

Excerpt from "The Fixed Star," by Martha Nussbaum

Ch. 3. Proclaiming Equality: Religion in the New Nation

If "all men are by nature equally free and independent," all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "equal" title to the free exercise of Religion according to the dictates of conscience."

James Madison, "Memorial and Remonstrance Against Religious Assessments"
(1785)

As the government of the United States of America is not in any sense founded on the Christian Religion, -- as it has in itself no character of enmity against the laws, religion or tranquility of Musselmen, -- and as the said States never have entered into any war or act of hostility against any Mehomitan nation, it is declared by the parties that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries.

Treaty of Tripoli, 1796-7, signed and enthusiastically endorsed by President John Adams

Seventeenth-century thought about religion and the state already focused on equality.

Roger Williams's attack on religious "partiality" emphasized the equal worth of each human conscience as a source of political principles. In England, meanwhile, John Locke's influential A Letter Concerning Toleration (1683) made the case for religious liberty in strongly egalitarian terms, concluding: "The sum of all we drive at is, that every man enjoy the same rights that are granted to others" (69). Locke's doctrines of natural rights and the social contract gave a strong push, in general, to a more egalitarian politics.

During the eighteenth century, however, human equality became the touchstone of political life and thought. On the continent, Jean-Jacques Rousseau argued that inequalities between human beings were social, not natural, in origin; they derived primarily from human greed and envy. Strongly influenced by Rousseau, Immanuel Kant defended the idea that ethical principles must be tested by their capacity to treat humanity with respect and impartiality. Kant supported a thoroughgoing and even-handed religious liberty, extending even to atheists, whom Locke had excluded from the scope of his protections.

Meanwhile in Scotland, in work that had a great influence on the American founding, philosopher Adam Smith used the idea of equality to argue for social and economic institutions that are now essential parts of our daily life, radical though they were at the time. In The Wealth of Nations (1776), Smith argued that even a difference as great as that between a philosopher and a "common street porter" "seems to arise not so much from nature, as from habit, custom, and education" (WN 28-9).¹ He relied on this idea when he made his radical arguments in favor of compulsory free public education (already practiced in Scotland) and an end to laws that impeded the free movement of labor (such as the requirement that workers register, and remain, in a particular parish). Using similar arguments, he attacked the evils of British colonialism, both in America and in India, with its annihilation of local self-government and its creation of a merchant class at home who hijacked the institutions of government to protect their inefficient monopolies. In England, meanwhile, Mary Wollstonecraft argued in A Vindication of the Rights of Woman (1792) that statesmen and thinkers were inconsistent when they proclaimed equal natural rights for all, and yet excluded women, confining them to the sphere of the home. Her work, ignored at the time, has by now become a classic statement of principle. Mary Astell (1668-1731) had already made similar arguments in the late seventeenth century, comparing the lot of women to that of slaves.

Especially in America at the time of the revolution, the idea that human beings are equal – equal in worth and dignity, and more or less equal in basic natural endowment – was a, if not the, key political notion in terms of which all debates were framed. Wollstonecraft's proposal regarding women went on the whole unremarked – although Mercy Otis Warren, first historian of the Revolution and close friend of John Adams, criticized the male framers in similar terms. The equality of African-Americans was also not generally agreed, and our Constitution notoriously permitted slavery, although opposition to the practice was at least as old as Rhode Island. Nor were the native inhabitants treated with the respect Roger Williams had shown them; here as elsewhere, Williams's radical ideas were centuries ahead of their time.

¹ Smith is of course not the only philosopher to have such ideas: John Locke's account of the mind as tabula rasa had already had wide influence. But we should remember that the Scottish Enlightenment was particularly important in the education of Americans, perhaps Madison, at Princeton, in particular.

Despite these inconsistencies, however, the idea of equality had considerable radical force, providing a rationale for rejecting monarchy and creating a republic -- and for building a republic that did not contain various baneful types of hierarchy. As historian Gordon Wood puts it, "Equality was in fact the most radical and most powerful ideological force let loose in the Revolution."² He shows how this idea was used to dismantle aristocratic hierarchies of privilege that were a holdover, in the colonies, from an English monarchical heritage. On the plane of white male citizenship, at any rate, the idea of equality was a powerful engine for uprooting differences of status and class, where participation in the new republic was concerned.

Salient among the rejected types of hierarchy was an establishment of religion, by which the framers meant governmental privileges, prominently including money raised through taxation, granted to one church or group of churches. Such establishments were seen as bad because they created a two-tier system of citizenship. Following the idea of equality, the framers of the Constitution were led to a far more emphatic repudiation of religious establishment than Roger Williams had envisaged, rejecting unequivocally the idea of state financial support for a church or churches. If the seventeenth century was the century that forged our Free Exercise Clause, it was the eighteenth century whose politics forged our Establishment Clause. In the process, the characteristic American notion of religious liberty expressed in Roger Williams's writings was deepened; its essential spirit remained.

This chapter will trace the connection between thought about human equality and the rejection of religious establishments, prominently including financial subsidy for a church or churches. Focusing in particular on the thought of James Madison, the primary architect of much of the Constitution and certainly of its First Amendment, we will see that opposition to religious establishment was not inspired by disdain for religion or a desire to demote it to a lesser place in human life. For Madison (a devout and curious believer) and for most of his contemporaries, the issue was one of equality: establishments, however benign, create ranks and orders of citizens, defining the status of some as unequal to those of others. After studying the theoretical

²Gordon S. Wood, The Radicalism of the American Revolution (New York: Vintage Books, 1991).

formulation of these ideas in Madison's famous Memorial and Remonstrance (1785), we shall see how these ideas went to work in the formulation of the First Amendment.

Although any constitutional amendment, and certainly this one, is a committee document, involving a plurality of voices and some compromise, and although Madison clearly did not get everything he wanted (for example, the application of his ideas about religious equality to the state governments), two wrongheaded views of the "religion clauses" can be confidently rejected. One is the view, recently espoused by Justice Thomas, that the purpose of the Establishment Clause was only to defend state-level establishments from federal encroachment: it had nothing to do with individual rights. This view is false, because the opposition to establishment, throughout the latter half of the eighteenth century and in the thought of the framers, had a great deal to do with individual rights: specifically, with the danger that some individuals would be ranked beneath others and would enjoy systematically unequal civil rights.

The other false view we'll examine is a view known as "nonpreferentialism." It is associated with the late Chief Justice Rehnquist, who expressed it vigorously in dissent.³ Nonpreferentialism is the view that the religion clauses only forbid the federal government to prefer one religious sect to another, and that they permit – and deliberately permit -- government to foster and financially support religion in a general way, giving it preference over non-religion. Although it cannot be denied that some of the founders (for example George Washington) supported nonpreferentialism, the history of the framing of the text of the First Amendment makes this view untenable as a view of that text's meaning: the framers explicitly rejected language that clearly stated nonpreferentialism, and they endorsed language that was associated with the Madisonian tradition of a much more stringent prohibition of state support for religion. I would argue that, once again, equality was the primary reason: despite the social good that could potentially be done by fostering a general religious spirit in society, the framers saw that any such state support itself created ranks and orders of citizens – especially in a nation in which, contrary

³ Wallace v. Jaffree, 472 U. S. 91 (1984).

to what you might suppose, only between four and twelve percent of Americans belonged, at that time, to any recognized church.⁴

The framers did not have clear positions on every important issue. They thought a lot more about tax support for religion, for example, than they did about ceremonial invocations of religion; they treated the latter issue in an offhand and unreflective manner, to Madison's considerable discomfort in later life. They did, however, lay down wise principles for us to follow and further develop, if the equality of citizens is something we care about.

I. Equal Worth and Dignity: the Stoic Background

Americans in the mid-eighteenth century were steeped in the texts of ancient Greek, and especially Roman, philosophy. Education both in Britain and on the Continent had always been strongly classical, and at this time texts in the Latin language were strongly preferred to those in Greek. Kant, for example, never learned Greek, and Adam Smith's lectures show a detailed familiarity with Roman thought that is absent when he talks in highly general terms of Plato and Aristotle. For the American founders, as for the modern thinkers whom they read, Roman political philosophy was of enormous importance, and, above all, the philosophical ideas of Roman Stoicism, together with the Stoics' eclectic fellow-traveler Cicero.⁵ As Gordon Wood puts it, "People could not read enough about Cato [the Stoics' stock example of virtue] and Cicero."⁶ Not only philosophically inclined writers such as Thomas Paine, but also the general educated public, shared this passion: thus playwright/historian Mercy Otis Warren could expect a warm response for satirical dramas that depicted various British officials as Roman tyrants and expressed Ciceronian ideas about the goodness of republican institutions.⁷

⁴ See Stokes and Pfeffer, Church and State in the United States (New York: Greenwood Press, 1975), 23-4. The divergent estimates come from W. W. Sweet, "Church Membership," Dictionary of American History (one in eight) and from Harold Davis, "Religion, American," Dictionary of American History (one in 20-25).

⁵ Cicero rejected Stoicism in epistemology, allying himself with a moderate skepticism. In ethics, his views are very close to those of the Stoics, with subtle differences; in political thought, those differences become unimportant.

⁶ Wood, 103.

⁷ These poetic dramas include The Adulateur (1772), The Defeat (1773), and The Group (1775); the British governor appears in the first two under the name of Rapatio, or "Plunderer." Warren later published all her dramas in a book that she dedicated to George Washington.

The Roman writers whose works were all the rage included, above all, the Roman republican statesman, orator, and philosopher Marcus Tullius Cicero (106-43 B. C.) and the influential politician and philosopher Lucius Annaeus Seneca (c. 4 B. C. – 65 A. D.), who ran the Roman Empire as regent during the youth of Nero. To a lesser extent, the founders were also aware of Roman Stoic philosophers Epictetus (first-second century A. D.) and Marcus Aurelius (second century A.D.); but these authors wrote in Greek, so they were less central. Of particular importance, outside philosophy, were the Roman historian Tacitus (late first –early second centuries A.D.), who movingly describes instances of Stoic resistance to imperial tyranny during the reign of Nero, and the historian and moralist Plutarch (first-second centuries A. D.), whose Lives of distinguished Greeks and Romans include biographies of Julius Caesar and his assassin Brutus that had already become the primary sources for Shakespeare's Julius Caesar.

What did Americans find in these works that so moved and fascinated them? Stoicism at Rome was not just an academic pursuit; it was a widespread cultural movement. Stoic ideas were diffused into the general culture to a degree unparalleled for a philosophical movement before or perhaps since – though the century we are considering, in America, runs a close second. Roman Stoic philosophers wrote for a general educated public, gracefully and eloquently. In return, they were widely read by that public, so much so that surviving letters of the period show people's earnest efforts to model their human reactions (to political strife, to reputational slights, to grief) on Stoic norms, referring especially to the paradigm of Stoic virtue, Cato. (Marcus Portius Cato was a real historical figure, a politician of the first century B. C., but his role as quasi-fictional character in works of philosophy and poetry⁸ is more important here than his historical contribution.) People lived for philosophical ideas, died for them. The conspiracy in the year 44 B. C. that led to the assassination of Julius Caesar, strongly supported by Cicero, was highly philosophical in inspiration. Leading conspirator Marcus Junius Brutus even auditioned potential conspirators by asking them some telling philosophical questions.⁹

⁸ Cato is the hero of Lucan's Pharsalia.

⁹ See David Sedley, "The Ethics of Brutus and Cassius," Journal of Roman Studies 87 (1997), 41-53. Sedley argues convincingly that Brutus was not actually a Stoic, but a closely related variety of Platonist, who rejected the quietistic strain in Stoic politics and insisted that instability is better than lawless tyranny. His question to the would-be conspirators was on this point.

Both Cicero and Seneca, like Brutus, died violent deaths, fighting for republican institutions: Cicero was assassinated by Marc Antony's henchmen after he delivered his famous speeches against the dictator. Seneca was forced to commit suicide after an unsuccessful conspiracy against Nero in which he and his nephew, the poet Lucan, were both implicated. (Lucan's great epic Pharsalia is one of our most important portraits of Stoic heroism, in the person of its hero Cato.)

All this by itself was enough to move well-read and thoughtful Americans who were about to embark upon a perilous political course. Roman Stoicism told them that ideas could change history, and that republican ideas were worth dying for, even should their attempt to change things prove unsuccessful.

Even more gripping, however, was the specific content of the Roman ideas. The Stoics taught that every single human being, just in virtue of being human, contains a portion of the divine. Our ability to perceive ethical distinctions and to make ethical judgments was held to be the "god within," and our capacity for ethical choice makes the inner life of each of us spacious and deep, capable of searching and choosing. Ethical capacity is found in all human beings, male and female, slave and free, high-born and low-born, rich and poor. And though people differ in ability once they are educated, the Stoics believe that in terms of innate equipment we are all basically equal, and all capable of attaining virtue by our own effort, given suitable education. The very capacity for ethical choice is so significant that its presence eclipses any differences of ability, even ethical ability, that we might encounter. Ethical capacity is therefore worthy of boundless reverence; it is in effect the person, the core of our humanity. Wherever we find humanity, then, we ought to respect it, and that respect should be equal, treating the artificial distinctions created by society as trivial and insignificant.

More than most, the Stoics meant what they said: they campaigned for the equal education of women, and their ranks included one former slave (Epictetus), one foreigner from the far reaches of the Empire (Seneca, born in Spain), and various women (whose writings unfortunately do not survive), not to mention the "new man" Cicero, whose non-aristocratic origins are a constant theme in his writings.

If these Stoic ideas sound familiar, given our discussion in the previous chapter, this is no accident. Stoic ideas played a large role in shaping at least some parts of Christian thought, and they played a major role in educating thinkers of the seventeenth, as well as the eighteenth, century. Dutch thinker Hugo Grotius quotes Cicero and Seneca more often than any other authors; they appear on almost every page of his major work On the Law of War and Peace. Stoic/Ciceronian ideas about human dignity and equality were the common currency in which people talked to one another. Although Roger Williams, unlike Grotius, rarely quotes from classical authors, and is obviously a deeply personal and original thinker, we should still read him against that background, which was surely the core of his first-rate English education. Cicero's On Duties, known as "Tully's Offices," sat on the desk of every English public servant, along with the Bible. Indeed, it was called "The Statesman's Bible." Adam Smith trusts his reader to recognize quotes from it without any footnote, alluding to Cicero the way we would to Shakespeare and the Bible. We should, then, hear Roger Williams's appeals to conscience in a Stoic, as well as a Protestant, context, or, rather, recognize that his Protestant context was steeped in Stoicism. Much later, Kant's appeal to impartiality, which I compared to Williams's, is explicitly patterned on Stoic models. Cicero's On Duties, Book III, contains an argument that is a direct antecedent of Kant's request that we test our ethical principles by asking whether they could become a universal law.¹⁰

The idea of human dignity, and of its boundless and equal worth, is the primary legacy of Roman thought to the world of the American Revolution.¹¹ What political principles and actions did it suggest? Cicero and the Stoics hold that human dignity should never be abused by making it subject to the arbitrary will of another. For contemporary political philosopher Philip Pettit, this idea of "non-domination" is the key to American revolutionary politics, and marks America as the site of a distinctive type of political thought, one based on the idea that one should not be a slave, but a free man in that specific sense.¹² Pettit is correct in observing that the rhetoric of the period

¹⁰ See my "Kant and Stoic Cosmopolitanism," in Kant's Perpetual Peace, ed. J. Bohmann and M. Lutz-Bachmann.

¹¹ See Wood p. 240.

¹² Pettit, Republicanism: A Theory of Freedom and Government (New York and Oxford: Oxford University Press, 1997).

is suffused with a hatred of servitude and an intense longing for a politics of free, non-dominated, men. I believe, however, that one can understand this emphasis on avoiding servitude more profoundly, and in a way much more pertinent to our thought about religion, if one goes behind non-domination to the notion of human dignity. It is because human beings have a dignity, are not mere objects, that it is bad to treat them like objects, pushing them around without their consent. And it is because human dignity is equal that it is abhorrent to set up ranks and orders of human beings, allowing some to tyrannize over others.

The Romans themselves derived a range of different political lessons from these ideas. Cicero, passionate defender of the Roman Republic in its waning days, believed that human dignity required republican institutions through which people could govern themselves without arbitrary tyranny. He defended the assassination of Julius Caesar in those terms. At the end of his life, when that attempt to salvage the republic had failed and tyranny seemed inevitable, he was deeply depressed, having lost, he said, the two things that he loved most in life: his beloved daughter Tullia (who died in childbirth during her third marriage) and the Roman republic. He was not consoled by the thought that Augustus was a decent individual (as, in most ways, he proved to be). People were still subjected to the will of another, even should that will prove benign. Many of Cicero's friends fully agreed with him about the republic, whether they were Stoics or not. Some later Stoics, however, thought, or at least said – since freedom of speech cannot be said to be complete under the Empire-- that a decently accountable monarchy might be acceptable. Some wrote praises of "good" emperors, such as Trajan. One, Marcus Aurelius, agreed to be adopted and to become, himself, the emperor. The experience of empire showed, however, that Cicero was correct: once a monarchy is in place, nothing prevents it from turning in an arbitrary and oppressive direction. Augustus was followed by Tiberius, Caligula, Claudius, and Nero – all of whom were capricious and violent, in different ways and to differing degrees. The lauded principates of later "good emperors" such as Trajan, Hadrian, Antoninus Pius and Marcus Aurelius were interleaved with the horrible persecutions of Domitian and Commodus. So it came to seem more and more reasonable for Stoic thought to ally itself firmly to the idea of accountable

republican institutions. The two anti-imperial conspiracies reported by Tacitus clearly aim at the restoration of such institutions, as well as the termination of Nero's lamentable reign.

Stoicism also contained, however, the seeds of a more quietistic response. Because the Stoics taught that dignity was all-important and material conditions utterly unimportant, it was possible to maintain that the soul was always free within, whether or not institutions enslaved it on the outside. Seneca's famous letter on slavery (Moral Epistle 47) asks masters to show respect to their slaves, and to treat them like full-fledged and equal human beings; but it does not attack the institution of slavery, which Seneca plainly thinks compatible with a dignified free life within, so long as masters do not beat or sexually abuse the slave.

Americans clearly followed Cicero (and Tacitus's conspirators), and repudiated the quietistic strand in Stoicism, holding that their equal dignity as human beings required an end to the British tyranny. More generally, they agreed that human dignity entails a politics of respect, in which human beings are treated as equals and in which they are not subject to "soule rape." Linking the Stoic idea of dignity to the somewhat more emotional and subjective Protestant idea of conscience, they held that in religious matters, people should not be subject to arbitrary whim and interference, on account of their conscience's dignity. Any acceptable account of religious liberty, moreover, would have to be one that guaranteed people equal liberty, on the basis of their deep underlying human equality.

One more influential Stoic idea that will play a role, ultimately, in constructing our First Amendment is that of human beings as "citizens of the world," or "cosmopolitans." Stoics held that our fundamental kinship is constituted by our common possession of reason and ethical capacity. Political boundaries are superficial, just as are wealth and class. Patriotism is seen as compatible with cosmopolitanism, but cosmopolitanism strongly shaped the content of patriotism, making it more likely that the nation and its unity will be conceived of in ethical terms, rather than in terms of a common soil and heritage.¹³ America has always been unusual among the nations of the world in just this way: we do not think that we are fundamentally people of a given race, or soil, or religion. We are held together by ethical commitments (to equal respect and the value of

¹³ See Wood, 221.

liberty) that transcend particular groups. These "cosmopolitan" ideas came to be seen as the mark of the enlightened person.¹⁴ They were not used so much to suggest a style of foreign relations as to suggest a way of thinking about the nation's own unity, in which blood, soil, and ethno-religious homogeneity are not necessary to hold a nation together: common ethical and political commitments are the right way to cement a republic.

The ideas of human dignity and equality already suggested that a good political community would not establish a single church, tyrannizing over citizens who believed differently. Cosmopolitanism, however, suggested something further: that a religious establishment was not necessary to hold a nation together. The nations of Europe have not thought this way, for the most part. Most of them still have established churches. France has a secular establishment that is more intrusive than any of the current European religious establishments. The very fact that the EU constitution almost contained reference to the EU as a Christian body shows the extent to which Europeans are still inclined to think of nationhood as a matter of blood, soil, and religious heritage. (In India, which is like the U. S. in fashioning nationhood on the basis of political and ethical aspirations, not common blood and religion, the Hindu right has for years tried to import the European concept of nationhood, tracing their idea of "Hindutva" or "Hinduness" self-consciously to Germany, and arguing that the idea of a single preeminent religion is an essential condition for strong modern nationhood.¹⁵)

The new nation did not think in the European way. Common ethical principles, above all a respect for the equal humanity of all human beings, would, the colonists believed, be sufficient to found a republic. Revolutionary America contained many different strands of thought. Some leading founders (Thomas Paine, Thomas Jefferson) were Deists, rationalistic and highly skeptical of traditional religion. Some (George Washington, Patrick Henry) had inclinations that we might today call "communitarian," seeing shared religious beliefs and practices as a good thing for the social fabric of a young nation. Some, like James Madison and many Baptists, Quakers, and other dissenters – following the lead of Roger Williams -- were personally religious

¹⁴ See Wood, 221.

¹⁵ See my *The Clash Within: Democracy, Violence, and India's Future*, Harvard University Press, forthcoming.

but highly skeptical of any association between religion and government. The idea of equal human dignity, however, bound all these diverse strands and people together. Whatever a nation might be, it must find institutional ways to honor the spirit of equal dignity. Eventually, even the communitarians granted that an established religion was not a good way to pursue this goal.

Cosmopolitan ideas also shaped a style of ethical discourse that strongly favored the emerging politics of religious fairness. From Smith and other thinkers of the Scottish Enlightenment Americans drew the idea that good world citizenship required the cultivation of a sympathetic imagination, so that we could see the humanity in one another across sharp divisions, prominently including religious divisions. Something like this is what Roger Williams had already called for in his appeal to the "merciful and compassionate reader." But Americans who drew on Smith, with his extensive investigations of sympathy, absorbed a distinctive set of attitudes that shaped the developing nation's sense of itself. Once again, this notion was put to work less in thinking about international relations than in the nation's internal grapplings with differences of class, region, and especially religion.

II. Attacking Establishment

The idea of equality was associated with religious liberty in virtually all of the colonies. Of twelve state constitutional free exercise provisions in 1789, all contained language referring to equality or a non-discriminatory standard, although in two cases this was limited to Christian denominations.¹⁶ In New York and South Carolina, the right of religious free exercise was said to be held by all "without discrimination or preference." Virginia held that "all men are equally entitled to the free exercise of religion." Other states made similar points through words such as "every," "no man can...be deprived," and so on.¹⁷ Even states such as Massachusetts, which retained an established church, used the non-discrimination language. The Massachusetts Constitution of 1780 stated: "...no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the

¹⁶ See McConnell, p. 37.

¹⁷ See McConnell, p. 37 and Hamburger p. 97.

public peace or obstruct others in their religious worship."¹⁸ These peace and safety exemptions were common, showing that the colonists agreed in giving religious practice, as well as belief, a broad latitude, on a footing of equality or non-discrimination.

Rhode Island, Pennsylvania, Delaware, and New Jersey never had any type of establishment. New England very quickly adopted systems of multiple rather than single establishment, favoring Protestant denominations – while guaranteeing (allegedly) nondiscriminatory religious freedom to all. In the South, the Anglican Church was established in all six colonies (Georgia, North and South Carolina, Virginia, and Maryland) at first, but these establishments proved controversial. North Carolina got rid of all establishment in 1776, Virginia, as we shall see, shortly thereafter. Others followed suit. Connecticut was the only colony that had a preferential establishment (establishing a single denomination) at the time of the framing of the U. S. Constitution. Indeed, establishment of all sorts was on the way out: Connecticut got rid of its own completely in 1818, New Hampshire in 1819; Massachusetts held out until 1833.¹⁹

Some colonies, then, still clung to the idea of benign establishment. Many colonies also required religious oaths for office-holding; some excluded Catholics, some Jews, some only atheists.²⁰ Even some who had no establishments (Pennsylvania, Delaware) had such oaths.²¹ A trend against establishment, however, was under way, the trend that quickly led to the abolition of all state establishments even without the federal pressure that Madison wanted to apply.

What were the arguments in favor of this dramatic shift in thinking – arguments that, as we see, rather quickly persuaded even the stiff-necked Congregationalists and the hierarchical Anglicans that establishment was a bad idea in the new nation?

First of all, experience showed that establishments talked nicely, but rarely really protected religious liberty with an equal hand. In Massachusetts, a Baptist was jailed for refusing to pay tax to support the established church. Dissenters were frequently excluded from office-holding, a

¹⁸ Quoted in McConnell, p. 24.

¹⁹ Data are from Leonard W. Levy, The Establishment Clause: Religion and the First Amendment (New York and London: MacMillan, 1986), pp. 1-62.

²⁰ See McConnell p. 23; Philip Kurland, "The Origins of the Religion Clauses of the Constitution," William and Mary Law Review 27 (1986), 839-61, at p. 845; Douglas Laycock, "Nonpreferential Aid to Religion: A False Claim About Original Intent," William and Mary Law Review 27 (1986), 875-923, at p. 916.

²¹ See Levy, p. 64.

significant burden on religious liberty in their view. They were also excluded from many universities: Brown, founded in 1745, was the first university in the colonies to have no religious test for entrance. Dissenters argued that it was a narrow conception of religious liberty indeed that allowed such inequalities of opportunity and social/political voice. Could one really be free to worship in one's own way if choosing the path of freedom meant second-class civil rights? Typical of this line of argument was the argument against South Carolina's established church by Presbyterian William Tennent: the "first, and most capital reason, against all religious establishments is, that they are an infringement of Religious Liberty."²²

More generally, dissenters simply did not accept the suggestion that an established church, financed by taxpayer money, could treat citizens equally. As they saw it, the minute one church rather than another hooked up with state power and state money, members of other religions – or that large group of Americans, at least eighty-five percent, who had no church membership – were treated as lower in status. This was not simply a likely consequence of financial establishment, it was a meaning expressed in the very fact of such an establishment. As Philip Hamburger writes, "Although dissenters often argued in terms of the appealing rhetoric of liberty, they also enunciated their demands in more precise terms – most commonly in terms of some degree of equality."²³ Thus dissenters in Virginia, in 1779, wrote, "We most earnestly desire and Pray that not only an Universal Toleration may take Place, but that all the Subjects of this Free State may be put on the same footing and enjoy equal Liberties and Privileges."²⁴ Samuel Stillman, a prominent Massachusetts Baptist, asked the governor to grant all peaceable Christians "the uninterrupted enjoyment of equal religious liberty." He emphasized that "equal religious liberty" meant a full equality of all legal and civil rights, without regard to religious differences: "The authority by which he [i.e. the 'magistrate'] acts he derives alike from all the people [and] consequently he should exercise that authority equally for the benefit of all, without any respect to their different religious principles."²⁵ In South Carolina, similarly, William Tennent

²² Hamburger, p. 76,

²³ Hamburger, p. 96.

²⁴ Hamburger, p. 99.

²⁵ Hamburger, 96-7.

emphasized that establishments always make invidious distinctions among people, giving some a recognized status and merely tolerating others:

The law knows and acknowledges the society of the one as a Christian church; the law knows not the other churches. The law knows the clergy of the one as ministers of the gospel; the law knows not the clergy of the other churches, nor will it give them a license to marry their own people...The law makes provision for the support of one church; it makes no provision for the others. The law builds superb churches for the one; it leaves the others to build their own churches...These are important distinctions indeed, but these are not all. The law vests the officers of the Church of England with power to tax not only her own people but all other denominations within the bounds of each respective parish for the support of the poor – an enormous power which ought to be vested in no denomination more than another.²⁶

Even when liberty is not infringed, then, establishment creates asymmetries of respect, voice, and fiscal power. Notice Tennent's cogent objection to turning poverty relief over to a sectarian group, as (in effect) with our predominantly Christian faith-based initiatives. To give this important function to a sectarian group or groups makes citizens fundamentally unequal in status and dignity.

III. Madison and the Virginia Assessment Controversy

James Madison (1751-1836) is commonly called "the Father of the Constitution."²⁷ His ideas and arguments so consistently dominated discussion of the new republic and its basic structure that, as one historian puts it, "the years 1785 to 1791 belong preeminently to the gentleman from Orange County, Virginia."²⁸ (With unusual insight, Alley also states that Madison, by issuing his "clarion call for religious liberty," revived the program of commitment to human dignity and fairness that Roger Williams had already inaugurated in the seventeenth century.) Short and unprepossessing, a poor public speaker, Madison influenced others, and influences us until the present day, through the cogency of his ideas and arguments. His biographer Irving Brant, sounds, however, a warning note: "To know what ultimate position James Madison will hold in his country's history one must know what that country's future will be. If the American

²⁶ Quoted in Levy, pp. 5-6.

²⁷ A. E. Dick Howard, "James Madison and the Founding of the Republic," in James Madison on Religious Liberty, ed. Robert S. Alley (Amherst, N. Y.: Prometheus Books, 1985), 21-34, at 21.

²⁸ Robert S. Alley, "Introduction," in James Madison on Religious Liberty, p. 13.

people abandon the rights and liberties he worked so hard to establish, he will be forgotten along with them."²⁹

Born and raised in Orange County, in western Virginia, Madison was raised on a slave-holding estate. Unusually for a young gentleman from his milieu, however, he chose to come north for college, enrolling in 1769 at Princeton University (then called College of New Jersey). Here he was exposed to a wide-ranging philosophical education that included study of Locke, Montesquieu, Grotius, Hobbes, and the philosophers of the Scottish Enlightenment (Hutcheson, Reid, Adam Smith). Thus he encountered some of the Stoic ideas that were increasingly suffusing his milieu not only directly, through the classical part of his education, but also indirectly, through direct descendants such as Grotius and Smith. He focused on history and government, and especially on a subject that he calls "The Law of Nature and of Nations" (which suggests a particular focus on Grotius, who used the Stoic idea of natural law to justify an account of international law).

From Locke and the Scottish philosophers, meanwhile, the young Madison derived a healthy respect for experience, prominently including history, as a source of political understanding. In Federalist 14, he later wrote: "Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?" Madison was not about to adopt Stoic ideas on the cheap, because they were ancient. He would accept only those that stood the test of his own critical examination in the light of history and his own sense of America's situation. With what he later recalls as the "minimum of sleep and the maximum of application," he finished his degree in three years.³⁰

Returning to Virginia, he noticed with the fresh eye of detachment the differences between Virginia and some of the northern states. Madison's opposition to slavery probably dates from an earlier time, but it becomes more and more pronounced as he often visits friends in Philadelphia. On one such trip he manumitted his personal slave Billy, who later became an independent

²⁹ Irving Brant, quoted in Alley, p. 13.

³⁰ Quoted in Howard, p. 23.

merchant, William Gardener, and handled much of the Madison family business.³¹ . At the Constitutional Convention in 1787 he denounced the entire institution of slavery in very strong terms.

Other differences also prompted critical reflection. Corresponding with a college classmate, William Bradford, who had returned to his home in Philadelphia, he condemns many aspects of Virginia life, including economic inequality and the arrogance of the rich. His rhetoric reaches Williams-esque heights, however, when he addresses the topic of religious liberty: "That diabolical Hell conceived principle of persecution rages among some and to their eternal Infamy the Clergy can furnish their quota of Imps for such business."³² (Throughout the correspondence, Madison often inveighs against the corruption and malice of the clergy of the established Anglican Church.) Bradford replies: "I am sorry to hear that Persecution has got so much footing among you. The discription [sic] you give of your Country makes me more in love with mine. Indeed I have ever looked on America as the land of freedom when compared with the rest of the world, but compared with the rest of america [sic] Tis Pennsylvania that is so. Persecution is a weed that grows not in our happy soil."³³ Such comparisons nourished Madison's evolving views of religious freedom.

The two friends also discussed the topic of religious establishment. Since Bradford (following Madison's advice) was preparing for a legal career, Madison proposes that he ought to make a study of Pennsylvania's Constitution, focusing on the question, "Is an Ecclesiastical Establishment absolutely necessary to support civil society in a supream Government? & how far is it hurtful to a dependent State."³⁴ The fact that Madison urges his friend to focus on his own state, which had no establishment and yet was doing quite well, prejudices the answer that was likely to emerge. As Bradford becomes more involved in revolutionary activity against the English, Madison, encouraging him strongly, observes that revolutionary fervor would probably have been dampened had the Northern colonies had Anglican ecclesiastical establishments:

³¹ Kenneth Clark, "Madison and Slavery," on line.

³² Letter of January 24, 1774, quoted in Alley, p. 48.

³³ *Ibid.*, letter of March 4, 1774.

³⁴ *Ibid.*, p. 46, letter of Dec. 1, 1774.

If the Church of England had been the established and general Religion in all the Northern Colonies as it has been among us here...it is clear to me that slavery and Subjection might and would have been gradually insinuated among us. Union of Religious Sentiments begets a surprising confidence and Ecclesiastical Establishments tend to great ignorance and Corruption all of which facilitate the Execution of mischievous Projects.³⁵

There are several surprising ideas in this paragraph. First, we see clearly the Stoic inclinations of Madison's analysis: the bad condition is one of "slavery and Subjection," the good condition one in which a people throw off domination. Second, to our surprise Madison does not associate the bad condition (acquiescence in slavery) with the establishment of the Anglican church (Church of England) alone, although that is how the paragraph starts out. Writing to a friend educated in New Jersey and dwelling in Pennsylvania, neither of which had any establishment, Madison associates passivity and tolerance of servitude with any sort of establishment whatever: they all tend to "great ignorance and corruption." Madison expands on this theme later in the letter, praising the Pennsylvania regime of liberty and non-establishment: "Religious bondage shackles and debilitates the mind and unfits it for every noble enterprize every expanded prospect."

Third, Madison suggests that establishment is bad not only for reasons of servitude and corruption, but also because plurality of opinion is itself valuable, undermining ill-earned "confidence" and preventing a complacency that would lead to passivity. (Throughout his life, Madison showed an unusual degree of interest in a wide range of religions, including Judaism and Islam. He read widely and corresponded with leading Jews in various states. In 1818 he wrote to Mordecai Noah, apropos a speech by the latter consecrating a Synagogue: "Having ever regarded the freedom of religious opinions and worship as equally belonging to every sect...I observe with pleasure the view you give of the spirit in which your Sect partake of the blessings offered by our Govt. and Laws."³⁶)

Not surprisingly, Madison soon became involved in the tangled religious affairs of his own state. In 1776, Virginia was drawing up a Declaration of Rights. George Mason had written a draft, stating: "that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience,...unless under color of religion any man disturb the peace, the

³⁵ Letter of Jan. 24, 1774, p. 47.

³⁶ Letter of May 15, 1818, Alley, p. 80.

happiness, or safety of society."³⁷ In his first major public act, Madison objected to the word "toleration" as too grudging. He proposed, successfully, that this language be replaced by the statement that "all men are equally entitled to the full and free exercise of religion according to the dictates of conscience." Toleration suggested hierarchy, as if it were by the blessing of the majority that the minority were not persecuted. That idea was going out, and the idea of human equality was coming in, with Madison in the vanguard. By 1790, even George Washington would write to the Jewish congregation at Newport: "It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights." Madison also objected that Mason's "peace, happiness, and safety" language was not protective enough: he suggested language that said government could interfere with the free exercise of religion only if equal liberty itself and the very existence of the State were "manifestly endangered." The drafting committee decided not to sort out this dispute, simply not specifying the interest that could override a free exercise claim.³⁸

The Declaration of Rights established an equality of liberty, but it did not address the issue of establishment, or the requirement of tax contributions for the support of the established church. In 1776 the legislature abolished this tax for non-Anglicans, and for Anglicans in 1779. The issue arose again, however, in 1784, when Patrick Henry, concerned about an alleged decline of virtue, submitted his "bill Establishing a Provision for Teachers of the Christian Religion." Henry began by paying tribute to equality, insisting that his bill did not threaten "the liberal principle...abolishing all distinctions of pre-eminence amongst the different societies or communities of Christians." This, then, was to be a non-preferential financial establishment, and Henry argued that its non-preferential character made it compatible with equality. The bill established a tax to support teachers of the Christian religion. Each person could designate to which denomination he wanted his money to go. If he did not name a church, the money would go "for the encouragement of seminaries of learning." (Thus there is apparently not even a default establishment, although it is obvious that some sects had seminaries and others did not.) Quakers and Mennonites

³⁷ See McConnell, p. 59.

³⁸ See McConnell 59-60, and M. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," Harvard Law Review 108 (1990), 1409, 1443-4, 1462-3.

(presumably because they did not have teachers) were permitted to deposit the money in a general fund and use it for any purpose they liked.

The bill attracted widespread opposition. Despite Henry's powerful oratory, it was ultimately defeated, with Madison and Thomas Jefferson leading the opposition. The key document in the defeat was Madison's famous "Memorial and Remonstrance Against Religious Assessments" (1785).

Madison's central argument is that any sort of establishment violates the equality of citizens, "that equality which ought to be the basis of every law." How is this the case here? The bill looks rather fair to the various sects, and Henry had argued that it is utterly non-hierarchical. Madison argues that the very idea that the state has authority to set up some religions over others is wrongheaded and hierarchical, expressing an idea of state power that is inherently opposed to citizen equality. In this case, the state claims the authority to set Christianity above non-Christianity. This result seems fine to most people. But if we grant that the state has this power in the first place, he continues, then we cannot prevent this authority from being used, as well, to set up some particular sect of Christians over other sects. Indeed, the bill already does this, by singling out only Quakers and Mennonites for special exemption, even though there may well be, or come to be, others who think that this state support is inimical to their religion.

More generally, we cannot claim the right of religious liberty without granting it on an equal basis to those who do not follow the religion we believe to be correct:

If "all men are by nature equally free and independent," all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "equal" title to the free exercise of Religion according to the dictates of conscience." Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us.³⁹ ...[The proposed bill] degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.

Madison takes up the radical position of Roger Williams: the very fact that the state endorses one religion above another is itself a violation of the equality of citizens. He extends Williams's position to the area of financial support, where Williams had not seen a problem. But what, precisely, is the equality problem? In the Virginia case, the endorsement is broad, but it is

³⁹ From full version of the "Memorial and Remonstrance" in McConnell 63-68.

still exclusionary, "degrading" non-Christians of all sorts, as well as people who are atheists or without religion. Unlike Williams, Madison does not enumerate these people, presumably out of political prudence: he is waging a legislative campaign against a powerful adversary, so he wants to maximize the terrain of agreement. He therefore relies on the idea that once the state arrogates to itself the authority to back Christianity against non-Christianity, this is tantamount to giving itself the power, as well, to back one Christian sect against another. But non-Christians are clearly in the picture when he speaks of "those whose minds have not yet yielded to the evidence which has convinced us."

Why, though, is mere tax support tantamount to setting up a hierarchy? Roger Williams did not think so. Madison's position seems to be that the very fact that the state uses its coercive taxation power to channel money to certain religions itself makes a statement that these religions are the state's favorites. Even when it is the entirety of Christianity that gets the benefit, first of all, it doesn't work well enough (his point about the enumerated exemptions); second, the benefit excludes non-Christians; third, the tax power could always be abused should the state decide to favor only some sects of Christians; and, fourth and most important, it makes a statement that the state just should not be in the business of making. The state just doesn't have any business telling people that they have to support religion in this, or that, or any way. That very statement establishes a hierarchy.

Madison's position is easy for us to understand when we focus on the exclusion of Jews, Muslims and other non-Christians. Henry's bill was not a truly non-preferential establishment. What about, though, an imagined revision in which members of non-Christian religions would also be free to support their own churches? Well, Madison's point about imperfect administration still holds, and becomes worse, once we admit the many religions that don't have clerics in the usual Christian sense. In Judaism, for example, the Rabbi is not an authority figure, he is a teacher, hired by the congregation; so it would be inappropriate to give the money to a Rabbi (as the bill would seem to recommend), rather than the congregation, or, better yet, to let each person decide to support the teacher or teachers he or she favors. Other religions, such as Native American religion, Buddhism, Taoism, and Confucianism pose even larger problems, and they

could not easily be solved in the way Henry tries to solve the problem of the Quakers, since these religions do not always even have organized congregations. If even Henry's list of exemptions doesn't work well enough, we can surely see that a long open-ended laundry list of exemptions, changing every time a new sect or sub-sect emerged, would be quite impossible to administrate, and would give rise to constant political wrangling. How could we even imagine the bill dealing with a religion such as Hinduism, with its plurality of local forms, its many distinct shrines and gods? (In much of Hinduism, moreover, we cannot even say that there is such a thing as "a religious teacher": religion is learned in ritual, and involves, above all, ritual performance.)

Madison's point about the potential danger to liberty also obtains: once the state has the authority to say, "I'm going to make you all support religion," it seems hard to prevent it from turning in a preferential direction, should the majority support that course. The point of principle has been conceded: the state has power over religion.

Madison's central argument, however, was one about inequality. And it looks, at first blush, as if that problem is solved: our imagined revision of Henry's bill does not set up a hierarchy of religions. Remember, however, that a vast majority of Americans at this time did not belong to any church. Whether they had religious beliefs or not, they did not choose to become members of, and to support financially, any recognized group. That does not mean that they did not care about virtue: but they chose to pursue virtue, and teach it to their children, outside the confines of organized ecclesiastical authority. (Recall that even Roger Williams separated himself from all organized churches to pursue his search for God. Many dissenters took this course.) So we still have exclusion and hierarchy, even in the modified nonpreferential bill. We are telling such people that, even though they themselves have chosen not to pay into a church, and not to trust existing ecclesiastical authority, they will have to do so: in this way the will of the majority (or in many cases the minority) dominates over people's personal conscientious choices.

Indeed, the more we think about it, the odder the proposed tax system appears, even in its modified nonpreferential form. People who have already joined a church assume, in so doing, financial obligations to support the church. In some cases these are conceived as voluntary, but in many cases a member in good standing of a congregation is required to pay an understood

amount. Tithing is just the practice of setting a fixed amount of expected contribution. Most, if not all, Jewish congregations impose the obligation in an even more formal way, sending an annual bill, and withdrawing privileges from people who do not pay their bill. So citizens whose religious membership puts them under such obligations will, in effect, be doubly taxed: they cannot withdraw the contribution they are already making without losing congregation membership, but they are also required to pay their taxes. The group of non-members will be taxed only once, but that is because they have (by not joining a church) expressed the choice not to support religious teachers at all. And the tax will force them to offer support that they wish not to offer. Both groups, therefore, are being made to pay one time more than they have chosen to pay; it seems that both are being wronged. Madison focuses on the burden to the excluded, but we can add that the church member suffers as well.

We should conclude, I believe, that Madison has a strong argument: any state policy that gives taxpayer money directly to religious institutions and teachers compromises the equality of citizens. As we shall see, much of our modern Establishment Clause jurisprudence builds on his insight and then asks what precise forms of aid to religion these considerations prohibit. It is generally agreed that direct aid of the Virginia sort is inadmissible, but questions remain. (Are there permissible forms of indirect aid? Can we find neutral principles to support tax support that will be given to both religion and non-religion alike?)

Madison makes some ancillary arguments against Henry's bill that are staples of public debate in this period. Like Adam Smith in The Wealth of Nations, he insists that government support for religion harms religion: it makes it into a state bureaucracy, or at least tends in that direction, and this opens the door to corruption and complacency. "During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution." If we compare the vigor of religion in today's United States, where every sect must compete for adherents, with the weakness and "indolence" of most of the established churches of Europe, which have lost public support over time, we can easily

see the truth of his claim. Knowing you'll get rich no matter what you do is not exactly a recipe for good management or passionate commitment.

My own experience working on religion-state issues in India adds a further point: once a given religion gets hooked up with state power, it becomes much more difficult for its members to innovate, creating new sects or departing from an old one that has lost its vigor. Thus, to take just one example, in America every major religion has heard the demands of women for full inclusion. If a given sect does not respond to those demands, people typically can form a new sect or sub-sect. All sorts of theological and organizational creativity is unleashed by the fact that no form of any religion has been established as canonical. This is not the case in India, where four major religions have deep connections to state power, and traditional clerics are given power to administer these connections. If you leave the traditional form, you forfeit that power. This entrenchment retards dynamism and creative challenges to the past. Thus, Christian women in India won the right to divorce on grounds of cruelty only in 2001 – because male clerics, who didn't care a lot about that issue, represented the religion in governmental contexts, and no change in the religion's official form could take place without them. Bureaucratic entrenchment meant that there was no way for women to get together and effect change. Establishment led to complacency and inertia.

Eestablishment, Madison continues, also harms government. By setting the Churches up in a position of state power, it creates a large force that constantly threatens civil harmony and peace. "What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances, they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people." Moreover, inviting the many churches into the civil sphere introduces a spirit of bickering and factionalism that is very dangerous to political life. (Madison stressed this idea more and more in his later life, depicting an established clergy as unelected leaders who would expect deference and thereby upset the political process.)

Madison's "Memorial and Remonstrance" carried the day. Henry's bill was defeated. The Assembly shortly adopted the Virginia Act for Establishing Religious Freedom, drafted by Thomas Jefferson. Despite its air of eighteenth-century rationalism, its sentiments are fully continuous with Roger Williams's thought. They extend that thought into the area of financial establishment:

Well aware that almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness...; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern....; that our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry;...that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order.....

Be it therefore enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in nowise diminish, enlarge, or affect their civil capacities.

The Act concludes by stating of itself that if it is ever repealed, that will be a violation of the natural rights of human beings.

Jefferson's bill does not use the language of equality in the way that Madison's "Memorial and Remonstrance" so prominently does. It rests, however, on an account of equal natural rights. Words such as "no man shall" and "all men shall" make it very clear that the rights in question are given to all without exception, on a basis of equality. No other bill for nonpreferential aid was reintroduced: so the public response was not to try to close the loopholes in the Bill, it was to drop entirely the question of aid to religion. A similar tax proposal was rejected the same year in Maryland.

IV. Framing the Constitutional Text

The initial framing of the Constitution already included a radical statement of religious equality. In Article VI, part 3, after discussing the requirement that all national and state officials take an oath to support the Constitution, the following clause was inserted: "No religious Test shall ever be required as a Qualification to any Office or Public Trust under the United States." At the time, this provision applied only to federal offices, not to the states, many of which continued to require religious oaths. Like the First Amendment, it became applicable to the states much

later, through a reading of the Fourteenth Amendment, as we shall see in chapter 4.

Nonetheless, even in this restricted form, the statement is bold and striking, given the prominence of test oaths in Britain. Nonetheless, when Charles Pinckney introduced it on August 30, 1787, it passed without demur – the only recorded objection being that it was unnecessary, "the prevailing liberality being a sufficient security against such a test."⁴⁰

The Constitution in its initial form, famously, contained no explicit Bill of Rights – once again, because it was thought unnecessary to enumerate rights about which there was broad consensus. Dissatisfaction arose during the ratification process, and it became clear that there was wide support for making things explicit. Madison strongly favored this course. Shortly thereafter, therefore, the first ten Amendments were drafted. For the "religion clauses" we have records of some of the debate in the House, and the textual proposal of the Senate, though the Senate kept no records of its internal workings.⁴¹

Madison had failed to gain election to the Senate because of the influence of Patrick Henry, his old nemesis, but he did win a closely contested House seat. From that vantage point, he proposed two amendments relevant to religion:

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

And:

No State shall violate the equal rights of conscience, or the freedom of the press...

As we can see, then, Madison all along wanted at least some provisions of the Bill of Rights to be binding on the state governments, but he expected opposition, so he broke his proposal into two parts.

Madison's proposals were referred to a committee. (We know nothing about how they deliberated.) The committee emerged on August 15, 1789, with the following text, the first to be considered by the entire House:

No religion shall be established by law, nor shall the equal rights of conscience be infringed.

⁴⁰ See Philip Kurland, "The Origins of the Religion Clauses of the Constitution," *William and Mary Law Review* 27 (1986), 839-861, at 847.

⁴¹ For a more detailed account, see McConnell, 71-9.

The first House version is even broader than Madison's first proposal, banning not merely a national religion, but all legal establishment of religion. Mr. Livermore, from New Hampshire, which had a state establishment at the time, proposed the alternative:

Congress shall make no laws touching religion, or infringing the rights of conscience.

This version apparently protected state establishments, since Congress was denied the power to make any law "touching religion," thus, apparently, any law that would ban such establishments.

Five days later, the House considered another version. There is no record of what happened in the interim:

Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.

One reasonable explanation of the change is that "no laws touching" sweeps too broadly, putting in jeopardy protective laws such as the free exercise clause itself, a point already made by Roger Williams. We notice as well, however, that the new version, unlike Livermore's, seems to allow Congress to make laws disestablishing the established churches in the States; we shall later see that the House, at least, favored extending at least some of the protections of the First Amendment to the states.

Significant, too, is the addition of "free exercise" to "rights of conscience." "Exercise" at the time clearly refers to the practice of worship, whereas "rights of conscience" might be taken to refer only to belief and speech. As we have seen, both Roger Williams and Madison were very clear in their defense of both belief and religious practice, and this was clearly a widespread, and here the dominant, view.

The Senate received the House text with the following small alteration (for which we have no explanation):

Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.

Six days later, a very different and far narrower Senate version emerged, as follows:

Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.

The anti-establishment provision has been drastically narrowed, in a way that seems to permit some types of "benign" and non-intrusive establishment, and even preferential financial support.

This version, however, did not prevail. A House-Senate conference committee worked out our final language:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;...

Once this text had passed, Madison turned to the next item on his agenda, proposing:

No State shall infringe the equal rights of conscience...

Because Madison believed that the dangers of oppression and hierarchy were greater at the state level (because there may be more homogeneity at that level), he called this proposal "the most valuable amendment in the whole list."⁴² Madison's motion is aimed at free exercise, but it could also be understood to rule out state-level establishments, given Madison's (widely-shared) understanding of what equality required. It passed in the House. It was rejected, however, by the more conservative Senate, and was not heard of again.

As we can see, there is no such unitary thing as "the intention of the framers." The text we have is a committee construct. Like any committee construct, it involves compromise among people with different views. Nor should we necessarily believe that the meaning of the text for us today is given simply by what these words meant at the time. That is one theory of constitutional interpretation. In many cases, however, we understand that our understanding of constitutional meaning evolves with new historical experiences. The free speech clause, for example, probably had a very narrow meaning at the time of the founding, applying only to what is called "prior restraint," i.e. banning materials before publication. It probably was not thought to protect people from punishment after the publication of the materials. Certainly the text was not understood at the time to protect all unpopular political speech. When Eugene Debs went to jail in 1918 for violation of the Sedition Act (for urging people to resist military induction), there was almost universal agreement that the First Amendment did not protect him. It was only later, as a result of reflection on his case, that the political speech of dissidents in wartime was held to be protected by the First Amendment. And yet, today, such unpopular political speech is understood as a paradigm of what the Amendment protects. Even the most ardent originalists have not proposed

⁴² McConnell, p. 80.

reverting to the original understanding in this instance, though they may someday do so. People generally agree that reflection and experience have deepened our understanding of the abstract terms of the Constitutional text.

It is even possible to argue that this change in understanding is, at a more abstract level, precisely what the original text meant: namely, the framers deliberately chose very general terms and did not spell things out in detail, precisely on account of their empiricism: they had decided to leave further specification to history and the processes of public debate.

Thus finding out what the text was taken to mean at the time is by no means the only thing we need to do if we are to think about it well today. We also need to think about history, about precedents, and about our current situation.

Nonetheless, it is still quite interesting to ask what the text meant at the time, and we can say at least something about this, even with a committee product like this one, by looking at the House journals, together with other documents of the period. We can observe at least the following:

1. "Free exercise" means practice as well as belief. Throughout the period, there is a lot of harping on the issue of religious practice. Both Williams and Madison were careful to spell out the fact that the protections they envisaged applied to acts as well as to belief and speech. Most state free exercise clauses did so in one way or another. Here we see that the vaguer idea of "rights of conscience" is ultimately replaced by a word that unequivocally refers to acts as well as belief and speech.

2. "No law respecting" is broader than "no law establishing." The vague language "no laws touching religion" was considered too broad, presumably because it would impugn laws protective of religion, and perhaps also because it would allow Congress to disestablish the state established churches. But "no law establishing" was evidently thought too narrow. Why so?

A central idea in Madison's "Memorial and Remonstrance," is that one can establish a state church without any law saying on its face, "the x Church is hereby established. " The Virginia Assessment Bill did not say anything about establishment, and yet, in the view of Madison and most of his contemporaries, it effectively did establish a state church. The chosen words are

reasonably understood in connection with these familiar arguments: Congress is debarred not only from official declarations of establishment, but also from passing laws that would amount to an establishment, even if that is not stated.

Does the final wording also protect the state establishments from interference? Very likely; and yet there is reason for doubt, since the House went on to pass Madison's proposal binding the states, without (apparently) seeing any inconsistency with their former endorsement of the First Amendment. Perhaps some did not see Madison's connection between equal rights and non-establishment, and voted for his motion binding the states without, therefore, thinking that it threatened state establishments. Here is an area of obscurity: no doubt different people had different reasons for their votes, and we will never know what they were.

3. "Conscience" and "Religion": Religion is Special. As we can see, drafts oscillated between reference to "rights of conscience" and the "free exercise of religion." Possibly the framers saw little difference. "The free exercise of conscience" would sound odd, since "conscience" is connected with belief and the inner life, not with "exercise." The phrase "free exercise of conscience" simply does not occur in documents of the period. Having decided that "exercise" was what they wanted, in order to protect acts as well as beliefs, they may have slipped over to the word "religion" without any sense of difference. Moreover, they really did not think very much about agnostics or atheists; the many non-church-members about whom they clearly did think were typically people like Williams, who searched for religion outside the confines of organized churches.

The words "conscience" and "religion", however, ring very differently in our contemporary ears. As we shall see, it has been a perpetual problem whether conscientious commitments that do not take a religious form receive any protection under the free exercise clause. If they do not, there is an equality problem. If I resist the military draft because I follow the ethical ideas of Henry David Thoreau and you resist the draft because you are an orthodox Jew, it seems somewhat unfair for your commitment to be honored and mine to be rejected, simply because yours is religious and mine is ethical – and yet this is what our Constitution appears to state. Such problems became acute during the Vietnam War, when many people resisted the war for

reasons of conscience, only some of which were religious. We shall turn to that problem in our following chapter. It seems clear, however, that the text the framers chose does make religion special for the purposes of the free exercise clause, fair or unfair. Perhaps non-religious commitments were thought to be sufficiently protected by the free speech and press clauses. To some extent later interpretations have broadened the understanding of what gets protection; but there are reasons why, in delicate areas such as military service and drug use, such broadening has not gone, and cannot go, very far.

4. "Prohibiting" and "Abridging": Weaker Protection? The First Amendment says that Congress shall make no law "prohibiting" the free exercise of religion, but that it may make no law "abridging" the freedoms of speech and press. Does this mean that Congress can "abridge" the free exercise of religion, so long as it does not "prohibit" it? The word "prohibiting" crept into the text after the final House version without recorded debate. Perhaps nothing much is meant by the difference; perhaps "abridging" seems to go well with speech, "prohibiting" with acts. It seems odd to talk of "abridging" an act, as if one could do only part of an act; and we said that the word "exercise," though it includes belief, places an emphasis on the protection of acts. Certainly Madison did not think that he had approved of any differentiation. Ten years later, he wrote, "The liberty of conscience and the freedom of the press were equally and completely exempted from all authority whatever of the United States." He went on to reject explicitly the reading that Congress is permitted to "abridge" the free exercise of religion so long as it does not "prohibit."⁴³ We should conclude that the text contains an unfortunate ambiguity that was noticed later on, but that its meaning was very likely what Madison said it was. The fact that no recorded debate touches on this difference strongly suggests that it was not intended as salient, and that the reason for the word "prohibiting" was, as I said, the oddness of the idea of "abridging" an action.

5. Where is equality? I have said that the idea of equality is central to the religion clauses. But the word "equal" does not occur in them. We can see that earlier drafts contained this word: why not the final draft? Here, once again, we need to think of the phrases that were actually in use at the time. The word "equal" went naturally with "rights," "natural rights," and "liberty." It did

⁴³ Madison, cited in McConnell, pp. 84-5.

not turn up with "exercise" – thus, when "free exercise" replaced "rights of conscience," the word "equality" dropped out. Surely, however, this omission does not mean that the text does not protect citizens' rights on a basis of equality. If there is anything that all the framers agreed strongly about, and never questioned, it was the idea of equality. "Free exercise" is taken to be grounded in equal natural rights; it is only that the phrase "prohibiting the equal free exercise of religion" would (a) be very odd, and (b) be much too weak, since Congress is not only debarred from partiality in restricting free exercise (restricting it unequally), it is debarred from all sorts and kinds of restrictions on free exercise. Suppose that Congress said, "Nobody may worship God in the United States." That would not offend against equality, but it would clearly be ruled out by the free exercise clause. The text debars Congress from even-handed restrictions of liberty as well as unfair ones, so the word "equal" could not occur before "free exercise." The idea of equality lies in the entirety of the meaning expressed, particularly in the idea that Congress may not do this – to anyone, is the clear meaning. "The free exercise" means anyone's free exercise, and so, like many state constitutions, ours captures the idea of equality by negation.

The prohibition on establishment also carries a clear meaning protective of equal civil rights. The central argument of Madison's widely influential "Memorial and Remonstrance" was that any establishment makes people's civil rights unequal. In saying this, Madison was echoing decades of debate and stating a widely-held position. So, by prohibiting a federal establishment of religion, the text prohibits one very prominent source of pervasive inequality.

Indeed, we might plausibly say that equality is the glue that holds the two clauses together. It is often obscure how they do go together, and their coexistence poses some legal conundrums. For example, if religion gets special breaks under the free exercise clause, isn't this by itself a kind of establishment, of the sort Madison feared? We will try to sort that out later. But we can see that at the time the free exercise of religion was a major expression of human equality, one of the deepest ways in which the equal rights of citizens were to be either protected or infringed. Establishment, meanwhile, is a major threat to equality across a whole range of civil rights. Free exercise alludes to the individual conscience, establishment to institutional arrangements that either set up a hierarchy or fail to do so. But of course hierarchy is bad, ultimately, because of

what it does to people, offending against their equality. The focus of the clauses is subtly different, but equal rights seem to be at the bottom of both.

V. Two Misleading Theories

Theories of the religion clauses abound. Many are complementary, offering mutual illumination. When there is genuine conflict, some contenders are plausible and "in the ballpark," and others are not. Two theories that are really not "in the ballpark" have recently become prominent, because in each case an influential Supreme Court justice has stated the false theory. It is worth, then, pausing to show why they are not in the ballpark. Notice that these theories are not offered as modern interpretations or as normative theories of what the clauses should be, but as correct historical readings of the text in its own historical context.

For Justice Thomas, the Establishment Clause does not protect individual rights at all, because it is only a device through which the framers protected the state-level establishments. This theory is important to him because it is generally agreed that the Bill of Rights's protections for individual liberties have been applied to the states through the Fourteenth Amendment – the doctrine known as "incorporation," which we shall discuss in chapter 4. Most people have held that both the Establishment Clause and the Free Exercise clause have been incorporated: thus, no state may establish a state religion. While granting that the free exercise clause is "incorporated," Justice Thomas, proposing to overturn decades of precedent, denies that the Establishment Clause is so – on the grounds that it was understood at the time not to protect individual rights at all, but only to insulate the state establishments from Congressional interference.

We can grant that it is at least debatable that part of the force of the Establishment Clause in its final form was this insulation. More precisely, some individuals may have supported the wording partly, or even largely, for that reason. It would be most implausible, however, to hold that this was its only point. The raging debate about establishments, from Roger Williams on through the mid-nineteenth century, focused at all times on individual rights: not, to be sure, only the free exercise right, but the whole range of civil rights that are rendered unequal by

ecclesiastical establishments. As Madison summarized this whole current of thinking, "[A]ll men are to be considered as entering into Society on equal conditions," and ecclesiastical establishments violate that equality, "degrad[ing] from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. As we have seen, this was not an idiosyncratic position, but one widely held, usually by a majority. Even when in a given colony a majority against establishment had not yet emerged, the trend was well under way, and all would shortly disappear. More important, the debate surrounding this trend focused on the idea of equality. State establishments were seen to threaten equal free exercise; they also were seen to threaten political equality, educational equality, employment equality. A wide range of individual rights was understood to be at stake in the question whether Congress might make laws "respecting an establishment of religion."

The second false doctrine is more superficially plausible, but nonetheless we can confidently rule it out. This is the idea that goes by the name of "nonpreferentialism," a pet theory of the late Chief Justice William Rehnquist. "Nonpreferentialism" is the view that what the Establishment Clause rules out is any preferential establishment of religion, i.e. one preferring one sect or group of sects to others. It does not rule out a general blanket endorsement of religion, or general financial aid to religion. We have already seen that, and why, Madison was against nonpreferentialism. We can now see that this opposition was shared by the group who framed the text.⁴⁴ At any rate, as Douglas Laycock argues, "The framers of the religion clauses certainly did not consciously intend to permit nonpreferential aid, and those of them who thought about the question probably intended to forbid it."⁴⁵

To see this clearly, we must go into more detail concerning the rejected drafts. When the Senate received the House version, it first substituted one that clearly states the nonpreferential position:

Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed.

⁴⁴ Here I follow the excellent argument of Douglas Laycock, in "'Nonpreferential' Aid to Religion: a False Claim About Original Intent," William and Mary Law Review 27 (1986), 875-923.

⁴⁵ Laycock, p. 878.

So the Senate was able to state clearly the nonpreferentialist position. Nonetheless, later the same day (after rejecting several stylistic variants of the nonpreferentialist draft), the Senate abandoned that version, adopting wording close to our final version:

Congress shall make no law establishing religion, or prohibiting the free exercise thereof.

This version, as we can see, speaks generically of all religion. A week later, the Senate reverted to quite a narrow wording, as we have already seen:

Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.

This version, narrower still than the first nonpreferential version, and a clear statement of something like nonpreferentialism, was, nonetheless, rejected by the House in favor of our final wording.

Our final version is one of the broadest considered by either house of Congress. Most important, it does not say "a religion," "a national religion," "one sect or society," etc.⁴⁶ It says "religion." Establishing "religion" is not the same as establishing "one sect or society" or even "a religion," and these distinctions were before the framers as they argued over the text. As Laycock concludes, "The 'no preference' position requires a premise that the Framers were extraordinarily bad drafters – that they believed one thing but adopted language that said something substantially different, and that they did so after repeatedly attending to the choice of language."⁴⁷

Moreover, as we can clearly see from the Virginia controversy, nonpreferential aid had had a good public outing. Henry's bill was as good an attempt at that position as was likely to emerge at the time. It was roundly rejected. Although we cannot use the Virginia debate (and the similar Maryland debate) as direct evidence for the meaning of the religion clauses, it does show us that people understood well the difference between nonpreferential aid and no aid. The various drafts were not being written in a context in which these distinctions had not been worked out and debated. In such a context, it seems clear that the rejection of nonpreferentialist language means something, is not purely inadvertent.

⁴⁶ See Laycock, p. 881.

⁴⁷ 882-3.

The late Chief Justice, strangely, neglects the evidence of the rejected drafts, our surest signs of what the accepted draft means, and focuses most of his argument on one stray remark of Madison made during the debate: one member of the House objected that the preferred language would disfavor religion, and Madison reassured him that the point of the establishment clause was to prevent a "national religion." It is true that Madison said this: but in a political ad hominem context in which he was reassuring an individual whose vote he wanted. He was not lying: the draft does have that force, and it also is compatible with state establishments, which was probably the member's primary concern. The fact that the language does more than simply reject a national religion was something Madison did not mention at that particular moment, but, since the final language is very close to his original proposal, and since we know a lot about what he thought and supported, we can infer that this silence doesn't mean that Madison himself held a narrow view of the clause's intention. He himself, along with the majority, voted for broader language against narrower nonpreferentialist language. The Rehnquist argument, then, is singularly unconvincing.⁴⁸ More generally, it is a very odd sort of originalism to ignore the text itself (in connection with other rejected texts) and to base one's argument on one remark made during a (partially recorded) debate.

But, say the nonpreferentialists, what about the manifold ways in which religion continued to be supported in the new republic? The First Congress appointed chaplains, a practice that continues to the present day. Presidents Washington, Adams, and Madison issued Thanksgiving proclamations mentioning God, although Jefferson refused, and Madison did so only in time of war and at the request of Congress. In later life, Madison felt that both the chaplains and Thanksgiving Day proclamations had been violations of the establishment clause.⁴⁹ He said he had never approved of the decision to appoint chaplains. Nonetheless, we are talking not about Madison but about the new nation's general understanding of its Constitution.

We should say, I think, that the framers knew in a general way what they were after, but (hardly surprisingly) had not thought out its implications in all particulars. The area of tax support for religion had received a great deal of scrutiny and debate, and so most people had arrived at a

⁴⁸ See also the excellent treatment of this issue in Laycock.

⁴⁹ See Laycock, 914.

definite position on that. Such things as public displays, public proclamations, and chaplains simply had not been debated, and so people went into them without the sort of guidance that had been offered, in the financial area, by the Virginia debate.⁵⁰ It is very interesting that Madison himself changed his view, later, concerning the implications of a text that he himself largely authored. It seems that he was clear about the general principles behind non-establishment, which he had eloquently stated in the "Memorial and Remonstrance," but less clear about their concrete implications, which would remain to be worked out as history unfolded new problems. This is in keeping with his empiricism. Indeed, the choice of highly general language is a way of giving experience and history time to unfold. Mistakes at the concrete level can be made; the general principles remain, suggesting some key questions to pose of any dubious case. Central among these must be: "Does this case create a hierarchy among citizens, so that they do not all enter the polity on equal conditions?" Some specific nonpreferentialist practices apparently seemed benign at first when considered in that light – although hindsight suggested to Madison that in fact they had not been so benign.

In any case, these examples are not very useful to the nonpreferentialist. The chaplaincy is highly preferential: House and Senate chaplains are typically Protestant, and there has never been even an attempt to represent all the religions from which representatives come. Thanksgiving Day proclamations depend on the judgment of the President in question, and there has never been a guideline suggesting that they ought to be nonpreferential. In fact, they are not nonpreferential. To take President Bush's two most recent proclamations (2004 and 2005) as examples, they both refer to God in the singular (thus excluding polytheists and members of nontheistic religions, as well as atheists), call God "Almighty" (thus excluding religions that do not believe in divine omnipotence), refer to God as watching over and guiding America (thus excluding religions that do not ascribe to God this sort of personalized intervention in worldly affairs), and refer to God as "He" (thus offending believers and sects that have worked hard to eliminate gendered language in reference to the deity). If Bush had aimed at true

⁵⁰ Here I am agreeing with Laycock, 914-15.

nonpreferentialism, he could have done a lot better -- although, as history shows, any way of talking about God or gods excludes someone.

The difficulty of constructing a truly nonpreferential prayer is a major ethical problem with nonpreferentialism. What I am interested in here, however, is that it is also a difficulty for anyone who wants to show that the proclamations made by early (or subsequent) Presidents expressed a philosophical commitment to nonpreferentialism. As we can see, the two who had well worked-out theoretical positions on this issue, Madison and Jefferson, were precisely the ones who either refused to make the Proclamation or thought in hindsight that they should have refused. It is possible that George Washington himself was a Henry-like nonpreferentialist. That fact, however, sheds no light on the meaning of the religion clauses, since Washington had nothing to do with framing them, and since it would be utterly unthinkable at the time that the President would be hauled into court (before judicial review even existed!), or even publicly criticized, for such a performance. There is no evidence that even Washington advanced a nonpreferentialist interpretation of the constitutional text.

Moreover, at the time, as the Virginia Debate shows, nonpreferentialism typically meant nonpreferential Christianity. And it is amply clear that the framers believed that the new nation had not been founded as a Christian nation. As my epigraph shows, the Treaty of Tripoli, enthusiastically endorsed by John Adams, one of our more cautious thinkers on religious issues, reassures Muslims that the United States is not and never has been a Christian nation. This denial was utterly uncontroversial in discussion of the treaty. In rejecting a nonpreferential Christian understanding of the nation, it is overwhelmingly likely that Adams and others were (once again) rejecting nonpreferentialism.

In short, the early history shows us something we already know about people: that they often act unreflectively, and that for this reason public debate makes a difference. Before Madison wrote the "Memorial and Remonstrance," many Virginians no doubt thought Henry's bill very progressive and even-handed. They did not see the subtle equality problem in it until Madison pointed it out -- just as we often fail to see what is offensive in some practice or way of speaking, until someone points this out to us. After it is pointed out with clear and convincing

arguments, things are different. In the case of tax support, things had become clear. In other cases, they became clear, eventually, to some individuals, but their public clarification awaited later work by the Supreme Court. Some issues, such as House and Senate chaplains, have never been given the benefit of full public debate. Most people are not even aware that these (highly preferential) institutions exist. No doubt future debate and reflection will enrich our understandings. It was wise of Madison and the other framers to specify the constitutional text at a rather high level of generality, since even they themselves (by Madison's own later account) had not thought enough about some of the specifics.

There is good reason to ascribe thoughtlessness and some inconsistency to the framers. There is no reason to saddle them with the false doctrine of nonpreferentialism.

As time went on, and state establishments dropped away, a more radical call for the separation of church and state began to be heard in some quarters. In a famous 1802 letter to the Danbury Baptists, Thomas Jefferson interpreted the First Amendment as "building a wall of separation between Church and State." Such ideas, though they went beyond the ideas of the framers, are defended in terms of an idea of natural rights that they shared. Jefferson's position never became fully mainstream. The ideas of equality and equal liberty continued to be the key ideas in the debate for many years to come.⁵¹ The arguments of the founding, however, had shown this much: that the mixture of civil with ecclesiastical power involved many dangers – to religion, which would be sapped of its vigor; to the state, which might be undermined by the factionalism of unelected clerical leaders; to liberty, which would be imperiled the minute the state arrogated to itself the right to make decisions in religious matters. Above all, however, the mixture of civil with religious jurisdictions threatened an equality of standing in the public realm that was enormously precious to all Americans. Separation, to the extent that the framers urged it, was not a way of belittling religion, it was a way of respecting human beings.

⁵¹ See Hamburger.

