-swearing—were addressed, that still leaves unexplained why the First Amendment seems to leave other dimensions of liberty of conscience unprotected. Sixteen drafts of the religion clauses, after all, sought to protect rights or freedom of conscience in general terms. These drafts reflected the common views of the founders, including earlier state constitutional drafters, that all religious parties, particularly religious minorities, needed protection from state coercions of conscience and from having to obey laws that required them to do something or to forgo doing something that conflicted with a core dictate of conscience.[253] It could be that the First Congress decided to leave all such conscience claims to the legislature to sort out, as they explicitly had done with the most contested claims of conscientious objection to military service. But that solution does not address concerns about the tyranny of the majority, which Madison had signaled as the primary danger point:

> In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.[254]

So what in the First Amendment protected rights of conscience, including the right to be free from compliance with majoritarian laws that ran afoul of core claims of conscience?

One answer lies in the reality that in the eighteenth century the phrase "free exercise" was synonymous with the phrases "freedom *to* exercise," "freedom *to* practice," or "freedom *to* act *out*" or act "*on*" one's religion as conscience demanded. The New York proposed draft, we saw, spelled this out: "[T]he people have an equal, natural, and unalienable right *freely and peaceably to exercise their religion*, according to the dictates of conscience" (No. 9; emphasis added). Casting the First Amendment free exercise clause

253. *Id.* at 41–45; *supra* text accompanying notes 25–28.

254. James Madison, *Letter to Thomas Jefferson, (October 17, 1788), in* Madison, *supra* note 24, at 5:272.

as a right or "freedom to exercise" or "to act" peaceably in accordance with conscience might well allow one to read a general right to liberty of conscience in the free exercise clause. Moreover, it would allow one to read the right to liberty of conscience as the right to forgo an act per the dictates of conscience even if a general law might require it.

After all, any lawyer—in the eighteenth century or now—would understand that freedom to act includes the freedom to forgo an action. Think of the voluntary act requirement in criminal law: Parties can be liable if they voluntarily act (say, in shooting someone), or if they voluntarily fail to act when they have a duty to act (say, in failing to rescue their spouse who has been shot).[255] The First Amendment "free exercise" clause could be read analogously. The "freedom to exercise" one's religion consists of both doing acts or forgoing acts based on the duties of conscience, all of which the law must protect and respect so far as possible so long as they are peaceable." When government intrudes on a party's freedom to make a conscientious choice to act or to forgo an action, that prima facie triggers a First Amendment free exercise claim.

This, too, is a speculative reading about the original meaning of the free exercise clause, but it might help explain why an explicit liberty of conscience clause, which includes the right to religious exemptions from compliance with general laws that violate conscience, was left out of the First Amendment. Religious exercise and religious exemption are both an inherent part of the freedom to exercise religion, this reading concludes, and Congress is prohibited from impeding that freedom.

Each of these originalist readings of how to protect freedom of conscience claims under the free exercise clause has ample champions today. Each can find traction in the founders' discussions and drafts of the First Amendment, although these readings would be considerably easier to press had Congress retained an express freedom of conscience clause. A further originalist argument for freedom of conscience can be built on Article VI's prohibition on religious test oaths as some

255. WAYNE LAFAVE, CRIMINAL LAW, at 6.1–6.2 (6th ed. 2017).

commentators have argued.[256] But this clause has attracted little Supreme Court case law, the last case being in 1946.[257]

6. "Of religion"

The word "religion" explicitly modifies the establishment clause and implicitly modifies the free exercise clause. Nowhere is the word "religion" defined in the Constitution or Bill of Rights, and if we strictly observed original intent, much of what constitutes religion in the twenty-first century would be excluded from First Amendment protection. In the eighteenth century, the founders recognized and celebrated a plurality of Protestant Christian faiths. When pressed as to how much further to extend recognized religion and its attendant constitutional protection, there was minor disagreement. Some set the legal line at Protestantism, others at Christianity in general (thereby including Catholics and Eastern Orthodox), and still others at theism (thereby including Jews, Muslims, and Deists).[258] But no founders writing on religious rights and liberties argued seriously about extending constitutional protection to others by setting the line to include the non-Western religious traditions practiced by, for example, African slaves or Native American tribes—let alone non-theistic traditions like Buddhism.[259]

The First Congress did little more than repeat this conventional understanding of the term "religion," offering no definition of religion. While the House debates repeated the general endorsement of a plurality of sects, societies, and denominations,

256. Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674 (1986); Daniel L. Dreisbach, *The Constitution's Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban*, 38 J. CHURCH & STATE 261 (1996).

257. The most recent case on point is *Girouard v. United States*, 328 U.S. 61 (1946) (holding that government may not require a party who conscientiously opposed to swear a military test oath before receiving naturalized citizenship status, per the free exercise clause and Article VI prohibiting religious tests). *See* WITTE & NICHOLS, *supra* note 22, at 129–32.

258. *See* Hutson, *supra* note 90; FAITH AND THE FOUNDERS OF THE AMERICAN REPUBLIC (Daniel L. Dreisbach & Mark David Hall eds., 2014) [hereinafter FAITH AND THE FOUNDERS]; THE FORGOTTEN FOUNDERS ON RELIGION AND PUBLIC LIFE (Daniel L. Dreisbach, Jeffry H. Morrison & Mark David Hall eds., 2009) [hereinafter THE FORGOTTEN FOUNDERS]; GREAT CHRISTIAN JURISTS IN AMERICAN HISTORY (Daniel L. Dreisbach & Mark David Hall eds., 2019) [hereinafter GREAT CHRISTIAN JURISTS].

259. *See* Hutson, *supra* note 90; FAITH AND THE FOUNDERS, *supra* note 90; THE FORGOTTEN FOUNDERS, *supra* note 90; GREAT CHRISTIAN JURISTS, *supra* note 90.

they touched by name only Quakers and Moravians.[260] They did allude to a distinction between religion and nonreligion, as they sought to reserve the protections of constitutional religious rights to the former only. In the House debates, Sylvester expressed concern about "abolish[ing] religion altogether" by crafting too broad a disestablishment clause.[261] Huntington wished "to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all."[262] Scott wanted to prevent misuse of the conscientious objection clause by "those who are of no religion."[263] But the congressional record offers few clues about what counted as religion, and where to draw the line between religion and non-religion.

CONCLUSION

The eighteenth-century American founders knew they were creating something new in their new constitutions. James Madison tells us what the founders commonly understood:

> In most of the governments of the old world, the legal establishment of a particular religion and without any, or with very little toleration of others, makes a pa[c]t of the political & civil organization; & there are few of the most enlightened judges who will maintain that the system has been favourable either to Religion or to government. Until Holland ventured on the experiment of combining a liberal toleration, with the establishment of a particular creed, it was taken for granted that an exclusive establishment was essential, and notwithstanding the light thrown on the subject by that experiment, the prevailing opinion in Europe, England not excepted, has been, that Religion could not be preserved without the support of Government, nor Government be supported without an established Religion, that there must be at least an alliance of some sort between them. It remained for North America to bring the great & interesting subject to a fair, & finally, to a decisive test.[264]

260. ANNALS, *supra* note 19, at 1:778–80.

261. *Id.* at 1:757.

262. *Id.* at 1:758.

263. *Id.* at 1:796.

264. James Madison, Letter to Rev. Adams (1833), *in* DANIEL L. DREISBACH, RELIGION AND POLITICS IN THE EARLY REPUBLIC: JASPAR ADAMS AND THE CHURCH-STATE DEBATE 118 (1996) (paragraph breaks omitted). See comparable earlier language by David Hume:

The "decisive test" for America was to unleash what Thomas Jefferson called a "fair" and "novel experiment" of guaranteeing religious freedom to all and granting religious establishments to none.[265] These religious freedom guarantees were set out in many of the new state constitutions forged between 1776 and 1784 and in the 1791 First Amendment to the United States Constitution. These constitutional texts defied the millennium-old assumptions inherited from Western Europe—that one form of Christianity must be established in a community and that the state must protect and support it against all other forms of faith. America would no longer suffer such governmental prescriptions and proscriptions of religion. All forms of Christianity had to stand on their own feet and on an equal footing with all other religions. Their survival and growth had to turn on the cogency of their word, not the coercion of the sword, on the faith of their members, not the force of the law.

Theologians and jurists, believers and skeptics, churchmen and statesman alike all participated in this new constitutional experiment. Their efforts, while often independent and wide-ranging, collectively yielded several first principles to guide the new American experiment—liberty of conscience, free exercise of religion, religious equality, religious pluralism, separation of church and state, and disestablishment, at least of a national religion.

These first principles of religious freedom came to their first and fullest expression in the eleven new state constitutions forged between 1776 and 1784. No state constitution embraced all six of these principles equally, and some maintained limits on free exercise and practices of establishment that would later be found unconstitutional. But these new state experiments of religious freedom were important laboratories for the First Amendment, informing the state ratification debates both about the Constitution and the Bill of Rights. And several of the draft amendments proposed by the states to the First Congress drew directly on state constitutional language and experiences.

> Before the United Provinces [of the Netherlands] set the example, toleration was deemed incompatible with good government; and it was thought impossible, that a number of religious sects could live together in harmony and peace, and have all of them an equal affection to their common country, and to each other. ENGLAND has set a like example of civil liberty . . . .

DAVID HUME, ESSAYS MORAL, POLITICAL, AND LITERARY 605–06 (Eugene F. Miller ed., 1985).

265. 1 THE PAPERS OF THOMAS JEFFERSON 537–39 (Julian P. Boyd ed., 1950).

These principles of religious freedom were also incorporated into the First Amendment to the United States Constitution, which singled out religion for special constitutional attention, alongside protections of free speech, free press, and free assembly. The First Amendment uniquely targeted "Congress." This meant that the First Amendment guarantees of no establishment of religion and no prohibition on its free exercise were binding only on Congress, not on state or local legislatures. It further meant that the federal courts could not hear cases where citizens sought religious freedom protection against state or local encroachments on them. "The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties," the Supreme Court declared early on: "this is left to the state constitutions and laws."[266]

Not only was the First Amendment narrowly focused on Congress, it also explicitly embraced only two of the six principles of religious freedom discussed by the founders and incorporated into the state constitutions. Congress could not establish religion or prohibit its free exercise. These two principles were considerably stronger constitutional limits on the national legislature than those on British and European parliaments in the day that commonly established one form of Christianity and limited, if not repressed, all other faiths. Moreover, the founders often treated "non-establishment" as an umbrella term to protect liberty of conscience, religious equality, and separation of church and state. And they equated "free exercise" with liberty of conscience, religious equality, religious pluralism, and separation of church and state.

Even so, the frugal final sixteen words of the First Amendment did not make clear what federal laws and governmental actions short of outright prescribing or proscribing religion were outlawed. Earlier drafts said Congress was not to "touch" or "favor" religion; not to give "preference" to any religion or any religious "sect," "society," or "denomination"; not to "establish articles of faith or mode of worship." Such provisions were left aside for the more ambiguous provision that Congress could not make laws "respecting an establishment of religion." Adding the word "respecting" to this guarantee could mean that Congress could make no laws "concerning" or "regarding" the various state

266. Permoli v. Municipality No. 1 of New Orleans, 44 U.S. 589, 609 (1845); *see also* Barron v. Baltimore, 32 U.S. 243 (1833) (holding that the Bill of Rights in general, and the Fifth Amendment in particular, applied only to the national government).

establishments of religion that still prevailed. Or it could mean that Congress could make no laws that "reflected" or showed "respect for" the old Christian establishments in Europe and some of the American colonies and new states. Or it could mean that Congress could make no law that "pointed to" or "moved toward" a new establishment of religion even in piecemeal fashion. All these understandings fit within eighteenth-century dictionary definitions of "respecting."

It was also not clear whether the non-establishment provision allowed Congress to favor or support religion "generally" or "non-preferentially" as several earlier drafts had urged. The same First Congress that drafted the First Amendment followed the Continental Congress's practice of funding and supporting religious education, missionaries, legislative and military chaplains, presidential Thanksgiving Day proclamations, and more. And the First Congress also included overt religious language and strong religious freedom guarantees in its first treaties, land grants, and territorial ordinances, like the Northwest Ordinance. The founders evidently did not regard such "non-preferential support" for religion as an establishment of religion contrary to the First Amendment.

Likewise, the various drafts of the free exercise of religion guarantee had included much more sweeping language: Congress was not to "infringe," "abridge," "violate," "compel," or "prevent" the freedom to exercise religion or the rights and freedom of conscience, or indeed even "touch" religion in a way that might obstruct, impede, or hinder its free exercise. Again, such provisions were left aside for the blunter provision: Congress could simply not "prohibit" the free exercise of religion. This left little textual guidance on what short of outright prohibition on the freedom to exercise religion was allowed or outlawed. Importantly, too, the First Amendment dropped the guarantee of freedom of conscience in general as well as the specific protections of conscientious objection to military service which several drafts of the First Amendment and every state constitution protected. Article V of the Constitution did ban federal religious test oaths, in part because they violated freedom of conscience.

Some founders like James Madison argued that the First Amendment's explicit words "prohibiting" and "abridging"—as well as other common words like "preventing," "limiting," and "violating"—were all synonymous limits on Congress, thereby

allowing for a less literal reading of "prohibiting." Moreover, other founders made clear that the First Amendment free speech, press, and assembly clauses expressly included religious speech, religious publication, and religious association. That left wide open the question of what the free exercise clause protected that was not already guaranteed by the free speech, press, and assembly clauses. One obvious candidate is the principle of liberty of conscience, with its express concern for religious voluntarism, freedom from coercion, and exemptions from laws that violated conscience. But this, too, is a speculative reading, especially since many of the state constitutions and earlier drafts of the First Amendment had separate liberty of conscience and free exercise of religion guarantees.

Neither originalists nor their critics will be fully satisfied with what this careful text-sifting of the sources of the First Amendment has yielded. In 2008, at a conference organized by the United States Court of Appeals for the Fifth Circuit, I had the privilege to present the foregoing account at a conference dinner with the most famous of originalists, Justice Antonin Scalia. He listened with more patience than I deserved, as I worked through the data and ventured my speculations on what's clear and not so clear about the original understanding of the First Amendment religious freedom clauses. After a few shrewd and pointed questions, and a few "hmmm's," "interesting's," and even one "that's very intriguing!" he concluded: "Well, you have now cast reasonable doubt in my mind. I'll need to look at the sources again."

Similarly, in 2012, as part of my duties in the Maguire Chair at the Kluge Center in the Library of Congress, I had the privilege of addressing the freshman class just elected to the House of Representatives. My task was to offer a short precis of the foregoing historical material and its implications for ongoing religious freedom protection. The first question after I finished was from a self-described liberal: "Why don't you just stick to the First Amendment text that calls for the separation of church and state?" "Because that's not what the text says," I replied. "Of course, it does," came the reply. I handed him my pocket constitution opened to the First Amendment. He read it several times very slowly, flipped a few pages back and forth, and then tossed the pocket constitution back to me, saying: "Well, it should be there!"

APPENDIX 1

Drafts of Religious Freedom Clauses in United States Bill of Rights (1787–1789)

Drafts Proposed by the State Ratification Conventions

1. "The rights of conscience shall be held inviolable; and neither the legislative, executive, nor judicial powers of the United States, shall have authority to alter, abrogate, or infringe any part of the constitutions of the several states, which provide for the preservation of liberty in matter of religion."—Pennsylvania Minority Proposal, December 15, 1787.[267]
2. "[T]hat the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience[.]"—Massachusetts Minority Proposal, February 6, 1788.[268]
3. "That no persons conscientiously scrupulous of bearing arms, in any case, shall be compelled personally to serve as a soldier."—Maryland Minority Proposal, April 21, 1788.[269]
4. "That there be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty."—Maryland Minority Proposal, April 21, 1788.[270]
5. "That all warrants, without oath, or affirmation of a person conscientiously scrupulous of taking an oath, to search suspected places, or to seize any person, or his property, are grievous and oppressive. . .."—Maryland Majority Proposal, April 21, 1788.[271]

267. THE FREEMAN'S JOURNAL, *supra* note 145; PROVIDENCE GAZETTE, *supra* note 145.

268. Massachusetts Minority Proposal, *in* THE SACRED RIGHTS OF CONSCIENCE: SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING 415–16 (Daniel L. Dreisbach & Mark A. Hall eds., 2009).

269. Elliot, DEBATES, *supra* note 69, at 1:553.

270. *Id.*

271. *Id.*

6. "Congress shall make no Laws touching Religion, or to infringe the rights of Conscience."—New Hampshire Proposal, June 21, 1788.[272]

7. "All warrants . . . to search suspected places, or seize any freeman, his papers or property, without information upon oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive . . . and ought not to be granted."—Virginia Proposal, June 26, 1788.[273]

8. "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."—Virginia Proposal, June 26, 1788.[274]

9. "That the people have an equal, natural, and unalienable right, freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others."—New York Proposal, July 26, 1788.[275]

10. "That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion according to the dictates of conscience; and that no particular religious sect or society ought to be favored or established by law in preference to others."—North Carolina Proposal, August 1, 1788; Repeated by Rhode Island, June 16, 1790.[276]

Drafts Debated in the First Congress (1789)

272. *Id.* at 1:326.
273. *Id.* at 3:593.
274. *Id.* at 1:327; 3:594.
275. *Id.* at 1:361.
276. *Id.* at 1:331; 4:244.

11. "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or any pretext, infringed."—Draft Proposed to the House by James Madison, June 8, 1789.[277]
12. "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."—Draft Proposed to House by James Madison, June 8, 1789.[278]
13. "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed."—Draft Proposed to House by Committee of Eleven, July 28, 1789.[279]
14. "[N]o person religiously scrupulous shall be compelled to bear arms."—Draft Proposed to House by Committee of Eleven, July 28, 1789.[280]
15. "[N]o State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases."—Draft Proposed to House by Committee of Eleven, July 28, 1789.[281]
16. "Congress shall make no laws touching religion, or infringing the rights of conscience."—Draft Proposed by Charles Livermore on August 15, 1789; Passed by the House.[282]
17. "[T]he equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed by any State."—Draft Proposed by Charles Livermore on August 17, 1789; Passed by the House.[283]
18. "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights

277. ANNALS, *supra* note 19, at 1:451.
278. *Id.* at 1:452.
279. *Id.* at 1:757.
280. *Id.* at 1:778.
281. *Id.* at 1:783.
282. *Id.* at 1:759.
283. *Id.* at 1:784.

of conscience."—Revised Draft Proposed by Fisher Ames on August 20, 1789; Passed by the House.[284]

19. "No person religiously scrupulous shall be compelled to bear arms in person."—Revised Draft Passed by the House, August 20, 1789.[285]

20. "Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."—Final Draft Proposed by the Style Committee, Passed by the House, and Sent to the Senate, August 25, 1789.[286]

21. "Congress shall make no law establishing One Religious Sect or Society in preference to others, nor shall the rights of conscience be infringed."—Draft Proposed and Defeated in the Senate, September 3, 1789.[287]

22. "Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society."—Draft Proposed and Defeated in the Senate, September 3, 1789.[288]

23. "Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."—Draft Proposed and Defeated in the Senate, September 3, 1789.[289]

24. "Congress shall make no law establishing religion, or prohibiting the free exercise thereof."—Draft Proposed and Passed by the Senate, September 3, 1789.[290]

25. "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion . . . ."—Draft Proposed and Passed by the Senate, and Sent to the House, September 9, 1789.[291]

284. *Id.* at 1:796.

285. *Id.*

286. 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 159, 166 (Linda DePauw et al. eds., 1972).

287. Elliot, DEBATES, *supra* note 69, at 1:116.

288. *Id.*

289. *Id.* at 1:117.

290. *Id.*

291. *Id.* at 1:129.

26. "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof."—Draft Proposed by Joint House-Senate Committee on September 24, 1789, and Passed by House and Senate on September 25, 1789.[292]

292. *Id.* at 1:145, 148, 948.