

# 5 Framing the Establishment Clause

At the first session of the First Congress, Representative Madison on June 8, 1789, proposed for House approval a series of amendments to the Constitution.<sup>1</sup> He accompanied his presentation with a lengthy speech explaining his action and defending the value of a

1. *The Debates and Proceedings in the Congress of the United States, Compiled from Authentic Materials*, edited by Joseph Gales and W. W. Scaton, 42 vols. (Washington, D.C., 1834–56), 1:448–59. This source, commonly known by its book-binder's title as the *Annals of Congress*, will hereafter be cited as *Annals*.

bill of rights, but he did not discuss the proposal relating to an establishment of religion. The section on religion read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."<sup>2</sup>

The term "national religion" has ambiguous connotations. It might have meant quite narrowly a nationwide preference for one denomination over others or, more broadly, preference for Christianity, that is, for all Christian denominations over non-Christian religions. Proponents of a narrow interpretation of the establishment clause see in the word "national" proof of their contention that nothing more was intended than a prohibition against the preference for one church or religion over others. Madison did not, at this time or when the proposal was debated, explain what he meant by the clause "nor shall any national religion be established."

Taken in the context of Madison's recommended amendments, it seems likely that "national" in this case signified action by the national government, because his next recommendation proposed a restriction upon the powers of the states: "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."<sup>3</sup>

In other words, the term "national" signified that the prohibition against an establishment of religion—whatever that meant—applied to Congress only and not to the states. That is, Congress had no power to enact an establishment of religion or to interfere with state establishments. Perhaps the word "national" was superfluous, but Madison aimed at allaying apprehensions on the part of those states that maintained their own establishments of religion. In any case, if there is any validity to the argument that "national" signified the intention to prohibit only the establishment of a single religion or sect, the fact remains that the word "national" was deleted and does not appear in the final version of the amendment, thereby indicating that Congress rejected that intention and meant something broader by its ban on an establishment of religion.

2. *Ibid.*, 1:451.

3. *Ibid.*, 1:452.

Without debate, Madison's recommendations for amendments were referred for consideration to a select committee of the House, composed of one member from each state, including Madison.<sup>4</sup> Although we know nothing of the committee's deliberations, which took one week, its report to the House shows that Madison was the dominating figure because his proposed amendments remained intact with but slight changes in phraseology in the interest of brevity. From the proposal on religion the committee deleted the clause on civil rights and the word "national." The proposed amendment then read: "No religion shall be established by law, nor shall the equal rights of conscience be infringed."<sup>5</sup> The report of the select committee to the House merely recommended a redrafting of the original proposals; no explanation of the changes was included.

The House, sitting as a Committee of the Whole, began and ended its debate on the amendment on August 15. Our only account of the debate, in the *Annals of Congress*, is more in the nature of a condensed and paraphrased version than it is a verbatim report.<sup>6</sup> The account is brief enough to be given here in full:

Saturday, August 15

AMENDMENTS TO THE CONSTITUTION

The House again went into a Committee of the Whole on the proposed amendments to the constitution, Mr. Boudinot in the chair.

The fourth proposition being under consideration, as follows:

Article I. Section 9. Between paragraphs two and three insert "no religion shall be established by law, nor shall the equal rights of conscience be infringed."

Mr. Sylvester had some doubts of the propriety of the mode of

4. In addition to Madison, the committee included three other signers of the Constitution: Abraham Baldwin of Georgia, Roger Sherman of Connecticut, and George Clymer of Pennsylvania. Also on the committee were Aedanus Burke of South Carolina, the only Anti-Federalist; Nicholas Gilman of New Hampshire; Egbert Benson of New York; Benjamin Goodhue of Massachusetts; Elias Boudinot of New Jersey; and John Vining of Delaware, who was chairman. *Ibid.*, 1:691.

5. *Ibid.*, 1:757.

6. See Appendix.

expression used in this paragraph. He apprehended that it was liable to a construction different from what had been made by the committee. He feared it might be thought to have a tendency to abolish religion altogether.

Mr. Vining suggested the propriety of transposing the two members of the sentence.

Mr. Gerry said it would read better if it was, that no religious doctrine shall be established by law.

Mr. Sherman thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the constitution to make religious establishments; he would, therefore, move to have it struck out.

Mr. Carroll—As the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand; and as many sects have concurred in opinion that they are not well secured under the present constitution, he said he was much in favor of adopting the words. He thought it would tend more towards conciliating the minds of the people to the government than almost any other amendment he had heard proposed. He would not contend with gentlemen about the phraseology, his object was to secure the substance in such a manner as to satisfy the wishes of the honest part of the community.

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

Mr. Huntington said that he feared, with the gentleman first up

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

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

Mr. Madison thought, if the word national was inserted before religion, it would satisfy the minds of honorable gentlemen. He believed that the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word national was introduced, it would point the amendment directly to the object it was intended to prevent.

Mr. Livermore was not satisfied with that amendment; but he did not wish them to dwell long on the subject. He thought it would be better if it was altered, and made to read in this manner, that Congress shall make no laws touching religion, or infringing the rights of conscience.

Mr. Gerry did not like the term national, proposed by the gentleman from Virginia, and he hoped it would not be adopted by the House. It brought to his mind some observations that had taken place in the conventions at the time they were considering the present constitution. It had been insisted upon by those who were

called antifederalists, that this form of Government consolidated the Union; the honorable gentleman's motion shows that he considers it in the same light. Those who were called antifederalists at that time complained that they had injustice done them by the title, because they were in favor of a Federal Government, and the others were in favor of a national one; the federalists were for ratifying the constitution as it stood, and the others not until amendments were made. Their names then ought not to have been distinguished by federalists and antifederalists, but rats and antirats.

Mr. Madison withdrew his motion, but observed that the words "no national religion shall be established by law," did not imply that the Government was a national one; the question was then taken on Mr. Livermore's motion, and passed in the affirmative, thirty-one for, and twenty against it.<sup>7</sup>

The debate as unreliably reported was sometimes irrelevant, usually apathetic and unclear. Ambiguity, brevity, and imprecision in thought and expression characterize the comments of the few members who spoke. That the House understood the debate, cared deeply about its outcome, or shared a common understanding of the finished amendment seems doubtful. Only a few members participated.

Not even Madison himself, dutifully carrying out his pledge to secure amendments, seems to have troubled to do more than was necessary to get something adopted in order to satisfy the popular clamor for a bill of rights and deflate Anti-Federalist charges that the new national government imperiled liberty. Indeed, Madison agreed with Roger Sherman's statement that the amendment was "altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the constitution to make religious establishments." The difficulty, however, lies in the fact that neither Sherman, Madison, nor anyone else except Benjamin Huntington took the trouble to define what he was talking about. What were "religious establishments"? Huntington of Connecticut understood that government support of ministers or of places of worship came within the meaning of the term. But what did the select committee on amendments intend by recommending that

7. *Annals*, 1:757-59.

“no religion shall be established by law”? Madison’s statement that the words meant “that Congress should not establish a religion” hardly showed the clarity for which we might have hoped.

On two occasions, however, he commented in such a way as to give some force to the arguments of those who defend a narrow interpretation of the establishment clause. In his answer to Sherman, made after Daniel Carroll’s comment, Madison declared that the amendment was intended to satisfy “some of the State Conventions,” which feared that Congress “might infringe the rights of conscience, and establish a national religion. . . .” At the time he spoke, he had the recommendations from four states. That of New Hampshire, drafted by the same Samuel Livermore who was present in Congress and took an essential part in the debate, was very much in line with his own thinking. But the recommendations from Virginia, New York, and North Carolina used the language of no preference. If Madison’s intent was merely to yield to their requests, whatever may have been his own ideas on the subject, he might have meant by “national religion” that Congress should not prefer one denomination over others.

That such was his intent seems possible in view of his response to Huntington. The reporter present tells us of Madison: “He believed that the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform. He thought that if the word national was introduced, it would point the amendment directly to the object it was intended to prevent.” Here Madison himself used the language of no preference or no preeminence. Yet we know from other evidence (reviewed later) that Madison himself did not regard the element of preference as indispensable to the idea of an establishment of religion. If all denominations combined together or if the government supported all, giving preference to none, the result would in his mind have been an establishment.

Huntington’s ambiguous statement probably referred to the eastern states (contrasted with southern and middle) such as his own, Connecticut, where taxes for religion were euphemistically called “contributions”<sup>8</sup> and were regulated by parish bylaws. Huntington, therefore,

8. Under Connecticut’s Toleration Act of 1784, non-Congregationalists

probably expressed a fear that state establishments might be interfered with by Congress. If so, Madison’s reply makes sense, because he was saying only that the proposed amendment restricted Congress but not the states. Even his use of the language of no preference makes sense if construed as a reply in kind to Huntington’s *ironic* reference to the effects in Rhode Island of the lack of an establishment. That is, Madison may have been saying, in effect, “What the people fear, Mr. Huntington, is not the situation in Rhode Island, which has no establishment of religion, but that in Connecticut, where one sect has obtained a preeminence, or two, the Congregationalists and Episcopalians, have combined together and compel others to conform.” If this was what Madison meant, then his use of the language of no preference revealed one intent of the proposed amendment but not its only intent.

Livermore’s motion for a change of wording apparently expressed what Madison meant by his use of the word “national” and satisfied the Committee of the Whole. The proposed amendment, adopted by a vote of 31 to 20, then read: “Congress shall make no laws touching religion, or infringing the rights of conscience.” But a few days later, on August 20, when the House took up the report of the Committee of the Whole and voted clause by clause on the proposed amendment, an additional change was made. Fisher Ames of Massachusetts moved that the amendment read: “Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.”<sup>9</sup> Without debate the House adopted Ames’s motion by the necessary two-thirds vote. Apparently the House believed that the

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who wished to be exempt from the tax for the support of the town Congregational Church could pay their tax to the church they regularly attended, after obtaining a certificate proving that they “contributed their share and proportion to supporting the public worship and ministry thereof. . . .” See M. Louise Greene, *Development of Religious Liberty in Connecticut* (Boston, 1905), p. 372. The use of “contribution” as a euphemism or synonym for “tax” appeared in other states as well. In Virginia, for example, the resolution of the state legislature designed to carry out a motion for a general assessment for religion provided “That the people . . . ought to pay a moderate tax or contribution annually, for the support of the Christian religion. . . .” Quoted in H. J. Eckenrode, *Separation of Church and State in Virginia* (Richmond, Va., 1910), p. 86.

9. *Annals*, 1:796.

draft of the clause based on Livermore's motion might not satisfy the demands of those who wanted something said specifically against establishments of religion. The amendment as submitted to the Senate reflected a stylistic change that gave it the following reading: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."

The Senate began debate on the House amendments on September 3 and continued through September 9. The debate was conducted in secrecy, and no record exists but the bare account of motions and votes in the *Senate Journal*. According to the record of September 3, three motions of special interest here were defeated on that day.<sup>10</sup> These motions restricted the ban in the proposed amendment to establishments preferring one sect above others. The first motion would have made the clause in the amendment read: "Congress shall make no law establishing one religious sect or society in preference to others." After the failure of this motion and of another to kill the amendment, a new motion was made to change it to read: "Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society." The final defeated motion restated the same thought differently: "Congress shall make no law establishing any particular denomination of religion in preference to another." The Senate then adopted the language of the House: "Congress shall make no law establishing religion."

The failure of these three motions, each of which seemed to express a narrow intent, and the Senate's adoption of the House version prove that the Senate intended something broader than merely a ban on preference to one sect. Yet if anything is really clear about the problem of "meaning" and "intent," it is that little is clear; when the Senate returned to the clause six days later, it altered the House amendment to read: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion." Like the

10. *Journal of the First Session of the Senate of the United States* (Washington, D.C., 1820), p. 70. The modern scholarly edition is Linda Grant De Pauw, ed., *Documentary History of the First Federal Congress of the United States of America*, 3 vols. (Baltimore, Md., 1972); see vol. 1, *Senate Legislative Journal*, p. 151; for the House's adamantness, see vol. 3, *House of Representatives Journal*, p. 228.

three previously defeated motions, this one had the unmistakable meaning of limiting the ban to acts that prefer one denomination over others or that, to put it simply, establish a single state church.<sup>11</sup>

Appearances can be deceiving, however. A Baptist memorial of 1774 had used similar language: "... the magistrate's power extends not to the establishing any articles of faith or forms of worship, by force of laws." Yet the Baptists, who advocated separation of government and religion, opposed nondiscriminatory government aid to all sects—proving once again how misleading language can be.<sup>12</sup> To Baptists, if law did not extend to articles of faith, no establishment of religion was possible. And, as the 1780 returns from Massachusetts towns showed, people who endorsed the principle that no denomination should be subordinated to any other or that no denomination should have preference of any kind favored separation of church and state.<sup>13</sup> In short, nonpreferentialism could signify voluntarism or the private support of religion.

The Senate's wording provoked the House to take action that made *its* intent clear, as the next step in the drafting of the amendment revealed. In voting on the Senate's proposed amendments, the House accepted some and rejected others, including the Senate's article on religion. To resolve the disagreement between the two branches, the House proposed a joint conference committee. The Senate refused to recede from its position but agreed to the proposal for a conference committee. The committee, a strong and distinguished one, consisted of Madison as chairman of the House conferees, joined by Sherman and Vining, and Ellsworth as chairman of the Senate conferees, joined by Paterson and Carroll. Four of the six men had been influential members of the Constitutional Convention. The House members of the conference flatly refused to accept the Senate's version of the amend-

11. *Journal of First Session*, p. 77; De Pauw, ed., *Documentary History*, 1:166.

12. For the Baptist statement in a memorial to the Continental Congress of October 1774, see Alvah Hovey, *The Life and Times of the Reverend Isaac Backus* (Boston, 1858), p. 209; the entire document covers pp. 204–10.

13. See above, chap. 2, note 9 and related text. See also below, chap. 3, notes 53–58 and related text, for additional examples of the language of no preference being used to mean no government aid whatever.

ment on religion, indicating that the House would not be satisfied with merely a ban on preference of one sect or religion over others. The Senate conferees abandoned the Senate's version, and the amendment was redrafted to give it its present phraseology. On September 24, Ellsworth reported to the Senate that the House would accept the Senate's version of the other amendments provided that the amendment on religion "shall read as follows: Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>14</sup> On the same day, the House sent a message to the Senate verifying Ellsworth's report.<sup>15</sup> On the next day, September 25, the Senate by a two-thirds vote accepted the condition laid down by the House.<sup>16</sup> Congress had passed the establishment clause.

The one fact that stands out is that Congress very carefully considered and rejected the wording that seems to imply the narrow interpretation. The House's rejection of the Senate's version of the amendment shows that the House did not intend to frame an amendment that banned only congressional support of one sect, church, denomination, or religion. The Senate three times defeated versions of the amendment embodying that narrow interpretation, on a fourth vote adopted such a version, and finally abandoned it in the face of uncompromising hostility by the House. The amendment's framers definitely intended something broader than the narrow interpretation that some judges and scholars have given it. The amendment reflected the fundamental fact that the framers of the Constitution had not empowered Congress to act in the field of religion. The "great object" of the Bill of Rights, as Madison explicitly said when introducing his draft of amendments to the House, was to "limit and qualify the powers of Government"<sup>17</sup> for the purpose of making certain that the powers granted could not be exercised in forbidden fields, such as religion.

Madison also wanted to limit the state governments. He knew that some states had no bills of rights and others "very defective ones." He believed that the states constituted a greater danger to personal liber-

14. *Journal of the First Session*, p. 86.

15. *Ibid.*, p. 87.

16. *Ibid.*, p. 88; De Pauw, ed., *Documentary History*, 1:186, 189, 192.

17. *Annals*, 1:454.

ties than the new national government. Accordingly, he proposed an amendment that read: "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." He argued that the states would likely abuse their powers if not controlled by "the general principle, that the laws are unconstitutional which infringe" the people's rights. When a congressman moved to strike the proposed restriction on state powers, Madison carried the House by the necessary two-thirds majority after he argued that this was "the most valuable amendment in the whole list." The amendment was defeated, however, in the Senate. Had the Senate passed it, a constitutional basis would have existed for interpreting the rights of conscience as being contradictory to establishments of religion. Such an interpretation had to wait until long after the Fourteenth Amendment imposed restrictions on the states. In any case, Madison's advocacy of his "most valuable amendment" shows that the principle of federalism was by no means the main force behind what became the First Amendment.<sup>18</sup>

The history of the drafting of the establishment clause does not provide us with an understanding of what was meant by "an establishment of religion." To argue, however, as proponents of a narrow interpretation do, that the amendment permits congressional aid and support to religion in general or to all denominations without discrimination leads to the impossible conclusion that the First Amendment added to Congress's power. Nothing supports such a conclusion. Every bit of evidence goes to prove that the First Amendment, like the others, was intended to restrict Congress to its enumerated powers. Because Congress possessed no power under the Constitution to legislate on matters concerning religion, Congress has no such power even in the absence of the First Amendment. It is therefore unreasonable, even fatuous, to believe that an express prohibition of power—"Congress shall make no law respecting an establishment of religion"—vests or creates the power, previously nonexistent, of supporting religion by aid

18. Madison's speech to the House, June 8, 1789, is conveniently reprinted in *The Bill of Rights: A Documentary History*, edited by Bernard Schwartz, 2 vols. (New York, 1971), 2:1027, 1033, 1113; pp. 1145-58 treat the Bill of Rights in the Senate.

to all religious groups. The Bill of Rights, as Madison said, was not framed "to imply powers not meant to be included in the enumeration."<sup>19</sup>

Little or no new light on the meaning of the establishment clause derives from the deliberations of the state legislatures to which the amendments to the Constitution were submitted for ratification. Records of state debates are nonexistent; private correspondence, newspapers, and tracts provide no help.

The admission of Vermont to the Union made necessary the ratification by eleven states. Nine approved the Bill of Rights within six months. The four recalcitrant states that by mid-1790 had not yet taken action on the proposed amendments were Virginia, Massachusetts, Connecticut, and Georgia; indeed, the last three states took no action until 1939 when, on the sesquicentennial anniversary of the Constitution, they belatedly ratified the Bill of Rights.<sup>20</sup>

Of the three states that failed to ratify the Bill of Rights until 1939, Georgia took the position that amendments were unnecessary until experience under the Constitution showed the need for them.<sup>21</sup> Connecticut's lower house voted to ratify in 1789 and again the following year, but the state senate, apparently in the belief that the Bill of Rights was superfluous, adamantly refused. Yankee Federalists in the state seem to have thought that any suggestion that the Constitution was not perfect would add to the strength of the Anti-Federalists. The same sentiment prevailed in Massachusetts. There Federalist apathy to the Bill of Rights was grounded on satisfaction with the Constitution as it was unamended, while the Anti-Federalists expressed more interest

19. James Madison to Thomas Jefferson, Oct. 17, 1788, in William T. Hutchinson et al., eds., *The Papers of James Madison*, ser. in progress (Chicago, 1962-), 11:297.

20. David M. Matteson, "The Organization of the Government under the Constitution," in *History of the Formation of the Union under the Constitution*, directed by Sol Bloom (Washington, D.C., 1943), pp. 316-19. Robert A. Rutland, *The Birth of the Bill of Rights, 1776-1791* (Chapel Hill, N.C., 1955), pp. 213-18; Bernard Schwartz, ed., *The Bill of Rights: A Documentary History*, 2 vols. (New York, 1971), 2:1171-1203, conveniently collects the primary sources on ratification.

21. Matteson, "Organization of the Government," pp. 325-28.

in amendments that would weaken the national government and strengthen the states than in protecting personal liberties. The Bill of Rights was caught between conflicting party interests, and as a result Massachusetts failed to take final action on the proposed amendments. The lower house adopted most amendments, as did the upper; both approved of what became the First Amendment, the Second through the Seventh, and the Ninth, but a special committee dominated by Anti-Federalists urged that all the amendments that Massachusetts had recommended when ratifying the Constitution should be endorsed again by the state before it finally concurred in the proposals from Congress. Jefferson, the secretary of state, believed that Massachusetts had ratified, bringing the number of ratifying states to the necessary ten, but a Massachusetts official, replying to Jefferson's query, stated, "It does not appear that the Committee ever reported any bill." Thus, because of the inaction of a committee charged with reconciling the measures taken by both houses, Massachusetts failed to approve officially the Bill of Rights.<sup>22</sup>

The circumstances surrounding ratification in Virginia are of particular interest. The state senate held up ratification for nearly two years while Anti-Federalists attacked the amendment as inadequate. The eight state senators who opposed it explained their vote publicly in these words:

The 3d amendment [the First Amendment] recommended by Congress does not prohibit the rights of conscience from being violated or infringed: and although it goes to restrain Congress from passing laws establishing any national religion, they might, notwithstanding, levy taxes to any amount, for the support of religion or its preachers; and any particular denomination of [C]hristians might be so favored and supported by the General Government, as to give it a decided advantage over others, and in process of time render it as powerful and dangerous as if it was established as the national religion of the country. . . . This amendment then, when

22. Thomas Jefferson to Christopher Gore, Aug. 8, 1791, in *Documentary History of the Constitution of the United States of America, 1786-1870. Derived from Records, Manuscripts and Rolls Deposited in the Bureau of Rolls and Library of the Department of State*, 5 vols. (Washington, D.C., 1894-1905), 5:177.

considered as it relates to any of the rights it is pretended to secure, will be found totally inadequate, and betrays an unreasonable, unjustifiable, but a studied departure from the amendment proposed by Virginia.<sup>23</sup>

Taken out of context and used uncritically, this statement by the eight Virginia senators supposedly proves that the establishment clause had only the narrowest intent of nonpreferentialism, that the Virginia legislators so understood it, and that the state eventually approved of it with only that narrow intent attached. The conclusion is drawn that the amendment did not purport to ban government aid to religion generally or to all denominations without discrimination. However, examination of the intricate party maneuverings and complex motives in the Virginia ratification dispute sheds a different light on the senators' statement.

Virginia's Anti-Federalists, led by Patrick Henry and U.S. senators Richard Henry Lee and William Grayson, had opposed the ratification of the Constitution for a variety of reasons. Chief among these was the belief that the Constitution established too strong a central government at the expense of the states. For example, the Anti-Federalists wanted amendments to the Constitution that would restrict Congress's commerce and tax powers. The same people led the movement for amendments that would protect personal liberties, but many cried out against the absence of a bill of rights more for the purpose of defeating the Constitution than of actually getting such a bill of rights.

23. *Journal of the Senate of the Commonwealth of Virginia; Begun and Held in the City of Richmond, on Monday, the 18th Day of October, . . . 1789* [binder's title, *Journal of the Senate, 1785 to 1790*] (Richmond, Va., 1828), p. 62. Quoted by John Courtney Murray, "Law or Prepossessions," and quoted by Edward S. Corwin, "Supreme Court as National School Board," *Law and Contemporary Problems* 14 (Winter 1949): 43, 12, respectively. The statement by the eight Virginia senators was revived and quoted by an advocate of the narrow interpretation of the establishment-of-religion clause in "Brief for Appellees," pp. 51-54, filed in the case of *McCullum v. Board of Education*, 333 U.S. 203 (1948). Both Murray and Corwin, who were wrong, quoted the brief rather than *Journal of the Senate* and drew their conclusions on this matter from the brief alone without investigating the context of the statement by the eight senators.

When Congress had considered amending the Constitution, the Anti-Federalists sought to secure amendments that would aggrandize state powers, but in this effort they failed. In the ratification controversy, therefore, the strategy of Virginia's Anti-Federalists hinged on the defeat of the proposed Bill of Rights in order to force Congress to reconsider the whole subject of amendments. The Federalists, on the other hand, eagerly supported the Bill of Rights in order to prevent additional amendments that might hamstring the national government.

On November 30, 1789, Virginia's lower house, dominated by the Federalists, quickly passed all the amendments proposed by Congress "without debate of any consequence."<sup>24</sup> But the opposition party controlled the state senate. "That body," reported Edmund Randolph to Washington, "will attempt to postpone them [the amendments]; for a majority is unfriendly to the government."<sup>25</sup> As a member of the Virginia lower house reported to Madison, the state senate was inclined to reject the amendments not from dissatisfaction with them but from apprehension "that the adoption of them at this time will be an obstacle to the chief objection of their pursuit, the amendment on the subject of direct taxation."<sup>26</sup> As Randolph had predicted, the senate, by a vote of 8 to 7, did decide to postpone final action on what are now the First, Sixth, Ninth, and Tenth Amendments until the next session of the legislature, thereby allowing time for the electorate to express itself. It was on this occasion that the eight senators in question made their statement on the allegedly weak Bill of Rights by presenting themselves as champions of religious liberty and advocates of separation between government and religion.

Madison remained unworried by this tactic, confidently predicting that the action of the senators would boomerang against them. "The

24. Edmund Randolph to George Washington, Dec. 6, 1789, in *Documentary History . . . Department of State*, 5:222-23.

25. *Ibid.*

26. Hardin Burnley to James Madison, Dec. 5, 1789, in *Madison Papers*, 12:460. See also James Madison to George Washington, Dec. 5, 1789, in *ibid.*, 12:459; Irving Brant, *James Madison, Father of the Constitution* (Indianapolis, 1950), pp. 286, 491 (n. 15).

miscarriage of the third article [the First Amendment], particularly, will have this effect," he wrote to George Washington.<sup>27</sup> His confidence is explainable on several counts. First, he knew that the First Amendment had the support of the Baptists, the one group most insistent upon demanding a thorough separation between government and religion.<sup>28</sup> Second, he knew that the eight senators did not come before the electorate with clean hands. Like Henry and Lee, who laid down their strategy for them, they had consistently voted against religious liberty and in favor of taxes for religion. Their legislative record on this score was well known. By contrast, the seven senators who favored ratification of the First Amendment had stood with Jefferson and Madison in the fight between 1784 and 1786 against a state establishment of religion and for religious liberty.<sup>29</sup> Finally, Madison reasoned that the statement by the eight senators was an inept piece of propaganda with little chance of convincing anyone because it was so obviously misleading and inaccurate. The eight senators alleged that "any particular denomination of Christians might be so favored and supported by the general government, as to give it a decided advantage over others"—a construction of the First Amendment that not even proponents of the narrow interpretation would accept—and they also asserted that the amendment "does not prohibit the rights of conscience from being violated or infringed"—despite the positive statement in the amendment that Congress shall not abridge the free exercise of religion. It is absurd to argue that "in the search for the intentions of the Founding Fathers as embodied in the First Amendment, the statement of the Virginia Senate is probably the most revealing extant document."<sup>30</sup> It is difficult to believe that those who rejected the establishment clause understood it better than its framers, that the Anti-Federalists knew better than Madison and his cohorts, and that those who supported an

27. Matteson, "Organization of the Government," pp. 321–22; James Madison to George Washington, Nov. 20, 1789, in *Madison Papers*, 12:453.

28. *Madison Papers*, 12:453.

29. See Brant, *James Madison*, pp. 286–87, 491 n. 16, for the voting records.

30. 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), p. 145.

establishment of religion in Virginia revealed the criteria for interpreting the limitation on Congress's powers. Moreover, the amendment proposed by Congress banned a law even *respecting* an establishment; the amendment proposed by Virginia and endorsed by the eight senators was framed in nonpreferentialist language—no preference to one sect over others, and was therefore not nearly as protective in its text as the amendment proposed by Congress.

In the end, Madison's confidence proved justified. On December 15, 1791, after a session of inaction on the Bill of Rights, the state senate finally ratified without a recorded vote. In the context of Anti-Federalist maneuverings, there is every reason to believe that Virginia supported the First Amendment with the understanding that it had been misrepresented by the eight senators. There is no reason to believe that Virginia ratified with the understanding that the amendment permitted any government aid to religion.

What conclusions can one come to, then, in connection with ratification of the First Amendment by the states? In Virginia, the one state for which there is some evidence, we can arrive only at a negative conclusion: the narrow interpretation of the establishment clause is insupportable. In nine other states there was perfunctory ratification, with no record of the debates, and in the remaining three states there was inaction. Therefore, it is impossible to state on the basis of ratification alone the general understanding of the establishment clause. But the legislative history of the framing of the clause demonstrates that Congress rejected a narrow or nonpreferentialist intent. And that history, seen in the context of the drive to add a bill of rights to the Constitution in order to restrict the powers of the national government, proves that the framers of the establishment clause meant to make explicit a point on which the entire nation agreed: the United States had no power to legislate on the subject of religion.