FEDERALISM AND THE ESTABLISHMENT CLAUSE: A REASSESSMENT

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The separationist approach to Establishment Clause adjudication has been under attack ever since it was first announced in 1947.1 Over the last twenty years, however, separationism has faced an onslaught of competing theories, such as accommodationism, non-preferentialism and a coercion standard.2 The latest challenger to separationism is the neutrality theory of evenhanded treatment of religious and nonreligious entities.3 As described by the Supreme Court, "programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not subject to an Establishment Clause challenge."4 Most criticism of the Court's neutrality approach has centered on its application in free exercise cases, with scholars on both the right and left condemning the abandonment of strict scrutiny review of government burdens on religious practice.5 The application of neutrality principles in the Establishment Clause

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context has also elicited criticism from within the Court and the academy. Justice Thomas' sweeping plurality opinion in *Mitchell v. Helms* (2000) touting program neutrality as the *sine qua non* of constitutionality led Justice O'Connor to condemn the "unprecedented breadth" of the ruling and Professor Erwin Chemerinsky to call it "a radical and unprecedented shift in the law of the Establishment Clause." But a Court majority stepped back from relying solely on neutrality in *Zelman v. Simmons-Harris*, the Cleveland voucher case, and all but ignored it as the controlling principle in *Locke v. Davey*, the Washington college scholarship program closed to theology majors. Still, neutrality is on the ascent, at the expense of separationist principles, leading some to speculate whether we are witnessing the "lingering death of separationism" as an organizing principle for resolving Establishment Clause controversies.

While separationism will likely hold its own against neutrality, a more subversive challenger has arisen—or to be more accurate, has been resurrected—one that if adopted, would truly represent "a radical and unprecedented shift in the law of the Establishment Clause." In two recent concurring opinions, Justice Thomas has thrown down a new/old gauntlet to separationism: federalism. In *Elk River School District v. Newdow*, the 2004 Pledge of Allegiance case decided on standing grounds, Thomas argued "the Establishment Clause is a federalism provision, which, for this reason, resists incor-


poration." As Justice Thomas went on to explain, the "text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments [of religion]." Under this approach,

[I]t may well be that state action [in the Establishment Clause context] should be evaluated on different terms than similar action by the Federal Government. . . . Thus, while the Federal Government may "make no law respecting an establishment of religion," the States may pass laws that include or touch on religious matters so long as those laws do not impede free exercise rights or any other individual religious liberty interest.

Thomas' call for a federalism constraint on the application of the Establishment Clause is not new and not necessarily tied to the Rehnquist Court's federalism revival involving the Commerce Clause and Tenth and Eleventh Amendments. Even since the Court incorporated the Establishment Clause in 1947, critics have charged that freedom from religious establishments does not constitute an individual liberty interest protected by the due process clause of the Fourteenth Amendment. Some have gone further to argue that rather than intending for the Establishment Clause to forbid a host of government practices "respecting an establishment of religion," the framers consciously designed the clause to leave the then existing state religious establishments intact. As such, according to one critic's writing in 1954, the First Amendment "is not only an express guarantee of personal religious freedom against the threat of federal action, but also an application of the principle of federalism . . . . The two [religion] clauses together were intended to remove the subject of religion completely from the federal competence."

15. Id. at 2330.
20. Snee, supra note 19, at 389. "[The framers] feared, not only federal interference with individual religious freedom, but also federal interference with state establishments or quasi-establishments then existing. To them, there was a danger of such interference with state sovereignty by affirmative federal action to establish a national religion, or by negative action disestablishing state establishments." Id. at 406.
The popularity of the federalism argument waned under the weight of subsequent Establishment Clause holdings. In the second school prayer case, a dissenting Justice Stewart half-heartedly asserted: "the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church but would also be unable to interfere with existing state establishments." But by then, Stewart stood alone in his belief, with Justice Brennan replying that the argument was coming too late in the day and had been rendered irrelevant by the passage of the Fourteenth Amendment. Still, the argument lingered throughout the 1960s and 1970s. In a 1978 monograph popular in conservative circles, Michael Malbin reviewed the various proposals for the Establishment Clause and concluded that the final language selected—"a law respecting an establishment of religion"—was designed to prohibit Congress from passing law that would affect the religious establishments in the states.

While stressing the federalism aspect to the Establishment Clause, all of these earlier critiques acknowledged that the framers likely believed the clause served other purposes, such that federalism was only one of several possible understandings. Scholars who otherwise supported the Court's separationist holdings also conceded that, based on the existence of state establishments in 1789, federalism considerations likely informed the framers' thinking. However,

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22. Id. at 254 (Brennan, J., concurring).
23. See Michael J. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment 15 (1978) (arguing that the chosen language "prohibits Congress from passing laws with respect to an establishment of religion," and was "designed to satisfy people from states, such as Massachusetts, that did have established churches.")
24. See Howe, supra note 19, at 29; Snee, supra note 19, at 389.
in the late 1980s, a new round of federalism critiques arose, only this time the authors made claims that federalism represented the sole or overriding consideration of those who drafted the Establishment Clause. Professor Daniel Conkle, after tracing the disparate views in the various new states toward church-state relationships, asserted the following:

[Given this widespread and deep division, how could Congress and the ratifying state legislatures have reached agreement on the Establishment Clause? It was supported, after all, both by separationists and by those who were committed to programs of state-sponsored religion. These various political actors simply could not have agreed on a general principle governing the relationship of religion and government . . . What united the representatives of all the states, both in Congress and in the ratifying legislatures, was a much more narrow purpose: to make it plain that Congress was not to legislate on the subject of religion, thereby leaving the matter of church-state relations to the individual states. This purpose honored the anti-establishment policies of states such as Virginia, but it also protected the existing state establishments from congressional interference. The appropriate breadth—or at least the appropriate phrasing—of the Establishment Clause was a matter that received considerable attention in the First Congress, but primarily as an issue concerning the appropriate means for effecting a policy of federalism on questions of church and state.]

Professor Gerard Bradley made a similar argument: that the final language of the religion clauses "tracked the federalist view that Congress had no enumerated authority over religion in the first place, as well as the basic anti-federalist endeavor to preserve existing state constitutional regimes from intermeddling federal legislation." In essence, according to this argument, the only point of consensus among these disparate interests was one of federalism: to exclude federal authority over all religious matters, leaving all regulation, pro and con, to the states. Moreover, due to the impossibility of consensus on a meaning among the framers, the clause lacks a substantive quality—that it is primarily if not solely a jurisdictional device. This latter theme was subsequently developed by two prominent scholars, Steven Smith and Akhil Amar, whose books in the mid-1990s reinvigorated the federalism issue. According to Smith, "[t]he religion clauses were understood as a federalist measure, not as the enactment

27. GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 92 (1987).
28. Conkle, supra note 26, at 1133-34.
of any substantive principle of religious freedom." Amar conurs that "as originally written, [the Establishment Clause] stood as a pure federalism provision . . . [T]he clause was utterly agnostic on the substantive issue of establishment; it simply mandated that the issue be decided state by state and that Congress keep its hands off, that Congress make no law respecting the vexed question."

The implications of this critique are obvious. Most immediately, it suggests that the search for an inherent meaning to the Establishment Clause is fruitless, "foreordained to failure" to use Steven Smith's phrase. And, it follows, if there is no substantive meaning to the Establishment Clause, then all of the Court's church-state holdings, at least those where the Court has relied on a historical interpretation of the clause, lack legitmacy. A few critics also insist that incorporation of the Establishment Clause should be rolled back, along with many of the Court decisions restricting state practices supporting religion. "[A]bandoning [incorporation] would certainly give the states far more latitude to acknowledge, accommodate, and promote religion than current doctrine allows." And potentially, "[i]f the Establishment Clause were not applied to the states, states would ostensibly be free to establish a state church or to give aid or preference to a particular religion." While a tax assessment for Southern Baptists in Texas would likely succumb to an equal protection or free exercise challenge, let alone to state nonestablishment provisions, there would be no federal bar to official acknowledgments of religion,

29. STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 30 (Oxford University Press 1995). "The religion clauses were purely jurisdictional in nature; they did not adopt any substantive right or principle of religious freedom." Id. at 17.


31. See Smith, supra note 29.

32. See Newdow, 124 S. Ct. at 2328 (Thomas, J., concurring in the judgment) ("I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation."). Lietzau, supra note 30, at 1193; Knicely, supra note 30, at 225; Note, Rethinking the Incorporation of the Establishment Clause: A Federalist View, 105 HARV. L. REV. 1700 (1992).

33. Rethinking Incorporation, supra note 32, at 1715.

34. Knicely, supra note 30, at 220.

35. See TEX. CONST. art. I, § 6: "no preference shall ever be given by law to any religious society or mode of worship."; TEX. CONST. art. I, § 7: "No money shall be appropriated or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary, nor shall property belonging to the State be appropriated for any such purposes."
nonsectarian school prayer, or many forms of nonpreferential aid to religion. The Texas Legislature could declare the Southern Baptist faith the "official" or preferred religion of Texas, provided it did not compel its adherence.\textsuperscript{36}

While not all federalism critics call for unincorporation, most argue that the historical record indicates that the framers believed the states should have leeway in their own church-state relationships, such that rights could take on different meanings vis-à-vis the federal and state governments. Like Justice Thomas, they insist that states should be able to fashion funding and other supportive relationships with religious institutions, constrained only by free exercise or equal protection interests.\textsuperscript{37} States and locales would be able to fashion laws and policies to satisfy the religious preferences of the prevailing majorities while allowing for greater experimentation in education and public benefits programs.\textsuperscript{38} Separationism, if it continued to exist as a concept, would be up to each state.

This article takes issue with this federalism interpretation of the Establishment Clause. Although the ultimate phrasing of the Establishment Clause may indicate the presence of federalism concerns, such was not primary or overriding impetus behind the call for or drafting of the First Amendment. Rather, the Establishment Clause reflects broad substantive values upon which a majority of early Americans could agree. While those who drafted and ratified the Establishment Clause may have disagreed over the precise meaning of "nonestablishment" and its day to day application to issues such as days of Thanksgiving or Sabbath laws (in the same way that modern observers diverge over issues such as vouchers and the public posting of the Ten Commandments), they shared common, broad ideals that found their way into the language of the First Amendment: freedom of conscience; no compelled support of religion; no delegation of government authority to religious institutions; and equal treatment of all sects. To be sure, federalism was an issue in the drafting of the Establishment Clause, but primarily in the sense that all of the proposed amendments reflected a shared desire to limit the powers of the general government vis-à-vis the states. Nevertheless, an amendment to restrict federal power by prohibiting a national church or federal in-

\textsuperscript{36} Another manifestation of this federalism trend, although not tied directly to the Establishment Clause and producing an opposite result, is the outcome in \textit{Locke v. Davey}, 540 U.S. 712 (2004), where the Court held that "we have long said that there is play in the joints between [the religion clauses]" that provides state flexibility in legislating on religious matters. \textit{Id.} at 718 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)). Thus a greater emphasis on federalism may allow states to provide greater guarantees of separation of church and state.

\textsuperscript{37} \textit{Zelman}, 536 U.S. at 679; \textit{Newdow}, 124 S. Ct at 2330.

\textsuperscript{38} \textit{Rethinking Incorporation}, supra note 32, at 1715.
volvement in religious matters is not the same thing as an amendment designed to preserve state establishments. Because disestablishment was the clear trend among the states, and those few states that maintained financial support for religion did not view their arrangements as "religious establishments," there was little reason for the drafters to secure state establishments through the First Amendment. Thus, the federalism aspect to the Establishment Clause has been overstated; by far, the clause is not "purely jurisdictional in nature." 39

Part I of this article reviews the argument that federalism provides the primary or sole explanation for the Establishment Clause. Part II then examines the status of church-state relationships at the time of the ratification of the Constitution and the various concerns of federalists and anti-federalists, along with the anti-federalists' calls for constitutional amendments. The third part of the article examines the drafting of the First Amendment itself and seeks to place the federalism aspect in its proper context. The article concludes with remarks about the futility of searching for any precise, original understanding of the Establishment Clause.

I. FEDERALISM AS THE BASIS FOR THE ESTABLISHMENT CLAUSE

The most complete articulation of the federalism argument is found in a 1954 law review article by Professor Joseph Snee, 40 written shortly after the Court's decisions in Everson v. Board of Education and McCollum v. Board of Education, 41 the latter case reaffirming incorporation while striking a local school district policy of "release time" for children to attend religious instruction. 42 The ink from Justice Black's pens was still not dry, and reversing the "error" of Establishment Clause incorporation still seemed achievable. The thrust of Snee's article thus dealt as much with the illogic of using due process liberty to incorporate non-establishment, "a political duty rather than . . . a constitutional right," as with the clause's inherent states-rights quality. 43

39. SMITH, supra note 29, at 17. See DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS, 1774-89 (2002) (Noting that the remaining states ultimately disestablished. "In this regard, Steven Smith's argument that the framers of the Constitution offered no substantive principle of religious liberty, leaving to the states complete authority over religion, breaks down. There were substantive principles enunciated in the religion clauses, disestablishment being the primary one, and so compelling was its merits that the states eventually, without exception, adopted it").
40. See Snee, supra note 19, at 373-94.
41. 333 U.S. 203 (1948)
43. Snee, supra note 19, at 373.
According to Snee (and later critics), the argument for federalism rests on three factors. The most salient fact for the federalism argument is that at the time of ratification and the subsequent drafting of the First Amendment (1787-89), six or seven states maintained religious establishments: Connecticut, Georgia, Massachusetts, Maryland, New Hampshire, South Carolina, and Vermont. It was therefore unlikely that the newly elected representatives and senators from those states would have supported a constitutional amendment that would have authorized federal authority to oversee or abolish these existing state establishments. According to Daniel Conkle and Steven Smith, the only point of consensus between those who were “committed to programs of state-sponsored religion” and those who, like Thomas Jefferson, believed that religion should be supported voluntarily, was to remove all authority from the federal government over religious matters, both internally and externally as it affected state establishments.

Although this argument rests on the questionable assumption that elected representatives would never adopt positions inconsistent with their respective states’ interests, it finds support in the House of Representatives debate over the phrasing of the First Amendment. As some have interpreted the debate, representatives from pro-establishment states expressed concerns about the scope of the proposed non-establishment principle and succeeded in securing limiting language. Initially, the House accepted language offered by Samuel Livermore of New Hampshire—similar to that proposed by the New Hampshire ratifying convention, that provided that “Congress shall make no laws touching religion, or infringing the rights of conscience.” Livermore proposed this phrasing after Benjamin Huntington of Massachusetts had expressed concerns that a broadly worded Establishment Clause could be interpreted as preventing federal courts from enforcing claims for financial obligations in “support

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45. Conkle, supra note 26, at 1133; Smith, supra note 29, at 21-22.
46. The House debates are found in 1 Annals of Cong. 757-59 (Joseph Gales ed., 1789). No records of a Senate debate exist.
47. Madison’s original language proposed “[T]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.” Id. at 451. Before being considered by the House on August 15, 1789, the committee on style, of which Madison was a member, revised the language to provide that “no religion shall be established by law, nor shall the equal rights of conscience be infringed.” Id. at 757.
49. 1 Annals of Cong. 759 (Joseph Gales ed., 1789).
of ministers, or building of places of worship." According to Professor Snee, "[u]nderlying the objection expressed by Huntington . . . was doubtless fear that, while the amendment proposed would prevent Congress from establishing a national religion, it did not expressly preclude Congress from forbidding state religious establishments of the kind then existing in several states." In this context, "touching" or "respecting" as the final language provides, implies a total lack of federal authority over religious matters, including those arrangements in operation in the states. Although the word "touching" was omitted in the final House version and the language further modified through Senate deliberations, the ultimate version that emerged from the joint conference committee read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," reflecting an apparent victory for those concerned about preserving state establishments.

Support for a federalism interpretation is found in other contemporaneous events and documents. During the state ratifying conventions of 1787-88, anti-federalists voiced objections (arguably inconsistently) to the prohibition on religious tests for federal office holding in the new Constitution and its lack of a Bill of Rights with a guarantee of religious freedom. The arguments were not completely specious (although anti-federalists frequently raised their complaints

50. Id. at 758.
51. Snee, supra note 19, at 385.
52. 1 ANNALS OF CONG. 796 (Joseph Gales ed., 1789); 1 SENATE JOURNAL 70 (Sept. 3, 1789).
53. "If respecting imputes anything new, it is, as some commentators have argued, a return to the Livermore formula by preventing Congress from interfering with existing state establishments. The amalgam perhaps intended was that the national government may neither effect an establishment nor interfere with states that do." BRADLEY, supra note 27, at 95.
54. See Herbert J. Storing, Letter from the Yeomanry of Massachusetts, Massachusetts Gazette, Jan. 25, 1788, in 4 THE COMPLETE ANTI-FEDERALIST 232 (1981) ("1st. There is no bill of rights in it. 2d. Although different religions are allowed to set in Congress, yet there is no liberty given to the people to perform religious worship according to the dictates of their consciences. 3d. There is a door opened for the Jews, Turks, and Heathen to enter into public[al] office, and be seated at the head of the government of the United States"). See also comments of Henry Abbot, North Carolina Convention, July 30, 1788, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 191-92 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES] ("[T]hey wish to know if their religious and civil liberties be secured under this system, or whether the general government may not make laws infringing their religious liberties . . . . They suppose that if there be no religious test required, pagans, deists, and Mahometans might obtain offices among us, and that the senators and representatives might all be pagans"); THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 195-96 (1986).
not to perfect the Constitution but to bring about its defeat).\textsuperscript{55} The negative inference of the religious test ban was that Congress possessed inherent authority to impose other religious requirements, while the necessary and proper clause and the taxing power suggested hidden federal authority to raise religious taxes. In defense of the Constitution, and in opposition to the anti-federalists' proposals, federalists such as Governor Edmund Randolph and James Madison of Virginia and James Iredell of North Carolina asserted the absence of any national power not enumerated in the text itself. In response to complaints by Patrick Henry, Governor Randolph remarked: "It has been said that, if the exclusion of the religious test were an exception from the general power of Congress, the power over religions would remain. I inform those who are of this opinion, that no power is given expressly to Congress over religion."\textsuperscript{56}

James Madison expressed similar views on the lack of federal authority over religious matters, stating: "[t]here is not a shadow of right in the federal government to intermeddle with religion. Its least interference [with religion] could be a most flagrant usurpation."\textsuperscript{57} While Madison could simply have been asserting a lack of federal power over national religious matters rather than a lack of authority over state religious laws, other federalists were more explicit in their remarks about the federalism limitations to the Constitution. James Iredell, later to become justice of the Supreme Court, replied to concerns that the federal religious test ban could be enforced on state governments:

\begin{quote}
They [Congress] certainly have no authority to interfere in the establishment of any religion whatsoever, and I am astonished that any gentleman should conceive they have. Is there any power given to Congress in matters of religion? Can they pass a single act to impair our religious liberties? If they could, it would be a just cause of alarm.
\end{quote}

Had Congress undertaken to guarantee religious freedom, or any particular species of it, they would then have had a pretense to interfere in a subject they have nothing to do with. Each state, so far as the clause in question does not interfere, must be left to the operation of its own principles.\textsuperscript{58}

In addition to such statements, the federalism interpretation finds support from the ambivalent attitudes of the federalists toward the proposed amendments, including the religious amendments. The

\textsuperscript{56} 3 Elliot's Debates, supra note 54, at 204.
\textsuperscript{57} Id. at 330.
\textsuperscript{58} 4 Elliot's Debates, supra note 54, at 194-95.
fact that the federalists supported the amendments out of political expediency to avoid a new constitutional convention adds weight to the argument that they, including James Madison, had little interest in the substance of the amendments, provided they assuaged anti-federalist's concerns. This is demonstrated by Madison's willingness to accede to almost any language during the House debate, provided some measure passed. After all, federalists like Madison and Alexander Hamilton believed (or professed) that the enumeration of powers in the Constitution rendered any express bans on nonexistent federal power superfluous. "Why declare that things shall not be done which there is no power to do?" asked Hamilton in Federalist No. 84. Also, Madison doubted the efficacy of declarations or bills of rights, expressing greater concern over the power of popular majorities than the overreaching of the national government. At a minimum, it is argued, this indicates that the federalist supporters of the First Amendment were unconcerned about its exact language or, by implication, its substance.

Finally, the federalism interpretation gains support from later actions and statements by various framers indicating their view that the federal government had no authority over state religious matters, including the existing state arrangements. It is particularly significant that some of these statements come from Madison and Jefferson, the framers most commonly relied on for a substantive understanding of non-establishment (and the strongest proponents of separation of church and state). In 1798 and 1799, Jefferson and Madison authored the Kentucky and Virginia Resolutions, respec-

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59. Bradley, supra note 27, at 88-89.
60. See 1 Annals of Cong. 758 (Joseph Gales ed., 1789), stating:
   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 under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion.

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61. "I go further and affirm that bills of rights . . . are 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?" The Federalist Papers No. 84, at 513 (Alexander Hamilton)(Clinton Rossiter ed., 1961) [hereinafter Federalist].
63. Bradley, supra note 27, at 97-117; Amar, supra note 30, at 34-35.
tively, to protest the Alien and Sedition laws. In arguing that Congress had exceeded its authority and infringed on free speech and press protections, both Jefferson and Madison analogized to the religion clauses, arguing that regulation of speech, the press and religion were matters left to the states. Later, while serving as president, Jefferson replied to an inquiry about his refusal to issue Thanksgiving proclamations in which he indicated a view that the First Amendment did not proscribe state establishments:

I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserved to the States the powers not delegated to the United States. Certainly, no power to prescribe any religious exercise or to assume authority in religious discipline, has been delegated to the General Government. It must then rest with the States, as far as it can be in any human authority.

Considered together, this evidence presents a persuasive case that the framers held a limited view of federal authority over religious matters, including those church-state relations existing in the states. It also is apparent that the framers believed that regulation of religious matters would remain the purview of state governments.

That the drafters of the First Amendment were concerned about limiting federal power is hardly profound; the entire purpose of the Bill of Rights was to limit federal authority in relation to individual and state’s rights. It is an entirely different question whether the framers were also of the opinion that: (1) the Establishment Clause had no additional meaning other than that of federalism; or (2) that

64. See Snee, supra note 19, at 390-91.
65. See 4 Elliot’s Debates, supra note 54, 540-45 (Kentucky resolutions) (“Resolved, . . . that no power over the freedom of religion, freedom of speech, or freedom of the press, being delegated to the United States by the Constitution, nor prohibited by it to the states, all lawful powers respecting the same did of right remain, and were reserved to the states, or to the people”); Id. at 577 (Virginia resolutions) (“Both of these rights, the liberty of conscience, and of the press, rest equally on the original ground of not being delegated by the Constitution, and consequently withheld from the [federal] government . . . . Any construction or argument, then, which would turn the amendment into a grant or acknowledgment of power, with respect to the press, might be equally applied to the freedom of religion”).
they intended the Establishment Clause to protect and preserve the existing state establishments. 67

The federalism interpretation wrongfully assumes that because the anti-federalists were obsessed with limiting national powers generally and restricting the ability of the federal government to interfere in state matters, those concerns extended equally to religious matters. As addressed in the next section, absent a handful of examples to the contrary, the vast majority of calls for a religious provision in the federal constitution centered on protecting rights of conscience and ensuring sect equality, not on securing existing state religious establishments. In addition, as noted, the federalism argument relies on the syllogism that the drafters of the religion clauses would have needed to reach consensus on the meaning of non-establishment, and that due to the diversity of opinion, the only possible point of agreement was on limiting federal power over the states. 68 However, this argument exempts the First Amendment from the normal legislative deliberative process through which laws regularly are supported and enacted for a variety of reasons, that lack of consensus is a common aspect of successful lawmaking. 69 It is sufficient that the various drafters shared broad, general ideals about religious liberty and how nonestablishment facilitated those ideals. Whether the drafters agreed on a central understanding of the Establishment Clause is not necessary to give the clause meaning.

II. THE STATUS OF CHURCH-STATE RELATIONSHIPS AT THE TIME OF THE RATIFICATION OF THE CONSTITUTION

A. THE HISTORICAL CONTEXT

As mentioned, the federalism argument relies in large measure on the “fact” that six or seven states maintained religious establishments at the time of the ratification of the Constitution and drafting of the First Amendment. Members of Congress from those states would not have agreed to any provision that could have been used to force changes to those existing church-state arrangements. Moreover, it is unlikely that federalist leaders like Madison, having experienced the controversy during ratification over the national ban on religious tests and seeking expedited approval of the new amendments, would have

67. See Newdow, 124 S. Ct. at 2331 (Thomas, J., concurring in the judgment) (“[I]ncorporation . . . would prohibit precisely what the Establishment Clause was intended to protect—state establishments of religion”).
68. Smith, supra note 29, at 21-22; Conkle, supra note 26, at 1132-35.
69. See Abner J. Mikva & Eric Lane, An Introduction to Statutory Interpretation and the Legislative Process 30-31 (2d ed. 2002).
fashioned any measure likely to garner opposition from a large number of states.

The problem with this interpretation is that it imposes a modern view of what constitutes an establishment on the historical record and fails to take into account the diversity of practices that existed within the various states. Federalism advocates wrongly assume that because the practices in the early state establishments are inconsistent with modern concepts of non-establishment, late eighteenth century observers viewed them as similarly inconsistent. Federalism advocates also wrongly dismiss the degree of consensus that existed among post-Revolutionary Americans about liberty of conscience and religious equality, ideals that conflicted with enforced religious assessments.

The vast majority of Americans during the late eighteenth century, not those living solely in states with establishments, believed that religion was essential for the preservation of civil society because it instilled morals and virtue in the people while providing for a stable social order. Some people also believed that government should provide financial support of religious institutions to advance these goals. As Yale president Timothy Dwight would later remark in arguing on behalf of Connecticut’s religious establishment: “no free government has ever existed for any time without the support of religion . . . . But religion cannot exist, and has never existed for any length of time, without public worship.” Madisonians and religious dissenters would have disagreed with the latter statement about public support of religion, believing that religion should be funded voluntarily, but would have generally embraced the former sentiment about the importance of religion for civil society.

Moreover, Americans throughout the fourteen nascent states agreed that freedom of religious conscience was an essential right.


73. See WILLIAM G. McLoughlin, 1 NEW ENGLAND DISSENT, 1630-1833, 605-06 (1971).

74. See VT. CONST. ch. 1, art. III: “[T]hat 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 minister, contrary to the dictates of his conscience.” See also BUCKLEY, supra note 71, at 177.
Even though they congratulated themselves for the freedom they had achieved over the previous two decades and believed that the new states provided the utmost protection for liberty conscience, they also realized how tenuous that right was. Like any generation, their perceptions and confidences were informed by the past, and they feared that the historical lessons of intolerance and persecution were easily replicated. Similarly, Americans generally agreed that no religious sect should receive preferential treatment over others. While the establishment of an exclusive state or national religion was unlikely, Americans worried about the combination of sects or the preferential treatment of the dominant religion by the powers that be, even under a system that claimed religious equality. Finally, most early Americans believed that enforced tax support of one religion or of religion generally violated rights of conscience. As Thomas Curry has written:

See Trench Coxe, Notes Concerning the United States of America, 1790, in 5 FOUNDERS' CONSTITUTION 94 (Philip Kurland ed., 1987) [hereinafter FOUNDERS' CONSTITUTION] ("The situation of religious rights in the American states, though also well known, is too important, too precious a circumstance to be omitted. Almost every sect and form of Christianity is known here as also the Hebrew church. None are tolerated. All are admitted, aided by mutual charity and concord, and supported and cherished by the laws"). See also Herbert J. Storing, An Old Whig, no. 5, in 3 THE COMPLETE ANTI-FEDERALIST, supra note 54, at 35-36:

The fact is, that human nature is still the same that ever it was: the fashion indeed changes: but the seeds of superstition, bigotry and enthusiasm, are too deeply implanted in our minds, ever to be eradicated . . . They are idiots who trust their future security to the whim of the present hour . . . . The more I reflect upon the history of mankind, the more I am disposed to think that it is our duty to secure the essential rights of the people, by every precaution; for not an avenue had been left unguarded, through which oppression could possibly enter in any government.


Civil and religious liberty are inseparably interwoven—whilst government is pure and equal—religion will be uncontaminated:—The moment government becomes disordered, bigotry and fanaticism take root and grow—they are soon converted to serve the purpose of usurpation, and finally, religious persecution reciprocally supports and is supported by the tyranny of the temporal powers.

See JAMES MADISON, A MEMORIAL AND REMONSTRANCE ¶ 4 (circa June 20, 1785) [hereinafter MEMORIAL AND REMONSTRANCE] (arguing for "equal conditions" and "equal title to the free exercise of Religion according to the dictates of Conscience"). See also BUCKLEY, supra note 71, at 177-78.

As Madison wrote in 1785, "it is proper to take alarm at the first experiment on our liberties . . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?" MEMORIAL AND REMONSTRANCE ¶ 3. See also FEDERALIST, supra note 61, at 51 (Alexander Hamilton or James Madison) (discussing the threat posed to liberty by the combination of sects).

See MEMORIAL AND REMONSTRANCE, supra note 78, at ¶¶ 3, 4 (arguing that enforced assessments violates rights of conscience); VT. CONST. ch. I, art. III: "[T]hat no man ought, or of right can be compelled to attend any religious worship, or erect or
ten, by the time of the Constitution, "[t]he belief that government assistance to religion, especially in the form of taxes, violated religious liberty had a long history."\textsuperscript{80}

The rub was what type of assessment system constituted a violation of conscience. Following the Revolution, all of the states with assessment systems switched to or reauthorized what are now called "multiple establishments," where a taxpayer could have his assessment paid to his own church or, as was more common in New England, to that church chosen by the majority vote of the parish.\textsuperscript{81} Thus, assessment supporters in Massachusetts, Connecticut, New Hampshire, and Virginia and Vermont prior to 1786 would not have viewed their systems as violating rights of conscience because no one, at least in theory, was forced to pay for another's religion.\textsuperscript{82} As Connecticut jurist Zephaniah Swift wrote in the 1790s, "[e]very Christian may believe, worship, and support in such manner as he thinks right, and if he does not feel disposed to join public worship he may stay at home as he pleases without any inconvenience but the payment of his taxes to support public worship in the located society where he lives."\textsuperscript{83} Smith denied that Connecticut maintained a religious establishment, which he associated with systems that favored one church exclusively.\textsuperscript{84}

This is why Jefferson's Act for Establishing Religious Freedom in Virginia was so path breaking, as he asserted that even to force a man "to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern."\textsuperscript{85} Madison's Memorial and Remonstrance also made the case for why multiple establishments violated rights of conscience, convincing Vir-

\textsuperscript{80.} CURRY, supra note 54, at 217. Accord Laycock, supra note 79, at 917, "[T]ax support for churches was deeply controversial and widely thought inconsistent with religious liberty").

\textsuperscript{81.} LEVY, supra note 44, at 26; McLoughlin, supra note 73, at 1630-1833.

\textsuperscript{82.} LEVY, supra note 44, at 27. As the Massachusetts Supreme Judicial Court wrote in upholding a challenge to the state's religious assessment system, [T]he first objection seems to mistake a man's conscience for his money, and to deny the state a right of levying and of appropriating the money of the citizens, at the will of the legislature, in which they are all represented . . . . The great error lies in not distinguishing between liberty of conscience in religious opinions and worship, and the right of appropriating money by the state. The former is an unalienable right; the latter is surrendered to the state, as the price of protection.

Barnes v. First Parish in Falmouth, 6 Mass. 401, 408-09 (1810).

\textsuperscript{83.} ZEPHANIAH SWIFT, 1 SYSTEM OF THE LAWS IN CONNECTICUT 146 (1791).

\textsuperscript{84.} LEVY, supra note 44, at 42-43; CURRY, supra note 54, at 172-75.

\textsuperscript{85.} 5 FOUNDERS' CONSTITUTION, supra note 75, at 84.
ginia to join the ranks of North Carolina, New York, New Jersey, Pennsylvania, Delaware, and Rhode Island, states that apparently reached the same conclusion without experiencing nearly as much angst. The standing order in Massachusetts, New Hampshire and Connecticut, however, were not convinced and viewed their systems of religious assessments as respecting rights of conscience. More important, they did not associate their systems with "religious establishments." Dissenting faiths in New England—Baptists and Quakers in particular—strongly disagreed.

Even though only multiple establishments survived the Revolution, and thus represented the only real threat to liberty of conscience, when people spoke of "religious establishments" they generally thought of exclusive establishments as existed in Britain and in Virginia prior to 1786. As Thomas Curry has documented, even advocates of full disestablishment used the term "establishment" to refer usually to exclusive systems or those where one church received preferential treatment. The New England state establishments could therefore claim with a straight face that their assessment systems neither were religious establishments nor violated rights of conscience. As Chief Justice Jedediah Smith of New Hampshire would declare in 1803:

"A religious establishment is where the State prescribes a formulary of faith and worship for the rule and government of all the subjects. Here the State [does] neither. It is left to each town and parish, not to prescribe rules of faith or doctrine for the members of the corporation but barely to elect a teacher of religion and morality for the society, who is to be maintained at the expense of the whole. The privilege is extended to all denominations. There is no one in this respect superior or inferior to another."

In addition, absent forward-thinkers like Jefferson, Madison, George Mason and John Leland, most people equated establishments with religious assessments, but little else. Other forms of govern-

86. See Barnes v. First Parish in Falmouth, 6 Mass. 401, 408-09 (1810).
87. See McLoughlin, supra note 73, at 611-12; 616-17 (quoting author "Hieronymus" commenting on the new Article III of the Massachusetts Declaration of Rights authorizing religious assessments: "I am not able to find any thing that has the appearances of establishment. All of the various denominations of Protestants are treated alike").
88. Id. at 616-19; see also Isaac Backus, 1775 Resolution to the Massachusetts Assembly, in A History of New England (1774-75) (asserting that requiring Baptists to pay assessments, even for the support of their own churches, would "wrong our consciences.") reprinted in 5 Founders' Constitution, supra note 75, at 65.
89. Curry, supra note 54, at 209.
90. Muzzy v. Wilkins, 1 Smith's (N.H.) 1, 9 (1803).
91. Curry, supra note 54, at 170-74.
ment support of religion—religious tests for officeholding and oath taking, Sabbath and blasphemy laws, church incorporation, official days of thanksgiving—generally were not viewed as attributes of an establishment.\footnote{92. \textit{Id.}; \textsc{Donald L. Drakeman}, \textit{Church-State Constitutional Issues: Making Sense of the Establishment Clause} 57 (1991); \textsc{McLoughlin}, \textit{supra} note 73, at 605-06.} Even though all states imposed some form of a religious test for office holding and excluded jurors and witnesses who could not attest to belief in God and the future state of punishments and rewards, most people did not see these practices as violating rights of conscience.\footnote{93. \textit{Drakeman}, \textit{supra} note 92, at 57-58.} Only with the federal prohibition on religious tests did that practice too become an attribute of establishments as had religious assessments.\footnote{94. \textit{See} Herbert J. Storing, "\textit{William Penn, no. 2}" (1788), in 3 \textit{Complete Anti-Federalist}, \textit{supra} note 54, at 12: [W]e find it declared in every on of our [state] bill of rights, "that there shall be a perfect liberty of conscience, and that no sect shall ever be entitled to a preference over the others." Yet in Massachusetts and Maryland, all the officers of government, and in Pennsylvania the members of the legislature, are to be of the Christian religion; in New-Jersey, North-Carolina, and Georgia, the protestant, and in Delaware, the trinitarian sects, have exclusive right to public employments; and in South-Carolina the constitution goes so far as to declare the creed of the established church. Virginian and New-York are the only states where there is a perfect liberty of conscience. \textit{Id.}}

A focus on the fact that six or seven states maintained religious establishments thus proves too much—and too little. In fact, four of those states did not maintain establishments in the sense understood in 1789 as tax support for religious worship. The first Georgia and Maryland constitutions allowed for religious assessments but neither state ever instituted a system.\footnote{95. \textit{See} \textsc{Curry}, \textit{supra} note 54, at 152-58; \textsc{Levy}, \textit{supra} note 44, at 47-49.} Maryland voters rejected a proposed assessment in 1785, dooming it forever, while a Georgia law of the same year apparently never went into effect.\footnote{96. \textit{Curry}, \textit{supra} note 54, at 153-56.} New constitutions in Georgia in 1789 and 1798, respectively, removed the religious test for office holding and abolished all authority for assessments.\footnote{97. \textit{Francis Newton Thorpe}, \textit{2 America Charters Constitutions and Organic Laws} 789, 800-01 (1909).} Although the 1778 South Carolina declared a "general establishment" of Protestantism, limiting church incorporation and public office holding to Protestants, it then inconsistently provided that no person could be compelled to support any religious body.\footnote{98. \textit{Curry}, \textit{supra} note 54, at 150; \textsc{Levy}, \textit{supra} note 44, at 50-51.} Thus, South Carolina's "establishment" amounted only to "a method of incorporating churches, and no church received public tax support."\footnote{99. \textit{Curry}, \textit{supra} note 54, at 150.} Finally, in 1786 Vermont rewrote its constitution of 1777, reaffirming 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 minister, contrary to the dictates of his conscience,” but omitting the previous contradictory provision requiring “support” of public worship. According to Douglas Laycock, “[b]y the time of the first amendment, church taxes were repealed or moribund outside New England, and they were not working well in the [three] New England states that still tried to collect them.”

By the time of the drafting of the First Amendment, therefore, compelled assessments for the support of religion existed in only three states and, in each case, in the form of nonpreferential, multiple establishments. Even in those states, religious assessments were unevenly enforced. However, as mentioned, representatives from those states with active assessment systems generally claimed that their states did not maintain religious establishments because they were: (1) not exclusive but nonpreferential; (2) that public support of religion was for the benefit of civil society, not religion; and (3) that their assessment systems did not violate rights of conscience. In fact, only Connecticut officially acknowledged its establishment, though its officials, like those in Massachusetts and New Hampshire would have been reticent to admit to one due to the negative connotation the term carried with its association to hated European establishments. As such, as the first Congress convened and considered proposed amendments to the Constitution, there was little reason for representatives to be concerned about preserving state religious “establishments” against federal intermeddling.

B. THE DRAFTING OF THE FIRST AMENDMENT

The First Amendment had its genesis in the debate over ratification and complaints by anti-federalists that the proposed Constitution failed to protect freedom of conscience. Some of the anti-federalist complaints regarding religious issues were merely transparent ruses to create fears about tyrannical federal authority. Other com-

100. 6 THORPE, supra note 97, at 3752; CURRY, supra note 54, at 188-89. Apparently, however, a few Vermont towns continued to raise assessments for the support of churches and ministers into the 1790s, based on the prior practice. Id. at 189. Accord 2 McLoughlin, supra note 73, at 800-01.

101. Laycock, supra note 79, at 917.

102. Id.; 2 McLoughlin, supra note 73, at 962-64. According to McLoughlin, the New Hampshire Constitution of 1783 and subsequent law authorizing assessments “did not require towns to levy taxes for the support of religion; [they] simply said they might do so ‘agreeably to the Constitution.’” Id. at 849-50 (emphasis in original).

103. CURRY, supra note 54, at 174-75, 184; 2 McLoughlin, supra note 73, at 610-11.

104. Laycock, supra note 79, at 906.

105. See LEVY, supra note 55, at 173.
plaints, however, were more sincere. The anti-federalist essayist "De-
liberator" warned in the Philadelphia Freeman's Journal in February
1788: "Congress may, if they shall think it for the 'general welfare,'
establish uniformity in religion throughout the United States. Such
establishments have been thought necessary, and have accordingly
taken place in almost all the other countries in the world, and will, no
doubt, be thought equally necessary in this."\footnote{106}

Advocates of the federalism interpretation find support in the fact
that political insiders in both the federalist and antifederalist camps
viewed the proposed amendments with indifference. Anti-federalists
raised calls for constitutional amendments primarily to defeat the in-
strument, not to perfect it, while federalists supported the amend-
ments to assuage anti-federalist complaints (and to call their bluff).
Thus, neither side's leaders believed that religious liberty, either na-
tionally or in the states, was under serious threat. According to feder-
alism advocates, this ambivalence toward the First Amendment thus
suggests a lack of interest in the substance of religion clauses, leaving
only the point of agreement being that of limiting federal authority
over state establishments.\footnote{107}

This argument confuses Madison's and other drafters' ambiva-
lence toward a need for a religious amendment with their commitment
to the fundamental principles represented in the provision. Based on
the 1785 Virginia struggle over religious assessments, there can be no
doubt about Madison's views on religious liberty and nonestablish-
ment or his commitment to the same.\footnote{108} Madison's initial ambiva-
lence toward the phrasing of the religion clauses reflects his view that
the provision was unnecessary or ultimately ineffectual, not that he
saw issues of religious equality and freedom of conscience as inconse-
quential.\footnote{109} While others may have viewed the amendment as inef-
ective or as throwing "tubs to a whale,"\footnote{110} their perspective was whether
the amendments would resolve the greater defects of the Constitution,
not whether the underlying principles had no meaning.

As can best be determined from the debates at the various state
ratifying conventions for the Constitution, no delegates expressed con-

\footnote{106. Storing, Essay by Deliberator, Philadelphia Freeman's Journal, Feb. 20, 1788, in \textit{3 Complete Anti-Federalist}, supra note 54, at 179.}
\footnote{107. Smith, supra note 29, at 20-22, 28-30; Bradley, supra note 27, at 88-89.}
\footnote{108. See Conkle, supra note 26, at 1134.}
\footnote{109. See Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in \textit{The Republic of Letters: The Correspondence Between Thomas Jefferson and James Madison 1776-1826}, supra note 62, at 564 ("E]xperience proves the inefficacy of a bill of rights on those occasions when its controul [sic] is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State").}
\footnote{110. See Bradley, supra note 27, at 88.}
cerns about preserving existing state establishments from federal encroachment (the vague exchange in the North Carolina convention between Henry Abbot and James Iredell being the only exception). The debate in Massachusetts, which at the time maintained a "slender" establishment, according to John Adams, is devoid of references to its assessment system or a need to protect it from federal intermeddling. The same phenomena exists the recorded debates in New Hampshire and Connecticut. When religious establishments were mentioned, it was usually in conjunction with the Constitution's proposed ban on religious tests for federal office holding. In this context, the references to establishments were usually critical:

Mr. [Samuel] Spencer [of North Carolina] was an advocate for securing every unalienable right, and that of worshipping God according to the dictates of conscience in particular. He therefore thought that no one particular religion should be established. Religious tests, said he, have been the foundation of persecutions in all countries.

Oliver Wolcott, delegate to the Connecticut ratifying convention, made a similarly negative connection between religious tests and establishments:

For myself, I should be content either with or without that clause in the Constitution which excludes test laws. Knowledge and liberty are so prevalent in this country, that I do not believe that the United States would ever be disposed to establish one religious sect, and lay all others under legal disabilities. But as we know not what may take place hereafter, and any such test would be exceedingly injurious to the rights of free citizens, I cannot think it altogether superfluous to have added a clause, which secures us from the possibility of such oppression.

Whether Wolcott appreciated the difference between exclusive and multiple establishments or believed that Connecticut's assessment system constituted an establishment is unknown. What does appear from his statement is that Wolcott: (1) viewed test oaths and religious establishments as oppressive; (2) believed that religious establishments were dying out; and (3) expressed no reason to seek protection for Connecticut's system. The most critical reference to religious establishments is likely found in a speech by Thomas

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111. See Levy, supra note 55, at 174-77.
113. Levy, supra note 55, at 175.
114. See generally 2 Elliot's Debates, supra note 54.
115. 4 Elliot's Debates, supra note 54, at 200.
116. 2 Elliot's Debates, supra note 54, at 202.
Tredwell in favor of a bill of rights made at the New York ratifying convention:

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—a tyranny of all others most dreadful, and which will assuredly be exercised whenever it shall be thought necessary for the promotion and support of their political measures.\textsuperscript{117}

Tredwell's comments affirmed the popular belief that religious establishments, consisting of forced assessments and religious tests, infringed on rights of religious conscience.

Of the state calls for constitutional amendments to protect individual liberties, religious freedom was mentioned less than concerns about right to trial by jury and freedom of the press. Still, a handful of state ratifying conventions called for a religious liberty provision, as did an equal number of minority blocks in the ratifying conventions. The primary concern expressed was to protect freedom of conscience, but state delegates and pamphleteers also called for guarantees for sect equality and against religious establishments.\textsuperscript{118} The anti-federalist minority in Maryland proposed "[t]hat there be no national religion established by law, but that all persons be equally entitled to protection in their religious liberty."\textsuperscript{119} Putting aside the fact that the language itself does not mention state establishments, it is unlikely that the Maryland delegates were concerned with using the federal constitution to protect their "religious establishment" because, as discussed above, Marylanders showed little interest in preserving it themselves.\textsuperscript{120} Similar sentiments were expressed by anti-federalist

\textsuperscript{117} Id. at 399; The Complete Bill of Rights, supra note 48, at 62.

\textsuperscript{118} See Herbert J. Storing, "An Old Whig, no. 5," in 3 The Complete Anti-Federalist supra note 54, at 36-37:

I hope and trust that there are few persons at present hardly enough to entertain thought of creating any religious establishment for this country; although I have lately read a piece in the newspaper, which speaks of religious as well as civil and military offices, as being hereafter to be disposed of by the new government; but if a majority of the continental legislature should at any time think fit to establish a form of religion, for the good people of this continent, with all the pains and penalties which in other countries are annexed to the establishment of a national church, what is there in the proposed constitution to hinder their doing so? Nothing; for we have no bill of rights, and every thing therefore is in their power and at their discretion.

\textsuperscript{119} Id.

\textsuperscript{119} See The Complete Bill of Rights, supra note 48, at 11. According to Leonard Levy, the proposal failed, not because the federalist majority disagreed with its substance, but because they "wished to ratify unconditionally for the purpose of demonstrating confidence in the new system of government." Levy, supra note 44, at 69.

\textsuperscript{120} See Curry, supra note 54, at 153-58 (noting that Maryland voters rejected a proposed assessment in 1785).
“Centinel,” who wrote in the Philadelphia *Independent Gazetteer* in November 1787:

[B]ut there is no declaration, that all men have a natural and unalienable right to worship Almighty God according to the dictates of their 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; 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 worship.121

Interestingly, a majority of the religious proposals came from states that already had abolished religious establishments and guaranteed religious conscience in their constitutions (e.g., Virginia, North Carolina, Pennsylvania, New York), so their calls cannot be interpreted as seeking to protect existing state establishments. For example, the Virginia convention proposed a federal amendment affirming an “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.”122 North Carolina, also lacking a religious establishment, proposed an amendment that tracked the language of Virginia’s.123

Only two proposals arguably indicated concerns for protecting existing state establishments from federal interference. New Hampshire, one of the three states with active establishments, proposed that “Congress shall make no Laws touching Religion, or to infringe the rights of Conscience,” language similar to that offered by Samuel Livingston during the House debate.124 However, there is no legislative history of the New Hampshire proposal to explain whether its language expressed only a national concern or a federalism one, too.125 The other “federalism” sounding proposal came from the Pennsylvania minority, which unsuccessfully proposed:

The rights of conscience shall be held inviolable, and neither the legislative, executive, not judicial powers of the United States shall have authority to alter, abrogate, or infringe any

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122. Virginia Ratifying Convention, Proposed Amendments No. 20, in 5 FOUNDERS’ CONSTITUTION, supra note 75, at 89.
123. THE COMPLETE BILL OF RIGHTS, supra note 48, at 12, 13.
124. Id at 12.
125. See LEVY, supra note 44, at 70; DRAKEMAN, supra note 92, at 65.
part of the constitutions of the several states, which provide for the preservation of liberty in matters of religion.\footnote{126} Despite its reference to preserving state constitutions, it is difficult to interpret this proposal as intending to protect state establishments from federal intermeddling. First, Pennsylvania did not have an assessment system in 1787 and had even abolished its religious test for public officeholding the previous year.\footnote{127} Possibly, the Pennsylvania minority was unselfishly seeking to protect the moribund religious establishment in neighboring Maryland, but such is unlikely. Second, the very language of the proposal indicates a desire to preserve the ability of states to protect "liberty in matters of religion," not religious establishments which, outside of New England, were considered inconsistent with religious liberty, particularly in Pennsylvania with its long history of religious tolerance.\footnote{128} Thus, the Pennsylvania petition is of no help.

If the New England states had been concerned with preserving their existing state establishments, then it seems they would have made express proposals to secure them from federal intermeddling, or at least offered proposals with language that avoided calling their systems "establishments." But Massachusetts and Connecticut ratified the Constitution without making such calls.\footnote{129} Contrary to the federalism interpretation, the theme that emerges from the various proposals for religious amendments is one of protecting religious conscience and equality that, for many early Americans like Thomas Tredwell, also included the freedom from forced religious taxation.\footnote{130} Of course, the absence of express calls for preserving state establishments during ratification does not mean that such concerns did not exist or arise by the time the first Congress began considering proposed amendments to the Constitution. As mentioned, advocates of a federalism interpretation rely heavily on the sequence of remarks and proposals in the House debates. Upon closer inspection, however, the debates do not indicate a consensus for protecting existing state estable-

\footnote{126} The Complete Bill of Rights, supra note 48, at 12.  
\footnote{127} See Letter from Benjamin Rush to Richard Price (April 22, 1786), in 4 FOUNDERS' CONSTITUTION, supra note 75, at 636 ("I am very happy in being able to inform you that the test law was so far repealed a few weeks ago in Pennsylvania").  
\footnote{129} The minority in the Massachusetts convention did propose an amendment to the effect that the "Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience." The Complete Bill of Rights, supra note 48, at 12.  
\footnote{130} See Laycock, supra note 79, at 917 ("[T]here were widespread objections to tax support for churches . . . . This opposition forced the Framers' generation to think about the tax issue. Once they thought about it, they concluded that any form of tax support for churches violated religious liberty").
lishments. Such “agreement” is derived by reading meaning back into vague statements by the representatives from the ultimate “federalism-friendly language”: “touching” or “respecting.”

According to the Daily Advertiser, on June 9, 1789, James Madison made a “long and able speech” introducing his promised amendments to the Constitution. It was not until August 15, however, that the House, meeting as a committee of the whole, considered what would become the First Amendment.

As support for the federalism interpretation, Professor Snee notes that Madison introduced two amendments, his fourth and fifth, that dealt expressly with religion. The fourth, which would evolve into the First Amendment, was to be inserted into Article I, section 9 of the Constitution and provided: “[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.”

Madison’s second proposed religious amendment (his fifth overall), to be inserted in Article I, section 10, provided that: “No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.” Professor Snee argues that the significant difference between the former proposed amendment, which restricts federal power, and the latter amendment, which restricts state power, is the prohibition on an establishment. This proves two things, according to Professor Snee. First, the lack of a prohibition on state establishments in the latter amendment indicates that the former was only intended to affect federal actions and leave state establishments inviolate. When this difference is read in conjunction with Madison’s proposal that ultimately became the Tenth Amendment, “it is clear that he concedes to the states power over religious matters which he would deny to the federal Government.”

Second, Professor Snee argues that Madison distinguished between rights of conscience, which he believed should be protected at both the

134. 1 Annals of Cong. 451 (Joseph Gales ed., 1789).
135. Id. at 452.
136. Snee, supra note 19, at 379-82.
137. Id.
138. “The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively.” 1 Annals of Cong. 453 (Joseph Gales ed., 1789).
139. Snee, supra note 19, at 380.
federal and state levels, and nonestablishment, which must serve some separate value. 140

This focus on the difference between the two proposals proves too much. The fact that Madison saw his first proposal as prohibiting only establishments at the federal level does not mean that he viewed that amendment (which became the First Amendment) as having any role in preserving existing state establishments. The second proposal restricting state violations of rights of conscience (sans an establishment prohibition) is merely consistent with Madison's fundamental belief that the Constitution had only limited enumerated powers which did not include the regulation of most state functions, including state establishments. There is no question that Madison opposed all religious establishments, both state and federal, and it is more likely that he believed, based on the trend in the several states, that state establishments were dying out and would be eliminated by later state constitutional revision (which they were). 41 The battle over the few existing state establishments was not worth the political capital. Second, it is also undisputed that Madison tied freedom of conscience to disestablishment, as did the religious dissenters in New England. 142 Whether Madison viewed violations of conscience as more troubling than establishments (and thus worthy of universal prohibition) misses the point that he considered violations of religious conscience as a primary attribute of establishments. The fact that Madison believed that rights of conscience encompassed more than notions of nonestablishment (e.g., religious exercise), such that it was important to mention both values, does not mean that he viewed the two concepts as distinct and unrelated. Madison, like the vast majority of early Americans, considered rights of conscience and religious disestablishment to be closely intertwined. Perhaps Madison hoped to plant a seed that would grow into universal disestablishment by first creating a recognized right of conscience. This interpretation is much more consistent with Madison's overall vision of church and state than one that suggests intent to preserve state religious establishments. 143

When finally considered by the House on August 15, Madison's proposed fourth amendment (what became the First Amendment) had been revised to read: "no religion shall be established by law, nor shall

140. Id. at 381.
141. "Fortunately for this commonwealth, a majority of the people are decidedly against any exclusive establishment. I believe it to be so in the other states. 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." 3 Elliot's Debates, supra note 54, at 330.
142. See Memorial and Remonstrance, supra note 78, at §§ 1, 8,15; Isaac Backus, A History of New England 1774-75, in 6 Founder's Constitution, supra note 76, at 65.
143. See generally Memorial and Remonstrance, supra note 78.
the equal rights of conscience be infringed.” Various members suggested changes to the proposed language, with Elbridge Gerry of Massachusetts offering narrowing language to read “no religious doctrine shall be established by law.” Such language, if adopted, would have made the federal Establishment Clause consistent with the existing practice in Massachusetts of a multiple, nonpreferential establishment, but his suggestion indicates no purpose to protect that state’s religious establishment from federal oversight.

The two statements that most support a federalism interpretation are those by Peter Sylvester of New York and Benjamin Huntington of Connecticut. As related in the *Annals*, Sylvester said he “had some doubts of the propriety of the mode of expression used in this paragraph; he apprehended that is 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.”

After several unrelated statements by other members, primarily offering stylistic alterations, Huntington stated that he agreed with Sylvester’s sentiments that the proposed language could “be taken in such latitude as to be extremely hurtful to the cause of religion.” While concurring with Madison’s interpretation of the proposed amendment as ensuring sect equality and rights of conscience, Huntington expressed fear that others might interpret the amendment differently:

The ministers of their congregations to the Eastward [i.e., New England], were maintained by the contributions of those who belonged to their society; the expense of building meeting-houses was contributed by the same manner. These things were regulated by bye-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 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 as way as to secure the rights of conscience, and

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144. 1 *ANNALS OF CONG.* 757 (Joseph Gales ed., 1789).
145. *Id.* at 757-59.
146. *Id.* at 757.
147. *Id.* at 758.
148. In response to the various comments, 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.” *Id.*
a free exercise of the rights of religion, but not to patronize those who professed no religion at all.\textsuperscript{149}

Huntington's statement is the only clear reference to existing state establishments and indicates a concern that the proposed Establishment Clause could be interpreted to prohibit federal courts from enforcing commitments to pay state religious assessments. Although it expresses a federalism concern, it is of a narrow nature—of ensuring that federal courts give full faith and credit to state legal obligations—not of a more general fear that Congressional authority pursuant to the treaty power, the necessary and proper clause, or the tax and spending clauses could be used to undermine state establishments. The focus of Huntington's concern is external, on the operation of the federal courts, not internal, on potential Congressional interference with state assessment systems. His statement calls for protection for state establishments, nonetheless.\textsuperscript{150}

Sylvester's remarks cannot be so interpreted, however. Sylvester was from New York, where no establishment existed, so his concern about "abolishing religion altogether" cannot necessarily be interpreted as fearing the abolition of existing state establishments (i.e., "religion").\textsuperscript{151} Rather, it is more likely he was concerned that a prohibition on religious establishment could be interpreted to forbid government activities such as days of prayer or church incorporations and was therefore "anti-religious." Because Sylvester's statements are ambiguous, at least with respect to protecting existing state establishments, only Huntington's can be considered pro-federalism.

Madison responded to Huntington by offering to insert the word "national" in the clause, such that the proposal would read: "no national religion shall be established by law."\textsuperscript{152} Whether Madison saw his new proposal as protecting the existing New England establishments or merely again emphasizing the lack of national authority over religion, the idea was nixed by a hyper-sensitive Gerry who objected to the notion of declaring a national government, as opposed to a federal one.\textsuperscript{153} The remainder of Madison's response to Huntington, however, indicates that he did not view federalism as an overriding concern. Instead, Madison again offered a substantive interpretation of the proposed clause:

\textsuperscript{149} Id.

\textsuperscript{150} Huntington's statement indicates, however, that he (like his fellow members of the Massachusetts standing order) did not view the financial "support of ministers" or "places of worship" as constituting a religious establishment. Id.

\textsuperscript{151} Id. at 757.

\textsuperscript{152} Id. at 758.

\textsuperscript{153} Id. at 759.
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.\textsuperscript{154}

In essence, Madison offered a narrow, substantive interpretation of nonestablishment in response to Huntington’s concern that the clause could become a weapon for those who “professed no religion at all” and sought to avoid their financial obligations. The purpose of the amendment was to prevent dominance by any one sect or a union of sects, out of concern that they could “compel others to conform” (again, a reference to rights of conscience), not to cleanse society of all things religious (i.e., “partroniz[ing] those who professed no religion”).\textsuperscript{155} Madison, of course, privately believed that multiple establishments also violated rights of conscience, though he viewed combinations as a greater threat, but since Huntington viewed things differently, both could agree that the prevention of sect preference or dominance would protect rights of conscience. Nevertheless, the gist of Madison’s response was rather to the prevention of sect dominance, than to the protection of state establishments. In that Madison was the floor manager of the proposed amendment, his perception of the point of contention should be given the benefit of the doubt. Madison’s perception is supported by the fact that no other member rose to second Huntington’s concerns.\textsuperscript{156} Essentially, it is as plausible that Madison’s remarks about sect equality accurately reflect the overriding issue of the House debates, not federalism.

At that point, Samuel Livermore of New Hampshire stated that he was not satisfied with the proposed amendment but did not care “to dwell long on the subject.”\textsuperscript{157} Livermore then offered the New Hampshire convention’s religious proposal: “[C]ongress shall make no laws touching religion, or infringing the rights of conscience.”\textsuperscript{158} Coming after Madison’s response to Huntington, Livermore’s proposal could be interpreted as an attempt to address the latter’s federalism concerns. Livermore did not provide an explanation for (or interpretation of) his proposal, so it is not clear whether he was responding to Huntington’s states-rights concern, to the broader substantive statements by other members, or merely seeking to move things along by offering his

\textsuperscript{154. Id. at 758-59.} \\
\textsuperscript{155. Id. at 758.} \\
\textsuperscript{156. See Laycock, supra note 79, at 890 (stating that there is no evidence that a majority of the members supported Huntington’s proposal).} \\
\textsuperscript{157. 1 ANNALS OF CONG. 759 (Joseph Gales ed., 1789).} \\
\textsuperscript{158. Id.}
state's proposal. However, both the *Daily Advertiser* and *New-York Daily Gazette* quoted Livermore as also stating that while he believed Madison's original proposal ("no religion shall be established by law") and his language meant the same thing, "yet the former might seem to wear an ill face and was subject to misconstruction."\(^{159}\) In this light, Livermore's proposal does not appear to be a substantive alteration to Madison's language in an attempt to clarify the federalism issue but more of a stylistic change.

The House, still meeting as a committee of the whole, then adopted Livermore's putatively pro-federalism language.\(^{160}\) However, five days later Fisher Ames of Massachusetts moved the language be altered to say: "[C]ongress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."\(^{161}\) The House approved Ames' proposal without apparent discussion and sent the amendment to the Senate for its consideration.\(^{162}\) What is most obvious from Ames' language is the omission of the "no laws touching religion" language that could be interpreted as being protective of state establishments. Professor Bradley claims that the change in wording is insignificant—that because Ames' language was adopted without debate, the members must have understood the new version also to protect state establishments from federal interference.\(^{163}\) But federalism proponents cannot have it both ways—emphasizing the significance of express language in one instance (Livermore's proposal) but ignoring its omission in another (Ames'). If federalism had been the dominate concern in the selection of Livermore's wording, then it seems that such supportive language would have been retained in the ultimate version, particularly when the alteration was offered by a member from a state with a religious establishment. That assumes, however, that a House majority was concerned about protecting existing state establishments and viewed the First Amendment as accomplishing this primary purpose.

Recorded debates of the Senate considerations do not exist. All meaning must be gleaned from the various proposals contained in the

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159. "He observed that tho' the sense of both provisions was the same, yet the former might seem to wear an ill face and was subject to misconstruction." *DAILY ADVERTISER*, Aug. 17, 1789, p.2, col. 1; *NEW-YORK DAILY GAZETTE*, Aug. 18, 1789, p. 798, col. 4, in *THE COMPLETE BILL OF RIGHTS*, supra note 48, at 61.

160. 1 *ANNALS OF CONG.* 759 (Joseph Gales ed., 1789).

161. *Id.* at 796.

162. The final House passed version modified Ames' proposal to read: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof, not shall the rights of conscience be infringed." *HOUSE JOURNAL*, Aug. 21 1787, at 107.

163. "In passing Ames's proposal instead of Livermore's without extended debate, the motivation of Livermore's proposal to leave state regimes undisturbed no doubt underlay the Ames language." *BRADLEY*, supra note 27, at 92.
Senate Journal. What those proposals reveal are various alterations to the House proposal of a substantive nature, not of a jurisdictional manner. The handful of proposed substitutes were in line with that offered by Eldrige Gerry to limit the substantive impact of the amendment, e.g., preventing establishments of “one religious sect or society in preference to others.” Each of these narrow substitutes was rejected. But none of the Senate proposals contain language that could be construed, like that offered by Livermore, to indicate a concern to protect existing state establishments.

On September 9, 1789, the Senate finally adopted language providing “Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion . . . .” The author or movant of this final version is unknown, though the language is reminiscent of Elbridge Gerry’s more limited proposal in the House, which expressed a substantive, not a jurisdictional, concern. The House objected to the Senate’s version and called for a conference committee to resolve the differences on the religion amendment, among others. Madison, Roger Sherman of Connecticut and John Vining of Delaware represented the House while the Senate appointed Oliver Ellsworth of Connecticut, William Paterson of New Jersey and Charles Carroll of Maryland; however, before the committee met the Senate “recede[d]” from their language for the First Amendment. Out of the committee emerged the familiar lan-

164. 1 Senate Journal, at 70 (Sept. 3, 1789). Other substantive proposals that would have limited the breadth of the House version included: “Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society” Id., and “Congress shall make no law establishing any particular denomination of religion in preference to another.” Id. These passed in the negative. 165. See The Complete Bill of Rights, supra note 48, at 6. 166. House Journal, at 146. 167. The Complete Bill of Rights, supra note 48, at 6-7. Too much can be made from the fact that several of the members of the conference committee—Sherman, Ellsworth and Carroll—were from states with religious establishments. See Bradley, supra note 27, at 89-91. Bradley asserts that Ellsworth was an orthodox Congregationalist and supported “the public enforcement of the truth of Christianity.” Id. at 89. To be sure, during the ratification debate in Connecticut, Ellsworth expressed support for laws prohibiting blasphemy and “professed atheism.” But many supporters of disestablishment such as Isaac Backus also supported Sabbath and blasphemy laws for the betterment of civil society. Only the most forward thinkers viewed sumptuary laws as violations of religious conscience. In addition, Ellsworth’s remarks, published in the Connecticut Courant, reveal attitudes that were hardly “orthodox,” with him arguing against religious tests as attributes of establishments and claiming that “[civil government has no business to meddle with the private opinions of the people.” See A Landowner VII, in 1 The Debate on the Constitution 521-25 (Barnard Bailyn ed., 1993). Finally, as mentioned, Maryland’s establishment was on its death-bed, and unlikely to be revived. Charles Carroll had little reason to secure its protection. 168. Senate Journal, at 142, in The Complete Bill of Rights, supra note 48, at 7-8.
guage of what would become the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." The author of this final language—if one exists rather than many—is lost to history; however, because the final language more closely tracks earlier House versions (and the Senate had already acceded the amendment to the House), and Madison had expressed dissatisfaction with the Senate changes, it may be assumed that he and the House committee members had greater say in the ultimate phrasing.

Considering the House debates and House and Senate entries together, the argument that federalism was the overriding—or the sole—concern of the framers is weak. Only Benjamin Huntington's remarks indicate a desire to protect state religious establishments, while Livermore's proposal, by his own admission, can be interpreted several ways. In contrast, Madison's remarks, which should be the best barometer of the atmosphere of the debate, do not reveal a concern with the issue of preserving state establishments. Even if Huntington's views were representative, they did not find their way into the House's final version. On the other hand, the bulk of the House debate, like the proposals reported in the Senate Journal, went to the substance of the religion amendment—of whether the amendment would be limited to prohibiting only sect preference or would encompass some broader notion of nonestablishment. The issues represented in the debates (and inferentially drawn from the rejected Senate proposals) are similar to those that were expressed during the ratification debate: protecting rights of conscience, which included freedom from religious assessments; prohibiting enforcement of any religious doctrines; and preventing the preference for any sect at the expense of others. But as with the 1787-88 calls for a constitutional

170. See Bradley, supra note 27, at 94 (discussing Madison's frustration with the Senate's version of the religion amendment).
171. Laycock, supra note 79, at 890 (noting that there is "no evidence that the majority [of House members] shared [Huntington's] views").
172. See id. at 908 ("Nothing supports the notion that [the framers] did not understand the familiar language they proposed. Rather, these examples suggest that when the Framers debated the details of the religion clauses, their views on religious liberty were more salient than their views on federalism").
173. Mr. 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 constitution, he said he was much in favor of adopting the words." 1 Annals of Cong. 757 (Joseph Gales ed., 1789).

Mr. Madison—"[H]e apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observations of it by law, nor compel men to worship God in any manner contrary to their conscience . . . . He believed
amendment, protecting existing state religious establishments did not appear to be an overriding concern. Rather, the general consensus was that establishments were oppressive; people simply disagreed over what constituted an oppressive establishment.

That many within Congress did not view a religion amendment as particularly necessary or effective and that they offered primarily stylistic changes to the language does not mean that they paid no attention to the substance of the proposals before them. The various proposals rejected by the Senate suggest otherwise, and Madison and the House apparently thought enough of their language to insist on it against the weaker Senate version. Moreover, the fact that the framers could not agree on what constituted an infringement on rights of conscience—of whether a general assessment was as coercive as an assessment under an exclusive system—does not mean that agreement was impossible on general principles. Advocates of the federalism interpretation have imposed an unfair burden of consensus on the framers, one colored by modern disagreements over specific applications of the Establishment Clause. It is sufficient that the framers agreed on broad principles while leaving their disagreements over specific issues for another day. This lack of clarity or focus, however, is not the same thing as indifference to principles. As Maryland Representative Daniel Carroll remarked during the House debate, "[h]e would not contend with gentlemen about phraseology, his object was to secure the substance in such a manner as to satisfy the wishes of the honest part of the community." Similarly, the undeniable fact that the framers understood the Establishment Clause as being effective against the federal government only does not mean that they purposefully designed the clause to protect existing state religious establishments. The record simply does not support such a conclusion.

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." Id. at 758.

174. Mr. Carroll—"He would not contend with gentlemen about phraseology, his object was to secure the substance in such a manner as to satisfy the wishes of the honest part of the community." 1 ANNALS OF CONG. 758.

175. HOUSE JOURNAL, at 146, in THE COMPLETE BILL OF RIGHTS, supra note 48, at 6.

176. See Conkle, supra note 26, at 1134-35 ("As a statement of general principle, the Establishment Clause would not have been enacted. As a statement of federalism, it was widely supported").

177. This is particularly true since many viewed the federal amendments as redundant and/or unnecessary.

178. 1 ANNALS OF CONG. 758 (Joseph Gales ed., 1789).
III. THE INHERENT DANGERS OF HISTORICAL INTERPRETATION

[All construction of the meaning of the Constitution, is dangerous or unnatural, and therefore ought to be avoided.][179]

Justice Rutledge once remarked that "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religion clause of the First Amendment."[180] Certainly, a perusal of the Court's church-state holdings, not to mention the scholarship concerning those holdings, reveals a heavy reliance on historical interpretation.[181]

The drawbacks to primary reliance on historical records are many. First, it must be recognized that the historical record of any period—the constitutional period being no exception—is always incomplete. We have only those documents that have survived the ravages of time and have been transcribed, compiled and published. There can be no doubt that other important, unrecorded conversations and discussions about the purpose and meaning of the Establishment Clause took place during the House committee on style (which Madison chaired), in the House debates, and in the Senate debate that accompanied the proposals recorded in the Senate Journal. And this does not include the possible host of letters, pamphlets, and important notations written on loose pieces of paper that are lost to time. In addition, the records that do exist may be woefully inaccurate, as they were transcribed by people who made mistakes and self-edited as they went along (not to mention allegations that the transcriber for the Annals was frequently inebriated).[182] Madison stated that the accuracy of the reported debates of the first Congress was "not to be relied on:"[179a]

The face of the debates [shows] that they are defective, and desultory, where not revised, or written out [by] the Speakers. In some instances, he makes them inconsistent with themselves, by erroneous reports of their speeches at differ-

[179] Id. at 574 (quote by Elbridge Gerry).
[182] See James H. Hutson, The Creation of the Constitution: The Integrity of the Documentary Record, 65 TEX. L. REV. 1, 36-38 (1986) (discussing the excessive drinking of the reporter, Thomas Lloyd, and relating that his notes were "frequently 'garbled' and that he neglected to report speeches whose texts are known to exist elsewhere").
ent times on the same subject. [The reporter] was indolent and sometimes filled up blanks in his notes from memory or imagination. 183

Finally, remarks contained within documents whose accuracy can be presumed can easily be misunderstood. The framers used terms and phrases familiar to the late eighteenth century, and frequently employed rhetoric that was intentionally vague or duplicitous (or, at times, was merely sloppy). 184 Therefore, the precise meanings of recorded statements may be ambiguous at best. 185 In addition, persuasive evidence exists that the framers believed that constitutional interpretation should be drawn from the express language of the document, not from the statements of those who drafted the language. 186 Thus, as Justice Brennan once remarked, "[a] too literal quest for the advice of the Founding Fathers upon the issues of these cases seems . . . futile and misdirected." 187

What does this say about the value of the historical record for modern religion clause interpretation? First and foremost, historians and lawyers must resist drawing conclusions from express language. As Thomas Curry has written, "the meaning of the First Amendment must arise out of its historical context rather then from a literalist reading [of the documentary record]." 188 That context, moreover, must be viewed in its entirety, and not by emphasizing particular "facts" (e.g., that six states maintained "religious establishments") independent from their contemporary meaning. Third, historians and lawyers should avoid scouring the record for answers to modern questions that the framers may not have asked. The framers must also be afforded the privilege we give to modern politicians of being obtuse, ambiguous, insincere, incomplete, and contradictory in their rhetoric.

This does not mean, however, that no meaning can be drawn from history. Recurring and consistent statements that reflect broad prin-

183. See Letters from James Madison to Edward Everett (Jan. 7, 1832), quoted in Hutson, supra note 182, at 38.
184. See Laycock, supra note 25, at 413.
185. Schempp, 374 U.S. at 237 (Brennan, J., concurring) ("[T]he historical record is at best ambiguous, and statements can readily be found to support either side of the proposition. The ambiguity of history is understandable if we recall the nature of the problems uppermost in the thinking of the statesmen who fashioned the religious guarantees; they were concerned with far more flagrant intrusions of government into the realm of religion than any that our century has witnessed").
186. See H. Jefferson Powell, The Original Understanding of Original Intent, 98 HARV. L. REV. 885, 903 (1985) ("The framers shared the traditional common law view—so foreign to much hermeneutical thought in more recent years—that the import of the document they were framing would be determined by reference to the intrinsic meaning of its words or through the usual judicial process of case-by-case interpretation").
188. Curry, supra note 54, at 222.
ciples or points of consensus can be instructive for modern application of the religion clauses. Those principles that emerge from the ratification debate and drafting of the Bill of Rights include concerns for rights of conscience, no compelled support of religion, no delegation of government authority to religious institutions, and equal treatment of all sects. In essence, "our use of the history of their time must limit itself to broad principles, not specific practices."\textsuperscript{189}

As a result, arguments that the framers of the religion clauses failed to reach a consensus on a substantive understanding, such that the only point of consensus was to protect existing state religious establishments, is misdirected. This argument sets up a proverbial "straw-man" that can be conveniently knocked down in order to prove that the framers intended either this or that practice to prohibited or allowed under the First Amendment. Rather, it is not necessary that the framers reached any particular consensus on the meaning and/or application of the religion clauses; it is sufficient that they agreed on broad, general principles and viewed the Establishment Clause as facilitating those ends. As Thomas Curry has summed up those shared concerns:

[T]he people of almost every state that ratified the First Amendment believed that religion should be maintained and supported voluntarily. They saw government attempts to organize and regulate such support as a usurpation of power and a violation of liberty of conscience and free exercise of religion, and as falling within the scope of what they termed an establishment of religion.\textsuperscript{190}

Protecting existing state religious establishments from federal interference through the First Amendment does not appear to have been one of those shared concerns.

\textsuperscript{189} Schempp, 374 U.S. at 241 (Brennan, J., concurring).
\textsuperscript{190} Curry, supra note 54, at 222.