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James  
Madison  
versus  
the  
Nonpreferentialists

A formidable school of nonpreferentialists—scholars, politicians, publicists, and judges—has developed a plausible but fundamentally defective interpretation of the establishment clause to prove that its framers had no intention of prohibiting government aid to all denominations or to religion on a nonpreferential basis. The nonpreferentialists are innocent of history but quick to rely on a few historical facts that, when yanked out of context, seem to provide a patristic lineage to their views. Sharp logicians, they are adept at parsing the proposals that emerged as the establishment clause. Their view is

that the legislative history of the clause and its final phrasing prove an intent to impose upon the national government merely a ban against aiding an exclusive or preferential establishment, which results in their conclusion that government assistance to religion generally, without a hint of discrimination, would not violate the establishment clause.<sup>1</sup> “The legislative history of the establishment clause,” we have been misinformed, “shows that the framers accepted nondiscriminatory aid to religion.”<sup>2</sup>

Chief Justice William H. Rehnquist, the judicial leader of the nonpreferentialists, presented their view in a dissenting opinion of 1985 when he declared, wrongly, that the “well-accepted meaning” of the establishment clause is that it prohibited the establishment of a “national religion,” which he defined as the official “designation of any church as a national one.” The clause also “forbade preference among religious sects or denominations.” But it created no wall of separation between government and religion, not even between church and state. “The Establishment Clause,” Rehnquist wrote, “did not require government neutrality between religion and irreligion nor did it prohibit the federal government from providing nondiscriminatory aid to reli-

1. Edward S. Corwin, “The Supreme Court as a National School Board,” *Law and Contemporary Problems* 14 (Winter 1949): 3–23; James O’Neill, *Religion and Education under the Constitution* (New York, 1949); Chester J. Anticau, Arthur T. Downey, and Edward C. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (Milwaukee, Wisc., 1964); Robert G. McCloskey, “Principles, Powers and Values: The Establishment Clause and the Supreme Court,” in *1964 Religion and the Public Order*, edited by Donald A. Giannella (Chicago, 1965), pp. 3–33; Walter Berns, *The First Amendment and the Future of American Democracy* (New York, 1976); Michael J. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (Washington, D.C., 1978); James McClellan, “The Making and the Unmaking of the Establishment Clause,” in *A Blueprint for Judicial Reform*, edited by Patrick B. McGuigan and Randall R. Rader (Washington, D.C., 1981), pp. 295–325; Robert I. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (New York, 1982); James Reichley, *Religion in American Public Life* (Washington, D.C., 1985); Richard P. McBrien, *Caesar’s Coin: Religion and Politics in America* (New York, 1987); Daniel L. Dreisbach, *Real Threat and Mere Shadow: Religious Liberty and the First Amendment* (Westchester, Ill., 1987).

2. Malbin, *Religion and Politics*, p. 16.

gion.”<sup>3</sup> Nonpreferentialists fasten onto every exception to an absolute separation of church and state (“In God We Trust” or Thanksgiving Day), and they convert every exception into a triumphal archway through the wall of separation. They want to bulldoze that wall so that it cannot impede a variety of nonpreferential aids to religion. And, finally, they lambaste the constitutional doctrine by which the Supreme Court applies to the states the First Amendment’s ban on establishments.

If, as nonpreferentialists suppose, the views of James Madison, the legislative history of the establishment clause, and its original meaning support the constitutionality of impartial government aid to religion, then the guiding light of history burns incandescently on behalf of nonpreferentialism. But they are wrong in thinking that they have a prop in Madison. They misconstrue the legislative history of the clause. And they mistakenly connect an establishment of religion with only a national church or a national religion. A good nonpreferential scholar, Daniel L. Dreisbach, declared that because the framers sought to “proscribe the establishment of a national church,” the conclusion reasonably follows that the national government is “not foreclosed from extending general benefits to religion if administered on an equal basis and in a manner that did not infringe on the free exercise rights of any religious group.”<sup>4</sup> Dreisbach even endorsed the view that the Constitution allows “the promotion of a generalized or nondenominational form of Christianity. . . .” Dreisbach failed to indicate which clause of the Constitution empowers Congress to extend general benefits to religion or to Christianity. None does.

Edwin Meese III, attorney general of the United States under President Reagan and a preeminent political leader of the nonpreferentialists, advocated that “the First Amendment forbade the establishment of a particular religion or a particular church. It also precluded the federal government from favoring one church, or one church group over another. That’s what the First Amendment did, but it did not go further. It did not, for example, preclude federal aid to religious groups so long

3. *Wallace v. Jaffree*, 472 U.S. 38, 98, 99, 106 (1985).

4. Dreisbach, *Real Threat and Mere Shadow*, p. 65; chap. 6 is entitled “The Prohibition of the Establishment of a National Church.”

as that assistance furthered a public purpose and so long as it did not discriminate in favor of one religious group against another.”<sup>5</sup> Nonpreferentialists simply do not trifle to state what part of the Constitution empowers the government to aid religion nonpreferentially. Even scholars of the nonpreferential persuasion have failed in this regard, although they could show that enumerated powers may be exercised in ways that indirectly benefit religion if the purpose and effect of an enactment is primarily secular in nature. Religiously affiliated universities such as Fordham or Yeshiva, for example, might be the recipients of a federal grant program for the teaching of mathematics. Such legislation, however, is secular in character and does not single out religiously affiliated institutions for special benefits, nor does the legislation rest on a power to regulate religion.

The nonpreferential interpretation seems persuasive if one can ignore or forget the fact that the First Amendment, no matter how parsed or logically analyzed, was framed to deny power, not to vest it. The fundamental defect of the nonpreferential interpretation is that it results in the unhistorical contention that the First Amendment augmented a nonexistent congressional power to legislate in the field of religion. The nonpreferential interpretation also seems persuasive if one can also ignore or forget the fact that neither Christianity nor Protestantism was ever a state church. The nonpreferentialists, having a tin ear for history, call Christianity or Protestantism one religion as if one religion were the equivalent of one church, as in the term “state church.” Invariably they end up with “state church” as the definition of an establishment of religion.<sup>6</sup> The nonpreferentialist effort results in the proposition that government aid to religion without hint of discrimination would not violate the establishment clause. Supposedly the legislative history of the establishment clause provides elaborate proof of the nonpreferential thesis.

Although Madison initially proposed “nor shall *any* national religion

5. Edwin Meese III, “Address before the Christian Legal Society,” San Diego, September 29, 1985 (U.S. Department of Justice, Washington, D.C., transcript), pp. 8–9.

6. Cord, *Separation of Church and State*, pp. 5, 6, 10; Malbin, *Religion and Politics*, p. 14. See also Dreisbach, *Real Threat and Mere Shadow*, p. 65.

be established," in the debate that followed he explained himself by saying that his proposal meant that "Congress shall not establish a religion." The word "a" has great significance for the nonpreferentialists. They emphasize the fact that in the debate Madison wished to proscribe "a national religion," that is, a single or exclusive religion preferred over all others "and nothing else." Similarly, they stress that the term used in the final version of the amendment is "an establishment of religion." The use of the singular noun, "an establishment," supposedly has the effect of narrowing the scope of the prohibition.<sup>7</sup> Madison allegedly wanted only to prohibit "discriminatory religious assistance" and "a national church." The climax of this view follows: "At the same time, the phrase 'an establishment' seems to ensure the legality of nondiscriminatory religious aid. Had the framers prohibited 'the establishment of religion,' which would have emphasized the generic word 'religion,' there might have been some reason for thinking they wanted to prohibit all official preferences of religion over irreligion. But by choosing 'an establishment' over 'the establishment,' they were showing that they wanted to prohibit only those official activities that tended to promote the interests of one or another particular sect."<sup>8</sup> Preferring "religion over irreligion" is a red herring; the question of such a preference was not an issue. The government possessed no power to aid irreligion or religion.

What shall we say, however, about the interpretation based on the use of the indefinite rather than the definite article? First, we are not interpreting a verbatim record of the debate. The record we have derives from unreliable newspaper reports. It is incomplete and does not purport to be a literal transcription of the words of the speakers. Reporters took notes that they later rephrased and expanded for publication. Any interpretation of the debate that turns on single words or precise nuances of phrasing must be suspect.<sup>9</sup> And any interpretation that turns on the use of the indefinite article rather than the definite article must be utterly rejected, for the simple reason that the reporter who took shorthand notes of the debates on the Bill of Rights omitted

7. Cord, *Separation of Church and State*, p. 5.

8. Malbin, *Religion and Politics*, p. 14.

9. See Appendix.

articles, both definite and indefinite. He recorded the main outlines of speech and later reconstructed those speeches from his memory. He omitted a great deal and sometimes garbled what he included. Madison said, when sending a copy of the reporter's work to Jefferson, it gave "some idea of the discussion," though it showed "the strongest evidences of mutilation & perversion, and of the illiteracy of the Editor." To another correspondent Madison wrote that the reporter "sometimes filled up blanks in his notes from memory or *imagination*" and that he also made drunken reports.<sup>10</sup>

Second, the nonpreferentialists stress the "a" in Madison's recommended amendment without considering that it did not pass the House. The amendment as adopted bans any law "respecting the establishment of religion." It does not refer to "a religion" or "a national religion." The reference is to religion in general. The nonpreferentialist argument is founded on a discarded proposal rather than the constitutional text. Nevertheless, Madison had an interpretation of "national religion," as we shall see, that undoes the nonpreferentialist argument.

Third, "the" is not "generic"; it is specific. Contrary to Robert Cord, Daniel Dreisbach, and the others, the employment of "the" instead of "an" as the article preceding "establishment of religion" would not have broadened the establishment clause. Fourth, "the" can be as singular as "a" or "an." But those are quibbles.

A more important objection to the nonpreferentialist emphasis on the definite article in the establishment clause derives from the attempt to construe it literally or strictly. That which is inherently ambiguous cannot be strictly construed. Worse still, strict construction of the First Amendment, if ever taken seriously, would lead to the destruction of basic rights. Strict construction often leads to narrow-mindedness. Consider the exact language of the amendment: "Congress shall make

10. James Madison to Thomas Jefferson, May 9, 1789, in William T. Hutchinson et al., eds., *The Papers of James Madison*, ser. in progress (Chicago, 1962-), 12:142. See Marion Tinsling, "Thomas Lloyd's Reports of the First Federal Congress," *William and Mary Quarterly*, 3d ser., 18 (Oct. 1961): 530, on the omission of articles, and pp. 530-38 for contemporary criticism of Lloyd's reporting. Tinsling quotes a Madison letter of Jan. 7, 1832, describing the reporter as a "votary of the bottle" who made "too free use of it" (pp. 537-38).

no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press.” The framers of the amendment deliberately used different verbs in the freedom of religion and freedom of the press clauses. That is a matter of considerably greater semantic importance than the difference between “an” and “the” in the establishment clause. If the framers meant what they said and said what they meant, then Congress may abridge the free exercise of religion so long as Congress does not prohibit it. The point is that contrary to Rehnquist and company, the principles embodied in the First Amendment’s clauses, not some misunderstanding based upon a grammarian’s niceties, command our constitutional respect.

The still more important fact is that the type of article used in the establishment clause made no difference. The First Amendment does not say that Congress shall not establish a religion or create an establishment of religion. It says Congress shall make no law *respecting* an establishment of religion. Whether “respecting” connotes honoring or concerning, the clause means that Congress shall make no law on that subject. The ban is not just on establishments of religion but on laws respecting them, a fact that allows a law to fall short of creating an establishment yet still be unconstitutional. The entire nonpreferentialist argument reduces to the proposition that, although a law preferring one religion over others would be unconstitutional, government aid to all without preference to any would be constitutional. But if government cannot pass a law on the subject of an establishment of religion, whether the aid is to all without preference or to only one makes no difference. A law of either kind is a law on a forbidden subject and therefore unconstitutional.

Another important fact shows that the type of article, whether definite or indefinite, singular or plural, made no difference for any practical purpose. President Jefferson, for example, when refusing to proclaim a day of national thanksgiving, thought the establishment clause did use “the” instead of “a,” for he misquoted it, stating that is said “no law shall be made respecting *the* establishment or free exercise of religion.”<sup>11</sup> What is significant is not the misquotation by Jefferson but his

11. Thomas Jefferson to Samuel Miller, Jan. 23, 1808, in *The Writings of*

belief that the ban on an establishment extended to presidentially proclaimed fast and thanksgiving days.

Similarly, President Madison misquoted the establishment clause but also had an extremely broad view of it. He usually quoted it as if it outlawed “religious establishments.” A “religious establishment” is a church or some religious institution and carries no implication of government aid to religion or involvement with religion as does an “establishment of religion.” That Madison quoted the clause as if it outlawed religious establishments shows that he understood it to mean that Congress had no authority to legislate on religion or its institutions. President Madison vetoed a land-grant bill intended to remedy the peculiar situation of a Baptist church that, as a result of a surveying error, had been built on federal land. Congress had sought to rectify the error by permitting the church to have the land rather than buy it or be dispossessed. Here was no making of broad public policy, yet President Madison saw a dangerous precedent, and he vetoed the bill on the grounds that it “comprises a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that ‘Congress shall make no law respecting a religious establishment.’”<sup>12</sup>

It is interesting and significant that Madison, the “father” of the Constitution and of the Bill of Rights, in a formal message to Congress should have misquoted the First Amendment in the particular way he did, using “religious establishment” synonymously with “an establishment of religion,” although the first, unlike the second, does not imply an act of the government. The point is, of course, that Madison never altered his early view, which was widely shared by the other framers of the Constitution, that Congress had no power to legislate on any matters concerning religion. His use of “religious establishment” instead of “establishment of religion” shows that he thought of the clause in the First Amendment as prohibiting Congress from making any law touching or “respecting” religious institutions or religion. He misquoted the

*Thomas Jefferson*, edited by Andrew A. Lipscomb and Albert E. Bergh, 20 vols. (Washington, D.C., 1903-4), 11:428; emphasis added.

12. James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents*, 10 vols. (Washington, D.C., 1969), 1:490, message of Feb. 28, 1811.

First Amendment in the same way in another veto message against a congressional bill that would have incorporated a church in the District of Columbia,<sup>13</sup> showing that he regarded even simple recognition, without financial support, to be within the ban against an establishment of religion.

As a member of the First Congress, Madison served on the joint committee that created congressional chaplaincies. Contrary to former chief justice Warren E. Burger and the Supreme Court, we do not know that Madison “voted for the bill authorizing payment of chaplains.”<sup>14</sup> True, there is no record of that date to indicate his objection to such chaplaincies. Nonpreferentialists assume from the silence of the record that Madison must have supported the chaplaincy bill in 1789, but they ignore his later statement that he disapproved of it. In a letter of 1822 to Edward Livingston he stated that he had not approved at that time or later: “I observe with particular pleasure the view you have taken of the immunity of religion from civil jurisdiction. . . . This has always been a favorite principle with me; and it was *not* with my approbation, that the deviation from it took place in Congress when they appointed Chaplains, to be paid from the National Treasury.”<sup>15</sup>

Madison also treated the establishment clause as if it prohibited a national religion and yet construed the clause as if it separated religion and government by erecting between them a high and impregnable wall, just as Jefferson construed the clause. The phrase “national religion” appeared in Madison’s first draft of the First Amendment, and

13. *Ibid.*, 1:489, message of Feb. 21, 1811.

14. *Marsh v. Chambers*, 463 U.S. 783, 788, n. 8. Burger cited *Annals of Congress*, 1:891, but nothing on that page is pertinent. In *Annals*, 1:1077, Jan. 7, 1790, not Sept. 25, 1789, as Burger said, we learn that the House resolved that each branch of Congress should appoint a chaplain and that the chaplains should be of different denominations, but the *Annals* does not record the vote or say how any member voted.

15. James Madison to Edward Livingston, July 10, 1822, in *The Writings of James Madison*, edited by Gaillard Hunt, 9 vols. (New York, 1900–1910), 9:100; emphasis added. See Cord, *Separation of Church and State*, p. 23; Antieau, Downey, and Roberts, *Freedom from Federal Establishment*, pp. 180–81, for Madison’s alleged support of the bill.

when the House drafting committee dropped the word “national,” he suggested in debate that it be restored. Nonpreferentialists construe his use of “national” to mean that he sought merely to prohibit the establishment by Congress of a single state church or congressional preference for one church or religion over others. But the evidence indicates that by his use of the word “national” in 1789 Madison intended to distinguish an act of the national government from that of a state, without regard to the preferential or nonpreferential character of the national act on a matter respecting religion. In the floor debate, he used “national religion” to mean “that Congress should not establish a religion.”<sup>16</sup> He discussed the establishment clause as if the word “national” still remained in it, yet he continued to interpret the meaning of the clause with the most extraordinary latitude.

As president, however, Madison had proclaimed several days for fast and thanksgiving, but he found extenuating circumstances in the fact that he was chief executive during the time a war was fought on national soil. And as he pointed out in his letter of 1822 to Livingston, although he “found it necessary” to deviate from “strict principle” by his proclamations, he “was always careful to make the Proclamation absolutely indiscriminate, and merely recommendatory; or, rather mere *designations* of a day on which all who thought proper might unite in consecrating it to religious purposes, according to their own faith and forms” (emphasis in original). Nevertheless, Madison could have followed the example of Jefferson, who, as president refused Congress’s requests to declare days of fasting and thanksgiving. Moreover, as president, Madison approved of chaplains for the armed forces, an action that he later thought unconstitutional.<sup>17</sup>

In Madison’s “Detached Memoranda,” written after he retired from the presidency in 1817, he expressed concern that the “danger of silent accumulations & encroachments by Ecclesiastical Bodies have [*sic*] not sufficiently engaged attention in the U.S.”<sup>18</sup> He asked, “Is the appoint-

16. *Annals*, 1:757.

17. Dreisbach, *Real Threat and Mere Shadow*, pp. 152–53.

18. Elizabeth Fleet, ed., “Madison’s ‘Detached Memoranda,’” *William and Mary Quarterly* 3 (1946): 554.

ment of Chaplains to the two houses of Congress consistent with the Constitution, and with the pure principle of religious freedom?" By way of answer he replied:

in strictness the answer on both points must be in the negative. The Constitution of the U.S. forbids everything like an establishment of a *national* religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and conducted by Ministers of religion paid by the entire nation?<sup>19</sup>

Madison continued: "The establishment of the chaplainship to Congress is a palpable violation of equal rights, as well as of Constitutional principles. . . . If Religion consists in voluntary acts of individuals, singly, or voluntarily associated, and it be proper that public functionaries, as well as their Constituents should discharge their religious duties, let them like their Constituents, do so at their own expense."<sup>20</sup> He classified chaplainships for the army and navy "in the same way," as forbidden "establishments" or an "establishment of a *national* religion."<sup>21</sup> Clearly a man who considered unconstitutional the use of public funds for the support of interfaith invocations and benedictions—and nothing could be more nonpreferential or lacking in exclusiveness—would also consider unconstitutional the use of public funds for any other purpose respecting religion. He warned against evil "lurking under plausible disguises, and growing up from small beginnings. *Obsta principiis* [resist the beginnings]."<sup>22</sup> The Constitution, he said, misquoting again, "forbids everything like an establishment of a *national* religion."<sup>23</sup> He included chaplains for Congress, military and

19. *Ibid.*, p. 558; emphasis added.

20. *Ibid.*, pp. 558–59.

21. *Ibid.*, pp. 559–60; emphasis added.

22. *Ibid.*, p. 558.

23. *Ibid.*; emphasis added.

naval chaplains, and presidential proclamations "recommending fasts & thanksgivings" as examples "of a *national* religion."<sup>24</sup> Rather than let these examples, which went beyond "the landmarks of power," have the effect of legitimate precedents, he said it was better to apply to them "the legal aphorism of *de minimis non curat lex* [the law does not bother with trifles]."<sup>25</sup>

Thus, the proposition that Madison meant merely a national church or no preference in the support of religion is groundless, as foolish perhaps as his proposition that the provision of military chaplains was like a national religion. The point, however, is that to Madison "a national religion" broadly covered as much as even the most trifling matters. Chief Justice Rehnquist built most of his opinion favoring the constitutionality of nonpreferential government aid to religion on the baseless reading he gave to "national religion," without considering or knowing that Madison believed that military chaplains or a fast day constituted a national religion.<sup>26</sup> Rehnquist merely read his own values into "national religion" (as did Madison). The views that Madison expressed in 1789 on establishments of religion conformed generally to his views, whether he thought in terms of a general assessment, a religious establishment, or a national religion. In each instance he wanted "perfect separation"<sup>27</sup> between government and religion.

In his "Detached Memoranda" Madison also stated that "Religious proclamations by the Executive recommending thanksgivings and fasts are shoots from the same root with the legislative acts reviewed [the chaplaincies]."<sup>28</sup> Madison made this remarkable judgment about so innocuous an act as a presidential recommendation for a day of thanksgiving, another extreme example of nonpreference on a matter respecting religion. He regarded such recommendations as violating the First Amendment: "They seem" he wrote, "to imply and certainly nourish the erroneous [*sic*] idea of a *national* religion."<sup>29</sup>

24. *Ibid.*, pp. 558–60; Madison's emphasis.

25. *Ibid.*, p. 559.

26. *Wallace v. Jaffree*, 472 U.S. 38, 91–114 (1985).

27. Thomas Jefferson to Edward Livingston, July 10, 1822, in *Writings of Madison*, 9:100.

28. Fleet, ed., "Madison's 'Detached Memoranda,'" p. 560.

29. *Ibid.*; Madison's emphasis.

In the 1822 letter to Livingston, Madison warned that the danger of an “alliance or coalition between Government and Religion . . . cannot be too carefully guarded against. . . . Every new and successful example therefore of a *perfect separation* between ecclesiastical and civil matters is of importance . . . religion and Government will exist in greater purity, without [rather] than with the aid of Government.”<sup>30</sup> His stress on a “perfect separation” appears also in his “Detached Memoranda,” where he noted: “Strongly guarded as is the separation between Religion and Government in the Constitution of the United States the danger of encroachment by ecclesiastical Bodies, may be illustrated by precedents.” One of his illustrations was the “attempt in Kentucky, for example, where it was proposed to exempt Houses of Worship from taxes.”<sup>31</sup> Madison believed that any semblance of support to religion by government was unconstitutional. But Madison’s “perfect separation” was less than perfect during his presidency, although he seems to have thought that his imperfections were excusable under the *de minimis* doctrine.

Among the evidence that nonpreferentialists have warped to prove that Madison “took the word ‘establishment’ to mean [only] a governmental religion such as a state church”<sup>32</sup> is Madison’s statement at the Virginia ratifying convention of 1788: “Fortunately for this Commonwealth, a majority of the people are decidedly against *any exclusive establishment*—I believe it to be so in other states. *There is not a shadow of right in the general government to intermeddle with religion.* . . . The United States abound in such 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.”<sup>33</sup> That a nonpreferentialist would italicize the second sentence as a revealing aid to his thesis passes belief. Those words prove that Madison opposed all government support of religion, because government has no power to legislate on the subject. But we are told that Madison simply opposed

30. Jefferson to Livingston, July 10, 1822, in *Writings of Madison*, 9:100–103.

31. Fleet, ed., “Madison’s ‘Detached Memoranda,’” p. 555.

32. Cord, *Separation of Church and State*, p. 10.

33. Elliot, ed., *Debates*, 3:330, as quoted in Cord, *Separation of Church and State*, p. 8; Cord’s emphasis.

“raising one religion above the others.”<sup>34</sup> The fact that Madison undoubtedly assailed an exclusive establishment does not prove that he equated every establishment with exclusivity. His statement must be understood in its context.

The immediately preceding speaker, Patrick Henry, had opposed ratification of the Constitution because, in part, it had no bill of rights to protect religious liberty. Madison reminded the delegates of some recent Virginia history, the attempt to enact a general assessment; he was making the then standard Federalist point that a bill of rights was not necessary and would not protect the people. He meant that, although Virginia’s constitution of 1776 had a bill of rights that guaranteed the free exercise of religion, it did not secure religious liberty because it did not prevent the attempt to enact a general assessment and would not have prevented an exclusive establishment if one sect had dominated the state. Having a national bill of rights, he argued, would not defend liberty if a majority of the people were of one sect. The country enjoyed religious liberty because of “that multiplicity of sects which pervades America, and which is the best and only security for religious liberty in any society”; the existence of many prevented one from oppressing the others. Fortunately for Virginia, he continued, the people opposed an establishment, and the national government had no authority over religion.

Thus, Madison was not saying that he or the people of Virginia opposed *only* an exclusive establishment. He was saying, rather, that the worst fear, an exclusive establishment, would not materialize even if the proposed constitution had no bill of rights.

Some, however, have transmogrified Madison, turning that principled opponent of all financial assistance by government to religion into an advocate of such aid on condition that it be nonpreferential in nature. They argue that Madison opposed Virginia’s general assessment bill only because it “placed Christianity in a preferred religious position.”<sup>35</sup> They disagree with the conventional interpretation of Madison’s “Memorial and Remonstrance,” namely, that it shows that he called for the separation not merely of church and state but of

34. Cord, *Separation of Church and State*, p. 8.

35. *Ibid.*, p. 20.

religion and government.<sup>36</sup> The conventional interpretation is the right one because Madison opposed all types of establishments on grounds of principle.

Madison's "Memorial and Remonstrance" certainly shows that he regarded the general assessment bill as an establishment of religion. He repeatedly referred to "the establishment proposed by the bill," "ecclesiastical establishment," "the establishment in question," "the proposed establishment," and so on.<sup>37</sup> The bill's supporters admitted that it was an establishment of religion, as its very name indicated: "A Bill Establishing a Provision for Teachers of the Christian Religion." In a letter to Monroe, Madison entitled it the "Bill for establishing the Christian Religion in this State."<sup>38</sup>

Proponents of the narrow interpretation emphasize that the bill provided for an exclusive establishment of one religion, Christianity, and therefore that Madison's opposition shows merely that he opposed only government support of one religion.<sup>39</sup> Presumably we are supposed to believe that if the bill taxed Jews for the support of a rabbi and Roman Catholics for the support of a priest, Madison would have supported it. But there were no rabbis or priests in Virginia and no synagogues or Catholic chapels either, although a few Jews and Catholics lived in Virginia, a very few. Religion in Virginia in 1784 was synonymous with Protestant Christianity. Moreover, the fact that the bill discriminated provided the basis of only one of the many reasons Madison opposed it.

Further, to depict the general assessment bill of 1784 as creating an exclusive establishment ignores the fact that it would have established all Christian churches in contrast to the situation before 1776, when the law established only the Church of England. Prerevolutionary law had created an exclusive establishment. To describe the 1784 proposal as exclusive mangles the meaning of the word "exclusive" as well as the

36. Berns, *First Amendment*, p. 9, correctly endorsed the conventional interpretation.

37. *Madison Papers*, 8:301-2.

38. James Madison to James Monroe, June 21, 1785, in *ibid.*, 8:306.

39. Dreisbach, *Real Threat and Mere Shadow*, pp. 143-45; Cord, *Separation of Church and State*, p. 20; Malbin, *Religion and Politics*, p. 25.

history of an establishment of religion in Virginia. The Church of England had enjoyed an exclusive establishment; broadening the benefits of an establishment to include all churches ended the exclusive character of that establishment. In effect, the general assessment would have established every religious society in the state that had a meetinghouse and a clergyman.

Nevertheless, the bill did discriminate against non-Christians by purporting to benefit Christians only. Although Madison criticized it on grounds of religious "discrimination," he attacked it chiefly because it created an establishment of religion, not because it created a discriminatory establishment. Using every possible argument against the bill, however, Madison even found discriminatory a provision of the bill that was meant to be liberal. The bill taxed everyone for the support of a clergyman of the individual's choice, but because Quakers and Mennonites had no formal clergy, the bill provided that they could pay their taxes into a fund to be spent as they directed "to promote their particular mode of worship." In his "Memorial and Remonstrance," Madison converted that provision into the basis for an argument that the bill granted improper preference to those denominations, for they were not the only ones to oppose a "compulsive support of their Religions."<sup>40</sup>

That the bill discriminated was not, however, the main reason Madison attacked the bill. What kind of establishment the bill created did not matter to him, nor how inclusive or exclusive it was. He attacked the bill because as a matter of principle he opposed *any* kind of an establishment of religion. Had he opposed the bill only because it established the Christian religion exclusively, his arguments would have been directed, quite simply, to the reasons for amending the bill so as to cover all religions, including Judaism, Islam, Deism, Hinduism, and Zoroastrianism. He made no such argument. He opposed the bill in whole, not in part. Indeed, at only one point in his "Memorial and Remonstrance" did he mention that bill's exclusive character: "Who does not see that the same authority which can establish Christianity, in

40. For Madison on the discriminatory character of the bill, see his letter to Jefferson, Jan. 9, 1785, and his "Memorial and Remonstrance," in *Madison Papers*, 8:229, 300, respectively.



exclusion of all other Religions, may establish with the same case any particular sect of Christians, in exclusion of all other Sects?"<sup>41</sup>

This sentence occurs, significantly, in the course of an argument in which Madison sought to convince his readers that the way to avoid the consequences of an infringement of liberty is to reject, on its first appearance, "the principle" that supports the infringement. The whole passage shows that Madison did not oppose the establishment because it was exclusively a Christian one. He opposed, rather, any government tax for religion because he feared a threat to liberty deriving from an unwarranted exercise of power in a domain forbidden to government.

That there can be no doubt of this is evident from Madison's fourteen other reasons for opposing the bill. Each was applicable to a bill supporting all religions or religion in general. The first of his fifteen arguments against the general assessment bill declared that the duty a person owes the Creator and the manner of discharging it must be voluntary, not coerced, and that religion is "wholly exempt" from the cognizance of government. Rhetorical questions about whether Madison was really an absolutist—would he have opposed a civil act against human sacrifice or polygamy?—are absurdly out of context. No answer to the question posed by nonpreferentialists alters the fact that Madison opposed all establishments, not just an establishment that favored Christianity over other religions: "Because if Religion be exempt from the authority of the Society at large [religion being a natural right], still less can it be subject to that of the Legislative Body" was Madison's second argument. The third was to "take alarm at the first experiment of our liberties" by "denying the principle" and thereby avoid the consequences of usurped power as well as entangling precedents.

Yet a scholar, having distorted one Madisonian argument after another, concluded: "In sum, only Madison's arguments against exclusive religious aid—in which he assailed the religious discriminatory Assessment Bill and the evils it was likely to produce—are germane in appraising Madison's attitude about the appropriate relationship between

41. "Memorial and Remonstrance," in *ibid.*, 8:300; Irving Brant, *James Madison, The Nationalist, 1780–1787* (Indianapolis, 1948), p. 345.

Church and State."<sup>42</sup> The author of that absurd remark denied us the wonder of seeing how he could distort the meaning of the Virginia Statute for Religious Freedom, which Jefferson had drafted and whose passage Madison guided through the state legislature. That document, like Madison's "Memorial," also described freedom of religion as a natural right exempt from civil governance, contended that forcing people to support even the religion of their own persuasion was tyrannical and made the support of religion private and voluntary. It too expressed Madison's views.

Although the Reverend John Courtney Murray, S.J., did not approve of Madison's opinions, he granted the correctness of the statement that the "Memorial" discloses Madison's opposition to "every form and degree of official relation between religion and civil authority. For him religion was a wholly private matter beyond the scope of civil power either to restrain or support."<sup>43</sup> Father Murray added that the theme of the "Memorial" is that religion "must be absolutely free from governmental restriction and likewise *absolutely 'free' from governmental aid*. . . . For Madison, as for John Locke, his master, religion could not by law be made a concern of the commonwealth as such, deserving in any degree of public recognition or aid, for the essentially theological reason that religion is of its nature a personal, private, interior matter of the individual conscience, having no relevance to the public concerns of the state."<sup>44</sup>

In the same year as the "Memorial," 1785, Madison also expressed himself strongly against an abortive plan of the Continental Congress to set aside public land in each township in the western territories for the support of religion—any religion. To Monroe he wrote: "How a regulation, so unjust in itself, so foreign to the Authority of Cong[re]s . . . and smelling so strongly of an antiquated Bigotry, could have re-

42. Cord, *Separation of Church and State*, p. 23. For the "Memorial and Remonstrance," see *Madison Papers*, 8:298–314.

43. John Courtney Murray, "Law and Prepossessions," in *Law and Contemporary Problems* 14 (Winter 1949): 28, quoting J. Rudedge in the *Everson* case, 330 U.S. 1, 39–40 (1947).

44. Murray, "Law and Prepossessions," p. 29; emphasis added.

ceived the countenance of a Committee is truly a matter of astonishment."<sup>45</sup> Notwithstanding Madison's objections, Congress included in the Northwest Ordinance of 1787 a provision that schools should be encouraged because religion and morality, as well as knowledge, were necessary to good government.

In 1790, prior to the adoption of the Bill of Rights, Madison in Congress gave the following reason for omitting ministers from enumerated occupations in a census bill: "As to those who are employed in teaching and inculcating the duties of religion, there may be some indelicacy in singling them out, as the general government is proscribed from the interfering, in any manner whatever, in matters respecting religion; and it may be thought to do this, in ascertaining who, and who are not ministers of the gospel."<sup>46</sup> Surely one who opposed nonpreferential land grants for religious purposes and who objected to a federal census report of ministers cannot be regarded as an opponent of only that public aid to religion which failed to provide for non-Christians. Nor can he be regarded as a supporter of nonpreferential government aid to religion. Madison had such refined constitutional scruples on this matter that in his mature opinion he also regarded as unconstitutional such governmental, legal, or financial support to religion as presidential proclamations of Thanksgiving, tax exemptions for religious institutions, chaplains for Congress and the armed services, incorporation of churches by the federal government in the District of Columbia, and the grant of lands to a church of the land on which it was built.

In the First Congress Madison did not say that his proposed amendment should be construed as banning only preferential aid or an exclusive establishment. He was saying that, contrary to Anti-Federalist warnings, the government under the Constitution would not adopt an exclusive establishment, because it had no power whatsoever over the subject of religion. Anyone who maintains that Madison in 1789 "believed Congress was being denied the power to 'establish a national

45. James Madison to James Monroe, May 29, 1785, in *Madison Papers*, 8:286; see also Brant, *The Nationalist*, p. 353.

46. Quoted in Irving Brant, *James Madison, Father of the Constitution* (Indianapolis, 1950), p. 272.

religion' *not religion*<sup>47</sup> seems to say that Madison believed that Congress could establish religions but not religion. This peculiarly fatuous view locks into the nonpreferential thesis the notion that, because the ban on establishments reached only preferential supports, the government could constitutionally support all religions without preference to any. Thus, when Walter Berns, an eminent constitutional scholar, examined the Senate's recommended draft of the establishment clause before the joint conference committee altered it, he said that its language would have "permitted federal aid to religion on a nondiscriminatory basis."<sup>48</sup> And when Madison made the remark about a ban on "a national religion," Berns took note of Madison's willingness to accommodate those who wanted "nondiscriminatory assistance to religion."<sup>49</sup> Similarly, Chief Justice Rehnquist has declared that "the Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion."<sup>50</sup> But *no one* in the debate on the proposal that became the First Amendment, least of all Madison, recommended any language that would empower the government to take any positive action favoring religion. Madison sought to accommodate only one group, those who wanted reassurance that the government would not legislate on religious matters. The one thing a ban on a national religion did not mean to him was the implicit power for the United States to foster religion or even accommodate its needs on a nonpreferential basis.

During the debate, Madison expressly disclaimed taking any position on the question whether an amendment on the matter was needed. When Roger Sherman declared that an amendment was "altogether unnecessary" because Congress had no power "to make religious establishments," Daniel Carroll replied that an amendment on the subject would "conciliate the minds of the people to the Government," and Madison agreed with Carroll. Although Madison would not say

47. Cord, *Separation of Church and State*, p. 11; Cord's emphasis.

48. Berns, *First Amendment*, p. 7.

49. *Ibid.*, p. 9.

50. *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985).

whether an amendment was necessary, he reminded the House that some state conventions had expressed the fear that Congress might establish a national religion by the exercise of a power under the necessary and proper clause. In his great speech of June 8, 1789, when he urged the House to consider amendments to protect "the great rights of mankind,"<sup>51</sup> he repeated seven times that amendments, whether needed or not, would allay public fears. People feared that Congress would establish a national religion, and he had introduced an amendment calculated to appease them.

Madison mentioned that some people feared the dominance of one sect or the possibility that two might combine to establish a religion to which others might have to conform.<sup>52</sup> Anti-Federalists had persistently expressed exaggerated fears about the way the new government would abuse its powers if the Constitution were ratified. In North Carolina, for example, Henry Abbot frenetically predicted, in his state's ratifying convention, that the treaty power would be used to make Roman Catholicism the established religion of the country,<sup>53</sup> and Major Lusk warned the Massachusetts ratifying convention that "Popery and the Inquisition may be established in America."<sup>54</sup> In his own ratifying convention, Madison had heard Patrick Henry prophesy that the United States would "extort confession by torture," perpetuate "the most tyrannical and oppressive deeds," and send taxgatherers into everybody's home to "ransack, and measure, every thing you eat, drink, and wear."<sup>55</sup> Madison and the Federalists could not swing sufficient votes to secure Virginia's ratification of the Constitution without first accepting recommendations for amendments submitted by Henry. His amendments included a proposed bill of rights, one provision of which declared that "no particular religious sect or society ought to be favored or established by law, in preference to others." After perfunctory

51. "Amendments to the Constitution," *Madison Papers*, 1:2:198; the speech is on pp. 197-209.

52. See above, chap. 5, debate of Aug. 15, 1789.

53. Elliot, ed., *Debates*, 4:192.

54. *Ibid.*, 2:148.

55. *Ibid.*, 3:436, 448-49.

endorsement by a committee on amendments, the state convention accepted all of Henry's proposals. That was the price of ratification by Virginia.<sup>56</sup>

Madison, therefore, did not express his personal opinion on how best to frame an amendment. His record on the point was clear: Congress had no power to meddle with or legislate on religion, so there was no need to limit nonexistent power. But he felt obligated to make an effort, concerning establishments of religion, to satisfy popular demand for something explicit on that subject as well as on religious freedom. His motives were more political than we like to recognize. Understandably, we exalt the Bill of Rights, which gives constitutional recognition to precious freedoms, and we assume that its framers were the wise statesmen who pondered just the right phraseology to make every provision possess a resonance and rightness for the ages. In fact they were more interested in discussing tonnage duties, and their debate was brief, listless, and unclear. Moreover, the Anti-Federalists, knowing that the adoption of a bill of rights would sink their movement for a second convention and make unlikely the amendments they really wanted, amendments that would cripple the powers of the national government, sought to scuttle Madison's proposals. Failing that, they tried delaying tactics, depreciated the importance of the very protections of individual liberty that they had formerly demanded as a guarantee against impending tyranny, and then tried to weaken the provisions.<sup>57</sup> Madison understood what the Anti-Federalists were up to and would not be put off. Privately, however, he said he was engaged in "the nauseous project of amendments." Among the reasons he gave for persisting in a policy that even some members of his own party opposed was his belief that the Anti-Federalists would make political capital out of a failure of Congress to propose amendments in the nature of a bill of rights. Moreover, he declared, the amendments "will kill the opposition everywhere, and by putting an end to disaffection to

56. *Ibid.*, 3:593, 659.

57. Leonard W. Levy, "Bill of Rights," in *Encyclopedia of American Political History*, edited by Jack Greene, 3 vols. (New York, 1984), 1:104-25; or Levy, *Constitutional Opinions* (New York, 1986), pp. 105-34.

the Government itself, enable the administration to venture on measures not otherwise safe."<sup>58</sup>

From a constitutional standpoint, Madison believed that the entire enterprise was unnecessary; from a political standpoint, however, the stakes were high. He meant to give the people what they seemed to want, guarantees that nightmares pictured by demagogues would not become real. Politics had demanded that the ratificationist forces swallow Henry's recommended amendments in Virginia in return for crucial votes. Those amendments included some that Federalists vehemently opposed, such as the requirement of a two-thirds majority by Congress for the enactment of laws regulating commerce. Conversely, George Mason, who made much, publicly, of the absence of a bill of rights in the Constitution, had said at the Constitutional Convention that he would rather cut off his right hand than sign the Constitution without that two-thirds provision.<sup>59</sup> Henry's phrasing for the Virginia convention's recommendation against preferred sects ignored the language of Virginia's Statute of Religious Liberty, which went much further; Madison and the ratificationists did not take the no-preference language seriously as a reflection of Virginia's opinion, but it was harmless: who, after all, favored a preferential establishment? Madison, moreover, did not use the Virginia recommendation or the language of no preference when he made the proposal that became the establishment clause.

In any case, Virginia's nonpreferential language could not possibly have implied that Patrick Henry and his Anti-Federalist forces meant to empower Congress to assist or encourage religion. They sought to cripple the national government in every possible way, not to augment its constitutional authority on a subject reserved for state control. Least of all did they mean to authorize Congress to exercise its tax power,

58. James Madison to Richard Peters, Aug. 19, 1789, in *Madison Papers*, 12:346-47.

59. See Max Farrand, ed., *The Records of the Federal Convention*, 3 vols. (New York, 1911), 2:479, for the statement of Aug. 31, 1787, about his right hand, and 2:640, for the statement of Sept. 12 that congressional control over commerce by majority vote constituted "an insuperable objection."

which they feared and deplored, in order to enact anything like a nationwide general assessment or general establishment.

No credence can be attributed to the view of the scholar Charles Antieau, who concluded from a few state recommendations couched in nonpreferential language that the public demanded government aid to religion without preference.<sup>60</sup> "It is revealing," he added, "to note that in every state constitution in force between 1776 and 1789 where 'establishment' was mentioned, it was equated or used in conjunction with 'preference.'"<sup>61</sup> He meant, of course, that nonpreferential support was not considered to be an establishment; but the Massachusetts experience destroys that point.

Indeed the basic laws of New Hampshire, Vermont, Maryland, Georgia, South Carolina, and even Connecticut, all of which lawfully permitted multiple establishments, as did Massachusetts, mentioned no favored church. In the classic sense of an establishment of religion, one denomination received preference, not Christianity or Protestantism. There is no doubt whatever that establishments of religion existed in four New England states, actually as well as theoretically. They disprove the nonpreferentialist interpretation that the absence of preference in government aid to religion denotes the absence of an establishment.

Interestingly, when Antieau named the six states that supposedly mentioned "establishment" in connection with the idea of nonpreference, the five besides Massachusetts were Pennsylvania, New Jersey, North Carolina, Delaware, and New York.<sup>62</sup> That these were the five is interesting because none of them maintained an establishment after 1776, and yet all five, including the three that never had an establishment at any time in their histories, placed the support of religion on a purely private basis. In other words, they believed that a constitutional provision ensuring no subordination of one sect to another, or providing no preference of one over another, banned government aid to religion. Opponents of government aid to religion, especially of tax

60. Antieau, Downey, and Roberts, *Freedom from Federal Establishment*, p. 132.

61. *Ibid.*

62. *Ibid.*, pp. 132-33.

support for religion, employed the language of no preference to achieve their objective of keeping religion and government in separate universes. According to Thomas Curry, the probable reason for such usage is that the classical concept of an establishment as a state church continued to dominate the American image of an establishment of religion. Apart from the fact that the image and the reality seemed so disparate, there is no explaining the fact that opponents of government aid, even nonpreferential aid, did not recommend or use language condemning nonpreferential aid. Condemning preferential aid and meaning a condemnation of even nonpreferential aid seems clumsy, perverse, and unlikely. Yet the fact is that the principle of voluntarism in the support of religion was most firmly entrenched for the longest time in Rhode Island, which recommended an amendment against government preference of one religion over another. Rhode Island meant to reaffirm its own principle of voluntarism and opposed any extension of national powers.<sup>63</sup>

The case of John Leland is similar to that of Rhode Island. A Baptist preacher who influenced James Madison, Leland advocated a radical separation of government and religion.<sup>64</sup> He rejected the commonly accepted belief that America was a Christian nation, and he contended that any sort of establishment of Christianity, including all state establishments, were "all of them, Anti-Christocracies." Legislative chaplaincies, to Leland, constituted establishments of religion. He favored equality in every sense for Deists, pagans, atheists, Jews, Turks, and Catholics. He advocated their right to hold public office and censured disqualifying test oaths as instruments of establishments. Above all, Leland insisted that "religion is a matter between God and individuals," not subject to the jurisdiction of government.<sup>65</sup>

The point is that Leland would have been the last person to approve

63. Thomas Curry, *The First Freedoms* (New York, 1986), pp. 192, 209–12.

64. L. H. Butterfield, *Elder John Leland, Jeffersonian Itinerant* (Worcester, Mass., 1953); William G. McLoughlin, *New England Dissent, 1630–1833: The Baptists and the Separation of Church and State*, 2 vols. (Cambridge, Mass., 1971), 2:928–35.

65. *The Writings of John Leland*, edited by L. F. Greene (reprint, New York, 1969), pp. 181, 184, 187, 191, 221, 281, 293.

of government aid to religion. Under no circumstances could he have implied that by his opposition to preferential aid he favored government assistance to religion on a nonpreferential basis. In 1794 he proposed, in the following language, an amendment to the Massachusetts constitution that he thought would have ended that state's nonpreferential establishment:

To prevent the evils that have heretofore been occasioned in the world by religious establishments, and to keep up the proper distinction between religion and politics, no religious test shall ever be requested as a qualification of any officer, in any department of this government; neither shall the legislature, under this constitution, ever establish any religion by law, give any one sect a preference to another, or force any man in the commonwealth to part with his property for the support of religious worship, or the maintenance of ministers of the gospel.<sup>66</sup>

The facts show that the treasured principle of nonpreference, which nonpreferentialists converted wrongly into an allowance of government aid on an impartial basis, is, in effect, irrelevant. States with no history of establishments (Rhode Island, Pennsylvania, Delaware, and New Jersey) endorsed the no-preference principle yet kept religion privately supported, while Massachusetts, New Hampshire, and Vermont endorsed the same principle yet maintained tax-supported compulsory public worship. Or take Rhode Island and Connecticut, the two states that had no written constitutions. After 1784 the laws of neither provided preference, yet one always had an establishment and one never did.

Two hundred years ago, when the United States was substantially a nation of Protestants and the links between government and religion were close in many ways, people did not quibble as we do about whether the integrity of the principle of separation depended on the use of the definite or the indefinite article or whether the law provided for absolutist language or language that by logical deduction allowed for important exceptions. The significant case of Isaac Backus, the great Baptist leader of Massachusetts, illustrates that fact. It has been

66. *Ibid.*, p. 229.

said of him that “no individual in America since Roger Williams stands out so preeminently as the champion of religious liberty.”<sup>67</sup> Backus, a veteran of the struggle against the establishment provision of the Massachusetts constitution of 1780, was a member of the Massachusetts ratifying convention in 1788 and supported ratification of the Constitution secure in the knowledge that the United States had no power to legislate on the subject of religion. In his *History of New England, with Particular Reference to the Denomination of Christians Called Baptists* (3 vols., 1777–96) and in the later one-volume abridgment (1804), he misquoted the First Amendment entirely as stating the following: “Congress shall make no law, establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion.”<sup>68</sup> The point is that he regarded such language, which the Senate had adopted at one point, as sufficient to condemn the establishments of religion in Massachusetts and Connecticut.<sup>69</sup> Nonpreferentialists would construe that language as the narrowest proposed during the entire legislative history of the First Amendment, logically allowing impartial government aid to religion of the sort that Backus opposed. Backus was misinformed but not naive; he was a veteran of the separationists’ campaign to make the support of religion purely voluntary. As Thomas Curry noted, in his analysis of the original meaning of the establishment clause, “Eighteenth-century American history offers abundant examples of writers using the concept of preference, when, in fact, they were referring to a ban on all government assistance to religion.”<sup>70</sup>

Curry also observed that the Senate debate in its historical context “represented no sharply divided opinions about the nature of the amendment on religion. Senators who believed that religion should be supported voluntarily could subscribe to the formula banning an establishment of ‘One Religious Sect or Society in preference to others’ as readily as their colleagues, especially from New England, who believed

67. *Dictionary of American Biography*, 1:470. William G. McLoughlin, *Isaac Backus and the American Pietistic Tradition* (Boston, 1967), and McLoughlin, *New England Dissent*, are the best works on Backus.

68. Quoted in McLoughlin, *New England Dissent*, 2:783.

69. *Ibid.*, 2:783–84.

70. Curry, *First Freedoms*, p. 211.

that the states should make provisions for the support of religion.” Senators from states whose constitutions had separated government and religion and left the support of religion to private conscience, Curry concluded, may well have preferred to use the no-preference language of those constitutions, just as New Englanders may have wanted the terminology most familiar to them, proscribing articles of faith or modes of worship.<sup>71</sup>

Curry observed that legislators in several states that opposed a preference for one religion did not propose assistance to all, and their constitutions “clearly banned any state support for religion whatsoever. On the other hand, proponents of a general assessment never viewed a ban on preferential establishments as enabling legislation for their cause.” In no instance, he added, did such people claim that no preference could justify the establishment of several or all religions rather than one. “Opponents of tax support for religion,” Curry showed, “never saw in the ‘no subordination of any one sect’ clause a threat to their own stance.” Staunch separationists on matters of government-aided religion “not only avoided criticizing the provision, but clearly approved of it.”<sup>72</sup> Massachusetts towns opposing the establishment article of the proposed state constitution of 1780 endorsed the nonpreferential principle on the supposition that it banned all establishments of religion.<sup>73</sup> Accordingly, as Curry concluded, although that principle denying preference “appears when lifted out of its historical context to favor or permit a broad involvement of government with religion, [it] meant quite the opposite in its time. Those most against any state support for religion used language prohibiting preferential establishment to express a negation of all state favors or financial assistance to churches.”<sup>74</sup>

The debate in both houses of Congress revealed, according to Curry, “not a clash between parties arguing for a ‘broad’ or ‘narrow’ inter-

71. Curry, “First Freedoms” (Ph.D. diss., Claremont Graduate School, 1983), p. 829. See also Curry, *First Freedoms*, p. 214.

72. Curry, “First Freedoms,” pp. 649–50. See also Curry, *First Freedoms*, p. 213.

73. See above, chap. 2, note 8 and related text.

74. Curry, “First Freedoms,” p. 651; see also pp. 783–84.

pretation or between those who wished to give the federal government more or less power in religious matters. It represented rather a discussion about how to state the common agreement that the government had no authority in religious matters.<sup>75</sup> Of course, the state governments had authority over religious matters, but not one had a constitution or law that embodied the narrow interpretation. Right as Curry is that no one in Congress wished to vest in the national government an authority over religion, the chief fact remains that the language employed by those favoring a narrow interpretation was defeated, allowing no basis for nonpreferentialism in the text of the Constitution.

Congress considered and rejected the phraseology that nonpreferentialists emphasize as indicative of narrow interpretation. The House rejected the Senate's version, showing that the House under no circumstances can be understood as having framed an amendment that merely banned preference. The Senate, having accepted a phrasing that lends itself to the narrow interpretation (when abstracted from its historical context), abandoned it in the face of uncompromising opposition from the House. When the amendment emerged from the joint conference committee and received approbation from both chambers, it meant something broader than no preference. And, however it was phrased, it made an exception to a power that did not exist. Construing the establishment clause as the nonpreferentialists do amends it by adding the word "exclusive," which is not there, so that it reads: Congress shall make no law respecting an exclusive establishment of religion. Awed stupefaction is an appropriate response to the nonpreferentialists' achievement in metamorphosing the clause into a source of positive power.

Black magic—not historical evidence, grammatical analysis, or logical deductions—black magic and only that can turn the First Amendment into a repository of government power. Plainly it limits power. The fact that Justices William Rehnquist, Antonin Scalia, and Anthony Kennedy as well as outstanding constitutional scholars like Charles Antieau, Walter Berns, or Daniel Dreisbach could even think that the First Amendment permits government aids to religion shows how desperately unable they were to control their policy preferences, which

75. Curry, *First Freedoms*, p. 215.

they read back into the past and into the words of the amendment.<sup>76</sup> Antieau sought to avoid dogmatism when he declared that all historical interpretations of the establishment clause seem reasonable and that all are "conjectural."<sup>77</sup> Some interpretations, however, are more reasonable than others and less conjectural.

Indeed, it is a fact, not an interpretation, that the unamended Constitution vests no power over religion and that the First Amendment vests no power whatever. It is a fact that the framers of the Constitution insisted that no limitations on the government's power over religion were necessary, because the government possessed only delegated authority, plus the authority necessary to execute the delegated powers; under no circumstances, argued the framers, could the government legislate on the subject of religion. They believed that nonexistent powers could not be exercised or abused, thus making all provisions against such a possibility superfluous. They believed that no need existed to declare that things shall not be done which there is no power to do.<sup>78</sup> They believed that the government, having no authority over religion, was powerless, therefore, even if the First Amendment never existed, to enact laws benefiting religion, with or without preference.

When introducing the amendments that became the Bill of Rights, Madison explicitly said that the "great object" was to "limit and qualify the powers of government" to ensure that powers granted could not be exercised in forbidden fields such as religion.<sup>79</sup> He told Jefferson that a Bill of Rights should be "so framed as not to imply powers not meant to be included in the enumeration."<sup>80</sup> To argue, as the nonpreferentialists do, that the establishment clause should be construed to permit nondiscriminatory aid to religion leads to the impossible conclusion that the First Amendment *added* to the powers of Congress even though it was framed to restrict Congress. It is not only an impossible conclusion; it is ridiculous. Not one state would have ratified such an

76. Antieau, Downey, and Roberts, *Freedom from Federal Establishment*, pp. 160–63, 208; Berns, *First Amendment*, pp. 7, 9.

77. Antieau, Downey, and Roberts, *Freedom from Federal Establishment*, p. 142.

78. *The Federalist*, no. 84.

79. "Amendments to the Constitution," *Madison Papers*, 12:204, June 8, 1789.

80. James Madison to Thomas Jefferson, Oct. 17, 1788, in *ibid.*, 11:297.

enhancement of national authority, especially if it increased the tax power. The nonpreferentialists' feat of transforming the words "Congress shall make no law" into an augmentation of power vindicates the prophecy of Federalist leaders who feared that, in Madison's words, "if an enumeration be made of our rights, will it not be implied, that everything omitted, is given to the general government?"<sup>81</sup>

Citing Justice Joseph Story's *Commentaries on the Constitution* is fashionable among the nonpreferentialists who think that his authority is on their side.<sup>82</sup> For example, Robert Cord invokes Story as part of his evidence that the First Amendment was not meant to "preclude Federal governmental aid to religion when it was provided on a nondiscriminatory basis."<sup>83</sup> Story did state that "Christianity ought to receive encouragement from the [national] State," but he did not mention which provision of the Constitution authorized that encouragement. In fact, Cord also quoted him as saying that "it was deemed advisable to exclude from the national government all power to act upon the subject. . . . Thus the whole power over the subject of religion is left exclusively to the State governments."<sup>84</sup> Cord also quoted Madison as saying that the national government had not the shadow of a power to meddle with religion, and Cord himself declared that "the First Amendment originally left the entire issue of governmental involvement with religion to the States."<sup>85</sup>

What then is the source of the government's authority to provide nonpreferential aid to religion? The nonpreferentialists, who tend to be conservatives, surely do not believe that the government can do whatever is not expressly prohibited to it; on the contrary, it should do only that which is enumerated or necessary to carry out delegated powers. It may benefit religion incidentally by the legitimate exercise of its powers, because a general enactment might apply to religious institutions.

81. Elliot, ed., *Debates*, 3:620.

82. Cord, *Separation of Church and State*, pp. 12-15; McClellan, "The Making and the Unmaking," p. 295; Berns, *First Amendment*, pp. 59-60, 71; Antieau, Downey, and Roberts, *Freedom from Federal Establishment*, p. 160.

83. Cord, *Separation of Church and State*, p. 15.

84. *Ibid.*, quoting *Commentaries on the Constitution*, secs. 1874, 1879.

85. *Ibid.*, p. 14.

The government might, for example, make grants to all nonprofit institutions if the grants are for secular services such as those provided by hospitals. Government may not use religious affiliation as a basis for the grants nor attempt to promote religion or aid a pervasively sectarian institution, but it may assist all hospitals, or orphanages, or colleges. In doing so, it is not exercising power over religion.

Nonpreferentialists show little real commitment to liberty, however, except rhetorically, so long as they insist on forcing religion and aid to religion on others, not just on those who do not want either but also on those who have conscientious objections. Those who believe in the sovereignty of private choice respecting religious matters rightfully resent coercion. The conservatism of the nonpreferentialists seems not to extend beyond matters involving the economy; they profess to favor minimalist government, keeping government off the backs of citizens, and deregulation wherever possible. In matters of religion, however, they are maximalist, eschewing *laissez-faire* and forcing the government on our backs.

Dean M. Kelley of the National Council of Churches has insightfully observed that the proponents of free enterprise in economics want to eradicate free enterprise in religion by having the government exercise an ever increasing role in "sponsoring, regulating, subsidizing, and assisting the people's religious activities." Kelley sees the establishment clause as "the perfect counterpart of the principle of 'free competition': the private parties in religion are to prosper or decline according to their own merits in the free marketplace . . . without governmental 'assistance,' restriction, regulation or interference."<sup>86</sup> The best way to help religion is "to *leave it alone*." "For government even to try to help religion is to hinder it," according to Kelley, who for religious reasons opposes religious exercises in the public schools, municipal religious displays, and legislative chaplains. He properly points out that far from "being welcomed as laudable accommodations to the religious needs of the people, these practices should be rejected as state proprietor-

86. Dean M. Kelley, "Free Enterprise in Religion, or How the Constitution Protects Religion and Religious Freedom," in *How Does the Constitution Secure Religious Freedom?*, edited by Robert A. Goldwin and Art Kaufman (Washington, D.C., 1986), pp. 11-12.



ships in religion—*prima facie* violations of the principle of free enterprise in the realm of religion.”<sup>87</sup>

Nonpreferentialists seem to have no historical memory. They write about the establishment clause as if it were an enemy of religion rather than religion’s bulwark, and they convert the clause into an antithesis of religious liberty, when in fact it is an additional guarantor of the rights of conscience. As the Presbyterian minister of South Carolina declared in 1777, “All establishments . . . are an infringement of religious liberty.”<sup>88</sup> The establishment clause, contrary to what the nonpreferentialists would have us believe, is a legacy not of Deists but of profoundly believing Christians who understood that religion should not be state-supported “for the essentially theological reason that religion is of its nature a personal, private interior matter of the individual conscience, having no relevance to the public concerns of the state.”<sup>89</sup>

Nonpreferentialism, unfortunately, is but a pose for those who think that religion needs to be patronized and promoted by government. When they speak of nonpreferential aid, they speak euphemistically as if they are not partisan. In fact they really are preferentialists. Being on the side of the angels by preferring religion over irreligion, a nonpreferential boast, is not the issue. The issue, rather, is whether religion needs the state, whether pious people require Caesar’s helping hand to serve God, and whether the rights of conscience thrive best when left alone. Nonpreferentialists prefer government sponsorship and subsidy of religion rather than allowing it to compete on its merits against irreligion and indifference. They prefer government nurture of religion because they mistakenly dread government neutrality as too risky, and so they condemn it as hostility. They prefer what they call, again euphemistically, accommodation. They reject the Madisonian view, which was actually no different from a conventional evangelical view, that religion will exist in greater purity without the aid of government. That was once a widespread religious belief. Nonpreferentialists prefer, however, to turn the clock back to the time when religion did not have to

87. *Ibid.*, p. 19.

88. Newton B. Jones, ed., “Writings of the Reverend William Tennent, 1740–1777,” *South Carolina Historical Magazine* 61 (1960): 197.

89. Murray, “Law and Prepossessions,” p. 29.

rely on private, voluntary support. For them the golden age ended when Massachusetts, the last state to do so, disestablished its public support of religion and no longer required every citizen to support the religion of his or her choice.

In the opinion of former attorney general Edwin Meese, “one of the founding principles” was that “it was an unfair burden for people of one religion to have to bear, by their taxes, the cost of another religion to which they did not personally subscribe.”<sup>90</sup> That misstates the founding principle. It was, rather, the one subscribed to by Jefferson, Madison, and Christian evangelists, namely, that to require people to support even the religion of their choice denied them their freedom of choice and their right to religious liberty; moreover such a requirement violated the wall of separation between government and religion by intruding government into a realm of sacred privacy.<sup>91</sup>

90. Meese, “Address before the Christian Legal Society,” pp. 4–5.

91. Jefferson said so in his Virginia Statute of Religious Freedom, Madison in his “Memorial and Remonstrance” (both cited in chap. 2), and the fundamentalists in “Religious Petitions Presented to the General Assembly of Virginia, 1774–1802,” Remonstrance of the Committees of the Several Baptist Associations in Virginia Assembled in Powhatan County, Virginia, Aug. 13, 1785, discussed in chap. 3 above.