

trust; accordingly, they could not bequeath monies to orphanages, hospitals, or schools devoted to propagation of their beliefs. All these aids to religion were preferential in character.⁷³

Nonpreferentialism existed only as a matter of law and theory with respect to financial aid for churches and clergymen. But nonpreferentialism as a matter of law and theory was a profoundly developed American characteristic. By contrast, as to nonfinancial aids to religion, Americans reacted reflexively, not having made an effort to explore the significance or implications of the principle of separation. Spending tax monies for religion was an old and controversial issue that inspired considerable thought; other aids for religion had not been the subject of controversy in the colonies or states and tended to be taken for granted.

73. On civil disabilities, see Morton Borden, *Jews, Turks, and Infidels* (Chapel Hill, N.C., 1984). On Christianity as part and parcel of the law of the land and on prosecutions for blasphemy and for disabilities relating to trusts and conveyances, see Leonard W. Levy, *Blasphemy: Verbal Offense against the Sacred, from Moses to Salman Rushdie* (New York, 1993). My characterizations of prosecutions for Sabbath breaking and profanity are impressionistic, based on extensive research in legal records when looking for blasphemy cases. On Sunday laws, see also the historical data in the opinion by Frankfurter in *McGowan v. Maryland*, 366 U.S. 420, 484-95, 543-59 (1961).

4

*The
Constitution
and
Religion*

The Constitutional Convention of 1787, which framed the Constitution of the United States, gave only slight attention to the subject of a bill of rights and even less to the subject of religion. In contrast to the Declaration of Independence and to many acts of the Continental Congress, the Constitution contains no references to God; the convention did not even invoke divine guidance for its deliberations. Its finished product made no reference to religion except to pro-

hibit a religious test as a qualification for federal officeholders.¹ On August 20 Charles Pinckney proposed that “no religious test or qualification shall ever be annexed to any oath of office under the authority of the U.S.”² The proposal was referred to the Committee of Detail without debate or consideration by the convention. When the committee reported ten days later, it ignored Pinckney’s proposal. From the floor of the convention he moved it again. The chairman of the committee, Roger Sherman of Connecticut, stated that such a provision was “unnecessary, the prevailing liberality being a sufficient security against such tests.”³ However, two delegates, in unreported speeches, “approved the motion” by Pinckney, and when it was put to a vote, it passed without further debate.⁴ The Committee on Style rephrased it and incorporated it into Article VI, clause 3, of the Constitution: “. . . no religious test shall ever be required as a qualification to any office or public trust under the United States.”

This clause “went far,” according to one scholar, “in thwarting any

1. Several scholars declare that the germ of the establishment clause derived from a proposal allegedly advanced by Charles Pinckney of South Carolina on May 29: “The legislature of the United States shall pass no law on the subject of religion. . . .” See Leo Pfeffer, *Church, State and Freedom* (Boston, 1953), pp. 110, 145; Anson Phelps Stokes, *Church and State in the United States*, 3 vols. (New York, 1950), 1:526–27. Pinckney’s proposal appears in Madison’s *Notes on the Debates* as part of the comprehensive plan of union submitted to the convention by Pinckney. See also Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution . . . In Five Volumes* (Philadelphia, 1941), 5:131. However, the Pinckney plan has been revealed to be spurious. Neither it nor the proposal banning laws on religion was ever presented to the convention. See Charles Warren, *The Making of the Constitution* (Boston, 1928), pp. 142–43. Pfeffer’s *Church, State, and Freedom*, revised in 1967, is the most authoritative constitutional history of America’s experience with the double-faceted principle of religious liberty and separation of government and religion under the First Amendment. He reviewed the contemporary constitutional law of the subject in *Religion, State, and the Burger Court* (Buffalo, N.Y., 1984).

2. Elliot, ed., *Debates*, 5:446.

3. *Ibid.*, 5:498.

4. *Ibid.*

State Church” in the United States.⁵ His reasoning is that in the absence of the clause Congress might have had the power to require an oath or subscription to the articles of faith of some particular church,⁶ or to Protestantism, or to Christianity generally. But no one at the time defined the scope of the protection; that is, the implied ban against an establishment of religion is no aid in explaining the meaning of such an establishment. Moreover, all but two states had religious tests for office, including Rhode Island, Pennsylvania, Delaware, and New Jersey, which never had any kind of establishment of religion.⁷ The ban on religious tests for office, therefore, did not extend to a ban on establishments.

There are no other references to the subject of religion at the Constitutional Convention, except for Benjamin Franklin’s speech at a critical juncture of the proceedings on the reason that prayer should open its session. Former president Ronald Reagan, who sometimes reinvented history, mistakenly declared that as a result of Franklin’s motion, “From that day on they opened all the constitutional meetings with a prayer.” Practical considerations—an unwillingness to let the public think the convention was in trouble, lack of money to pay a minister, and deference to Philadelphia’s Quakers—resulted in the death of the Franklin motion. The convention, he noted, “except three or four persons, thought prayers unnecessary.”⁸

When George Mason of Virginia expressed a wish that the new constitution “had been prefaced with a Bill of Rights,” he offered no suggestions as to the contents of such a bill. Nor did Elbridge Gerry of

5. Stokes, *Church and State*, 1:527. See also Pfeffer, *Church, State, and Freedom*, p. 110.

6. See James Madison to Edmund Randolph, Apr. 10, 1788, in William T. Hutchinson et al., eds., *The Papers of James Madison*, ser. in progress (Chicago, 1962–), 11:19.

7. Morton Borden, *Jews, Turks, and Infidels* (Chapel Hill, N.C., 1984), pp. 11–12; Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York, 1986).

8. Warren, *Making of the Constitution*, pp. 250–51. Reagan’s remarks of Oct. 13, 1983, to leaders of Christian religious organizations are in *Weekly Compilation of Presidential Documents* (Washington, D.C., 1983), p. 1427.

Massachusetts who, agreeing with Mason, moved for a committee to prepare a bill of rights. This motion aroused opposition on the grounds that the state bills of rights "being in force are sufficient." Mason rejoined, "The Laws of the U.S. are to be paramount to state Bills of Rights," but without further debate the motion that a bill of rights be prepared was put to a vote. It was defeated 10 to 0, the delegates voting as state units.⁹ Thus, the record of the Constitutional Convention is no guide in discerning the understanding of the framers as to an establishment of religion.

On the other hand, the failure of the convention to provide for a bill of rights should not be misunderstood. The members of the convention did not oppose personal liberties; in the main they simply regarded a bill of rights as superfluous. They reasoned that the new national government possessed only expressly enumerated powers, and no power had been granted to legislate on any of the subjects that would be the concern of a bill of rights. Because no such power existed, none could be exercised or abused, and therefore all provisions against that possibility were unnecessary. Of the many statements of this argument,¹⁰ the most widely publicized was that of Hamilton in *The Federalist* where he concluded simply: "For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"¹¹

9. Max Farrand, ed., *The Records of the Federal Convention*, 3 vols. (New York, 1911), 2:587-88.

10. For example, see Elliot, ed., *Debates*, 3:203-4, 450, 600 (Randolph and Nicholas in Virginia), 4:149 (Iredell in North Carolina), 4:315-16 (C. C. Pinckney in South Carolina), and 2:78 (Varnum in Massachusetts). For the very influential statements by Wilson of Pennsylvania, see 2:436, 453. See also John Bach McMaster and Frederick D. Stone, eds., *Pennsylvania and the Federal Constitution, 1787-1788* (Lancaster, Pa., 1888), pp. 313-14. See also McKean in *ibid.*, p. 337; Ellsworth in Paul L. Ford, ed., *Essays on the Constitution of the United States* (Brooklyn, N.Y., 1892), pp. 163-64; Williamson, "Remarks," *ibid.*, p. 398 (North Carolina); and Hanson, "Remarks on the Proposed Plan," in *Pamphlets on the Constitution of the United States*, edited by Paul L. Ford, ed. (Brooklyn, N.Y., 1888), pp. 241-42 (Maryland).

11. *The Federalist*, edited by Jacob E. Cooke (Middletown, Conn., 1961), no.

The reasoning here is of the utmost significance in defining the powers of Congress in regard to establishments of religion. Abundant evidence shows the belief of the framers that Congress was bereft of any authority over the subject of religion. The whole concept of a federal system of distributed powers, with the national government possessing only limited, delegated powers, forms the principal evidence. In addition, consider the following specific comments by framers, which are illustrative rather than exhaustive. James Wilson of Pennsylvania, in response to the allegation that there was no security for the rights of conscience, asserted: "I ask the honorable gentlemen, what part of this system puts it in the power of Congress to attack those rights? When there is no power to attack, it is idle to prepare the means of defense."¹² Edmund Randolph of Virginia declared that "no power is given expressly to Congress over religion" and added that only powers "constitutionally given" could be exercised.¹³ Madison said, "There is not a shadow of right in the general government to intermeddle with religion."¹⁴ Richard Dobbs Spaight of North Carolina maintained: "As to the subject of religion . . . [n]o power is given to the general government to interfere with it at all. Any act of Congress on this subject would be a usurpation."¹⁵ Wilson, Randolph, Madison, and Spaight had attended the Constitutional Convention. Their remarks show that Congress was powerless, *even in the absence of the First Amendment*, to enact laws that benefited one religion or church in particular or all of them equally and impartially.

From late 1787 through the following year, the proposed constitution engrossed the political attention of the country. The Congress of the Confederation submitted the document to state conventions for ratification. Men for and against ratification sought election as delegates. A torrent of speeches, essays, articles, and pamphlets poured

84, pp. 579-80. For an analytical discussion of the Constitutional Convention's failure to include a bill of rights, see Leonard W. Levy, *Emergence of a Free Press* (New York, 1985), pp. 220-36.

12. Elliot, ed., *Debates*, 2:455.

13. *Ibid.*, 3:204; see also 3:469.

14. *Ibid.*, 3:330.

15. *Ibid.*, 4:208.

forth from partisans on both sides. Opponents of ratification feared most of all that the centralizing tendencies of a consolidated national government would extinguish the rights of states and individuals. The failure of the new instrument to provide for a bill of rights constituted the most important single objection, and the Constitution would probably not have received the requisite number of state votes for ratification had not some Federalist leaders like Madison pledged themselves to seek amendments constituting a bill of rights as soon as the new government went into operation. Indeed, six of the thirteen original states accompanied their instruments of ratification with recommendations for amendments, some of which would have secured specified fundamental personal liberties.¹⁶

Accordingly, it is astonishing to discover that the debate on a bill of rights occurred on a level of abstraction so vague as to convey the impression that Americans of 1787–88 had only the most nebulous conception of the meanings of the particular rights they sought to ensure. The insistent demands for the “rights of conscience” or “trial by jury” or “liberty of the press” by the principal advocates of a bill of rights were not accompanied by a reasoned analysis of what these rights meant, how far they extended, and in what circumstances they might be limited. Many opponents of ratification discovered that to denounce the omission of a bill of rights was a politically effective tactic, one that provided a useful mask for less elevating, perhaps even sordid, objections relating to such matters as taxation and commerce.¹⁷

One cannot assume that there was no necessity for careful definition on the grounds that the meanings of specific rights were widely known and agreed to by all. They were not. Not even trial by jury, which was protected by more state constitutions than any other right, had the same meaning and scope from state to state.¹⁸ Moreover, there were

16. Massachusetts, New Hampshire, Virginia, New York, North Carolina, and Rhode Island.

17. For a thorough discussion, see Levy, *Emergence of a Free Press*, chap. 8.

18. See Elliot, ed., *Debates*, 2:112, 114 (Gore and Davis in Massachusetts), 3:468 (Randolph in Virginia), 4:145, 150 (Iredell and Johnston in North Carolina); for Wilson of Pennsylvania, see McMaster and Stone, eds., *Pennsylvania and the Constitution*, pp. 309, 353, 406. On the variety of early state procedures

substantial differences in the character and number of the rights guaranteed by the various states.¹⁹ Several state conventions, in ratifying the Constitution, even recommended amendments to protect rights not known in their own constitutions.²⁰ Whatever the explanation, the fact is that from the tens of thousands of words exchanged during the ratification controversy on the subject of a bill of rights no illumination can be gained as to the understanding and content attached at that time to particular rights.

This generalization applies to the subject of establishments of religion. An awareness of the need for analytical precision in discussions of the subject might have been expected, considering the variety of historical experiences with establishments before and after independence and considering the diversity of relevant state constitutional and statutory provisions. At the very least, one would expect frequent expressions of fear and concern on the subject. Yet the startling fact is that it was rarely mentioned at all and then only very briefly. One searches in vain for a definition in the rhetorical effusions of leading

concerning the rights of accused persons, see generally Charles Fairman, “The Supreme Court and Constitutional Limitations on State Government Authority,” *University of Chicago Law Review* 21 (Autumn 1951): 40–78 passim. Charles Warren, in *Congress, the Constitution and the Supreme Court* (Boston, 1925), p. 81, pointed out that, in civil cases, the citizens of four states had been deprived of jury trial in the seven-year period before the Constitution was framed.

19. For example, only seven of the thirteen states had separate bills of rights in their constitutions; six states allowed establishments of religion, which were prohibited by others; six states did not constitutionally provide for the right to the writ of habeas corpus. See generally Francis Newton Thorpe, *The Constitutional History of the United States*, 3 vols. (Chicago, 1901), 2:199–211, for a table on state precedents for the federal Bill of Rights; Edward Dumbauld, “State Precedents for the Bill of Rights,” *Journal of Public Law* 7 (1958): 323–44; Levy, *Emergence of a Free Press*, pp. 226–27.

20. For example, Massachusetts recommended the right to indictment by grand jury but did not provide for it in its own constitution; Virginia and North Carolina recommended constitutional protection for freedom of speech, which they did not protect in their respective constitutions; and New York recommended protections against compulsory self-incrimination and double jeopardy, neither of which New York constitutionally protected.

advocates of a bill of rights and in the debates of the state ratifying conventions.²¹

The debates of the ratifying conventions of Delaware, New Jersey, and Georgia are nonexistent. Moreover, each ratified unconditionally and without proposing any amendments. Nothing, therefore, can be said of opinion in those states.²²

In Connecticut, which also ratified without recommendations for amendments, the fragmentary record of the debates shows only that Oliver Wolcott, briefly mentioning the value of the clause against test oaths, said: "Knowledge and liberty are so prevalent in this country, that I do not believe that the United States would ever be disposed to establish one religious sect, and lay all others under legal disabilities."²³ Similarly, Oliver Ellsworth, writing in a tract, referred to the fact that religious tests for office were always found in European nations where one church is established as the state church.²⁴ Neither Ellsworth nor

21. Elliot, ed., *Debates*, reports in detail the debates of five states (Massachusetts, New York, Virginia, North Carolina, and South Carolina) and in very fragmentary fashion the debates of three others (Maryland, Pennsylvania, and Connecticut). McMaster and Stone, *Pennsylvania and the Constitution*, collects extant Pennsylvania debates together with pamphlets and essays from that state, while Ford, *Essays*, and Ford, *Pamphlets*, collect important essays and pamphlets from all the states. Modern collections of primary sources will, when completed, supersede earlier works. Herbert Storing, ed., *The Complete Anti-Federalist*, 7 vols. (Chicago, 1981), seems definitive but in time will give way to Merrill Jensen et al., eds., *The Documentary History of the Ratification of the Constitution*, ser. in progress (Madison, Wisc., 1976-). Eight volumes are completed to date. Vol. 1 covers the period 1776-87, before the framing of the Constitution; vol. 2 replaces McMaster and Stone on Pennsylvania; vol. 3 covers the ratification in Delaware, New Jersey, Georgia, and Connecticut; vol. 8 (edited by John P. Kaminski and Gaspar J. Saladino) covers Virginia. Kaminski and Saladino, eds., *Commentaries on the Constitution: Public and Private*, vols. 13-16, cover Feb. 21, 1787, to Mar. 16, 1788.

22. Jensen et al., eds., *Documentary History*, vol. 3, includes every scrap of information concerning the ratification of the Constitution by these states without referring to religious liberty, let alone establishments of religion.

23. *Ibid.*, 3:558.

24. Ford, ed., *Essays*, p. 168.

Wolcott, both Federalists, believed the Congress could legislate on the subject of religion.

In Pennsylvania, which had never experienced an establishment of religion, the state convention ratified unconditionally after voting against a series of amendments, constituting a bill of rights, proposed by the Anti-Federalist minority. These defeated amendments, while protecting the "rights of conscience," contained no provision respecting an establishment of religion, although John Smilie, an Anti-Federalist, had expressed the fear that "Congress may establish any religion," and an "Old Whig" lamented that nothing could prevent Congress from enacting an "establishment of a national church."²⁵ Tench Coxe, a Federalist tract writer, used the words "established church" when pointing out that only members of the Church of England could hold office in Great Britain.²⁶ Opponents of ratification from the town of Carlisle proposed that "none should be compelled contrary to his principles or inclination to hear or support the clergy of any one established religion."²⁷ "Centinel," who also recommended a bill of rights, proposed more broadly in the language of the Pennsylvania constitution that "no man ought, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to or against his own free will and consent."²⁸

Massachusetts, which maintained an establishment of religion at the time of ratification, was the first state to ratify with amendments, but the amendments had nothing to do with religion. The delegates to the state convention included over twenty Baptists, among them the Reverend Isaac Backus. He described the Constitution as a door "opened for the establishment of righteous government, and for securing of equal liberty, as never before opened to any people on earth."²⁹ No

25. Jensen et al., eds., *Documentary History*, 2:623, 592; see also Storing, ed., *Complete Anti-Federalist*, 2:37, 179, for "Old Deliberator" warning that Congress might "establish an uniformity in religion throughout the United States."

26. Ford, ed., *Pamphlets*, p. 146.

27. McMaster and Stone, *Pennsylvania and the Constitution*, p. 502.

28. *Ibid.*, p. 589. "Centinel" was probably Samuel Bryan.

29. Elliot, ed., *Debates*, 2:236.

person in the state convention or in antirratificationist tracts alluded to an establishment of religion, which the Baptists vehemently opposed. None even mentioned religious liberty. This would be an astonishing fact, considering the hostility within the state to the establishment there existing, unless there was an undisputed understanding that Congress had no power over religion.³⁰

Maryland ratified without amendments,³¹ although fifteen had been recommended, including a proposal “that there be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty.”³² Maryland’s own constitution permitted an establishment of religion, though none existed. All fifteen of the defeated amendments had aimed chiefly at protecting state governments from infringement by the national government.³³ They failed not because the Federalist-dominated convention of Maryland disagreed with them but because it wished to ratify unconditionally for the purpose of demonstrating confidence in the new system of government.³⁴ The same may be said of Pennsylvania and all other states that ratified without recommending amendments.

In South Carolina the Reverend Francis Cummins made the only reference to an establishment of religion when he condemned “religious establishments; or the states giving preference to any religious denomination.”³⁵ The convention’s recommendations for amendments, however, mentioned nothing about a bill of rights.³⁶ At the time,

30. Charles C. Tansill, ed., *Documents Illustrative of the Formation of the Union of the American States* (Washington, D.C., 1927), pp. 1018–20; William G. McLoughlin, *New England Dissent, 1630–1833: The Baptists and the Separation of Church and State*, 2 vols. (Cambridge, Mass., 1971), 2:780–83.

31. Tansill, ed., *Documents*, pp. 1021–22.

32. Elliot, ed., *Debates*, 2:553.

33. Philip A. Crowl, *Maryland during and after the Revolution* (Baltimore, Md., 1943), p. 156; Werline, *Problems of Church and State*, pp. 143–68.

34. Werline, *Problems of Church and State*, chap. 6.

35. Chester J. Antieau, Arthur T. Downey, and Edward C. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (Milwaukee, Wis., 1964), p. 106, quoting *City Gazette or Daily Advertiser of Charleston*, May 26, 1788.

36. Tansill, ed., *Documents*, pp. 1022–24.

South Carolina proclaimed the “Christian Protestant . . . religion to be the established religion of this state.” No churches received public financial support, but those that accepted a prescribed creed were “considered as established.”³⁷

New Hampshire’s debates do not exist. Although the state maintained an establishment, its instrument of ratification included among recommendations for amendments the following: “Congress shall make no laws touching Religion, or to infringe the rights of Conscience.”³⁸

In Virginia, where the most crucial struggle against establishments of religion had ended in victory just three years before the state ratifying convention met, only two speakers during the course of the lengthy debates alluded to an establishment. Edmund Randolph, defending the Constitution against Patrick Henry’s allegation that it endangered religious liberty, pointed out that Congress had no power over religion and that the exclusion of religious tests for federal officeholders meant that “they are not bound to support one mode of worship, or to adhere to one particular sect.” He added that there were so many different sects in the United States that “they will prevent the establishment of any one sect, in prejudice to the rest, and forever oppose all attempts to infringe religious liberty.”³⁹ Madison, also addressing himself to Henry’s general and unsupported accusation, argued at this time that a “multiplicity of sects” would secure freedom of religion, but that a bill of rights would not. He pointed out that the Virginia Declaration of Rights (which guaranteed “the free exercise of religion, according to the dictates of conscience”) would not have exempted people “from paying for the support of one particular sect, if such sect were exclusively established by law.” If a majority were of one sect, liberty would be poorly protected by a bill of rights. “Fortunately for this commonwealth,” he added, “a majority of the people are decidedly against any exclusive establishment. I believe it to be so in the other states. There is not a shadow of right in the general government to intermeddle with

37. Thorpe, ed., *Constitutions*, 6:3255; John Wesley Brinsfield, *Religion and Politics in South Carolina* (Easley, S.C., 1983), pp. 122–27.

38. Thorpe, ed., *Constitutions*, 6:1026.

39. Elliot, ed., *Debates*, 3:204.

religion. Its least interference with it would be a most flagrant usurpation. . . . A particular state might concur in one religious project. But the United States abound in such a variety of sects, that it is a strong security against religious persecution; and it is sufficient to authorize a conclusion that no one sect will ever be able to outnumber or depress the rest."⁴⁰

Nonetheless, Madison and his party could not muster sufficient votes to secure Virginia's ratification of the Constitution without accepting a recommendation for amendments that were first submitted by Patrick Henry. Henry's amendments, including a Declaration of Rights, were read before the convention but not reported in its record of proceedings; the reporter states that they "were nearly the same as those ultimately proposed by the Convention"⁴¹ after perfunctory endorsement by a committee on amendments. Among the recommended amendments was a provision that "no particular religious sect or society ought to be favored or established, by law, in preference to others."⁴²

In New York, Thomas Tredwell, an antirratificationist, made the only reported reference to an establishment in his speech favoring a bill of rights: "I could have wished also that sufficient caution had been used to secure to us our religious liberties, and to have prevented the general government from tyrannizing over our consciences by a religious establishment—a tyranny of all others most dreadful, and which will assuredly be exercised whenever it shall be thought necessary for the promotion and support of their political measures."⁴³ The New York debates were fully reported until just before the closing days of the convention when John Lansing, an antirratificationist leader, introduced a bill of rights to be prefixed to the Constitution. Although debate began on this subject on July 19, 1788, and continued intermittently through July 25 when the convention adopted Lansing's bill of

40. *Ibid.*, 3:330. See also the similar statement by Zachariah Johnson, 3:645–46.

41. *Ibid.*, 3:593.

42. *Ibid.*, 3:659; Tansill, ed., *Documents*, p. 1031.

43. Elliot, ed., *Debates*, 2:399.

rights, not a word of debate is reported.⁴⁴ Thus there is no indication of the meaning attached by the convention to its recommendation that "no Religious Sect or Society ought to be favored or established by Law in preference of others."⁴⁵ This language was similar to that used in the state constitution of 1777, which disestablished the Church of England even as it alleged that the church had never been established.

North Carolina, which had ended its establishment in 1776, recommended an amendment like that of Virginia and New York.⁴⁶ The subject first arose in the state ratification convention when a delegate, Henry Abbot, expressing concern about the possibility of the general government's infringing religious liberty, asserted that "some people" feared that a treaty might be made with foreign powers to adopt the Roman Catholic religion in the United States. "Many wish to know what religion shall be established," he added. He was "against any exclusive establishment; but if there were any, I would prefer the Episcopal." In the next breath, he expressed a belief that the exclusion of religious tests was "dangerous," because congressmen "might be all pagans."⁴⁷

James Iredell, the state's leading Federalist, answered Abbott's fears by pointing out that the exclusion of a religious test indicated an intent to establish religious liberty. Congress was powerless to enact "the establishment of any religion whatsoever; and I am astonished that any gentleman should conceive they have. Is there any power given to Congress in matters of religion? . . . If any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass, by the Constitution, and which the people would not obey."⁴⁸ Governor Samuel Johnston agreed with Iredell and concluded: "I hope, therefore, that gentlemen will see there is no cause of fear that any one religion shall be exclusively established."⁴⁹ The

44. *Ibid.*, 2:410–12.

45. Tansill, ed., *Documents*, p. 1035.

46. *Ibid.*, p. 1047; Elliot, ed., *Debates*, 4:244.

47. Elliot, ed., *Debates*, 4:191–92.

48. *Ibid.*, 4:194.

49. *Ibid.*, 4:198–99.

Reverend David Caldwell, a Presbyterian minister, then spoke in favor of a religious test that would eliminate "Jews and pagans of every kind."⁵⁰ Samuel Spencer, the leading Anti-Federalist, took Caldwell's statement as endorsing the establishment of "one particular religion," which Spencer feared would lead to persecution. He believed that religion should stand on its own "without any connection with temporal authority."⁵¹ William Lenoir agreed with Spencer but warned that federal ecclesiastical courts might be erected and they "may make any establishment they think proper."⁵² Richard Dobbs Spaight, who had been a delegate to the Federal Convention, answered: "As to the subject of religion, I thought what had been said [by Iredell] would fully satisfy that gentleman and every other. No power is given to the general government to interfere with it at all. Any act of Congress on this subject would be a usurpation."⁵³

When Rhode Island's convention tardily met to ratify the Constitution, eight states had already ratified the Bill of Rights. Accordingly, Rhode Island's recommendation for an amendment against an establishment,⁵⁴ modeled after those of New York, Virginia, and North Carolina, was a superfluous flourish that had no effect on the framing of the First Amendment.

What conclusions do these scant facts, drawn from the ratification controversy, yield? No state or person favored an establishment of religion by Congress. On the few occasions when convention delegates or contemporary writers mentioned an establishment, they spoke against its desirability or against the likelihood that there would be one. The evidence does not permit a generalization as to what was meant by an establishment of religion. To be sure, most of the few references to an establishment expressly or in context referred to the preference of one church or sect or religion above others. This fact taken by itself proves little. For example, Coxe of Pennsylvania had merely said that in England, where there was an "established church," only its members could hold office. From this statement we can conclude only that Coxe

⁵⁰ Ibid., 4:199.

⁵¹ Ibid., 4:200.

⁵² Ibid., 4:203.

⁵³ Ibid., 4:208.

⁵⁴ Tansill, ed., *Documents*, p. 1053.

thought that the exclusive support of one church or denomination by the government, such as the Episcopal Church enjoyed in England, constituted an established church. There is no argument about that, but did he distinguish between an established church and an establishment of religion? Did he understand an establishment of religion to be government support of all church denominations or of one only? Coxe's brief statement provides no answers to these questions, and the same may be said of the statements by the other speakers on the subject. Madison, for example, was simply saying to those who believed that religious liberty was endangered by the proposed national government, "Not even your worst fear shall come to pass."

The recommendations for amendments by Virginia, New York, North Carolina, and Rhode Island, which used nonpreferential language, are not clarifying; they do not even necessarily indicate that preference of one denomination over others was all that was comprehended by an establishment of religion. They do indicate that preference of one denomination over others was something so feared that a political necessity existed to assuage that fear by specifically making it groundless. Viewed in context, the recommendations by these four states derived from Anti-Federalist fears of the new national government and a desire to limit its powers. All four states, indeed all the states and all factions, agreed with the recommendation of New Hampshire that "Congress shall make no laws touching religion." Rhode Island, which never had an establishment and opposed every sort of one, did not likely use the language of nonpreferentialism as an indirect way of recommending that Congress be empowered to aid religion generally. Still less would Patrick Henry's Virginia forces have insisted on Virginia's similar language in order to aggrandize the authority of the United States. Not a single recommendation for amendment by any state on any subject was intended to enhance or add to national powers.

As at the Constitutional Convention, a widespread understanding existed in the states during the ratification controversy that the new central government would have no power whatever to legislate on the subject of religion. This by itself does not mean that any person or state understood an establishment of religion to mean government aid to any or all religions or churches. It meant rather that religion as a subject of legislation was reserved exclusively to the states.