"Nonpreferential" Aid to Religion: A False Claim About Original Intent

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“NONPREFERENTIAL” AID TO RELIGION: A FALSE CLAIM ABOUT ORIGINAL INTENT

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Professor Kurland usefully reviews the framing of the religion clauses and draws some of the lessons that emerge from that review.¹ What he says about the first amendment is so sensible and so studiously noncontroversial that one can hardly disagree with it. He greatly overstates his casual assertion that the framers of the fourteenth amendment did not intend to apply the Bill of Rights to the states, but I have discussed that elsewhere.² Consequently, I will have little to say about his Article as such. Instead, I will build on his Article to examine a recurring controversy about the meaning of the establishment clause. I will draw on Professor Kurland’s Article, on a useful new book by Thomas Curry,³ and on my own review of the relevant history. This history refutes one important claim about the establishment clause—that the Framers specifically intended to permit government aid to religion so long as that aid does not prefer one religion over others.

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³ T. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment (1986).
The theory that the establishment clause forbids only preferential aid has long been a favorite of those who support government aid to religion. It does not go away despite repeated rejection by the United States Supreme Court. In the round of establishment clause debate triggered by the political coalition that elected Ronald Reagan to the Presidency, the "no preference" argument has been stated in one form or another by Attorney General Edwin Meese, Chief Justice William Rehnquist, political scientists Michael Malbin and Robert Cord, law professor Rodney Smith, and my former student, Martin Nussbaum. Malbin's pamphlet and Cord's book have become standard authorities for supporters of government aid to religion.

Professor Tushnet's prediction that Cord would be ignored was erroneous. Justice O'Connor's concurrence in Wallace v. Jaffree cites Cord, and Justice White's dissent was receptive. Justice Rehnquist's dissent drew heavily on Cord's history without citing it. Justice Stevens' opinion for the majority rejected Justice Rehnquist's conclusions on the basis of precedent, but it did not refute Justice Rehnquist's account of history.

13. See id. at 90-91 (White, J., dissenting).
14. See id. at 92-106 (Rehnquist, J., dissenting).
15. Id. at 52-55 (opinion of the Court).
16. While this Comment was in press, Professor Leonard Levy published a book rejecting the nonpreferentialist thesis for reasons that are only partly consistent with the reasons...
The prominence and longevity of the nonpreferential aid theory is remarkable in light of the weak evidence supporting it and the quite strong evidence against it. I do not mean to overstate what we know about the establishment clause. Neither its history nor its text offers us a single unambiguous meaning. But they can eliminate some possible meanings, and to do that is real progress.17 So long as the debate is dominated by a false claim, it is hard to discuss the real issues.

In challenging a politically important claim and labeling it as false, I am self-consciously facing the dangers Professor Kurland highlighted when he quoted Judge Hand's metaphor of Martin Luther and Erasmus.18 The dangers are real, but the point is overstated. The force of the metaphor derives from the fallacy of the excluded middle. Scholars may contribute their knowledge or insight to public debate on important issues. They may contribute it in a form that is understandable to a policymaker, or even to the public, consistently with their duty of rigorous intellectual honesty. Scholars should not feel constrained to publish only turgid prose in obscure journals. They should not leave the public debate to those who feel no scruples whatever to conform their claims to the evidence. Even an Erasmus may speak to the press, testify to a congressional committee, or state a carefully considered claim in forceful language.

I. THE NONPREFERENTIAL AID CLAIM

There are several versions of the nonpreferential aid argument, but all reach substantially the same conclusion. The claim is that the framers of the religion clauses intended a specific meaning with respect to the problems now treated under the establishment clause: government may not prefer one religion over others, but it may aid all religions evenhandedly. Under this view, the Supreme

Court’s more expansive interpretation is a usurpation that remains illegitimate no matter how long the Court adheres to it.

This claim is false. The framers of the religion clauses certainly did not consciously intend to permit nonpreferential aid, and those of them who thought about the question probably intended to forbid it. In fact, substantial evidence suggests that the Framers expressly considered the question and that they believed that nonpreferential aid would establish religion. To assert the opposite as historical fact, and to charge the Supreme Court with usurpation without acknowledging the substantial evidence that supports the Court’s position, is to mislead the American people.

The fact is that the First Congress repeatedly rejected versions of the establishment clause that would have permitted nonpreferential aid, and nothing in the sparse legislative history gives much support to the view that the Framers intended to permit nonpreferential aid. Proposals for nonpreferential financial aid were squarely rejected in Maryland and Virginia in 1785 and 1786, amidst much public debate. No state offered nonpreferential aid to churches, and only Maryland and Virginia seriously proposed such aid. Some of the New England states provided financial aid to more than one church, but these systems were preferential in practice and were the source of bitter religious strife. There is no evidence that those schemes were the model for the establishment clause.

The Framers also had a second, less considered intention. Both the states and the federal government openly endorsed Protestantism and provided a variety of preferential, nonfinancial aid to Protestants. This aid was wholly noncontroversial, because the nation was so uniformly Protestant and hostile to other faiths. The early preference for Protestantism is not a precedent for nonpreferential aid, and it is not an attractive model for establishment clause interpretation. The Framers’ generation thought about establishment clause issues in the context of financial aid; they did

19. See infra notes 26-38 and accompanying text.
20. See infra notes 52-96 and accompanying text.
21. See infra notes 101-23 and accompanying text.
22. See infra notes 124-35 and accompanying text.
23. See infra notes 136-43 and accompanying text.
24. See infra notes 223-28 and accompanying text.
not think about those issues in connection with nonfinancial aid.\textsuperscript{25} We can make better sense of the establishment clause if we follow what the Framers did when they were thinking about establishment. Thus, to the extent that the Framers’ intent is thought to matter, the relevant intent is their analysis of financial aid to churches.

II. The Best Evidence of the Framers’ Intent: The Text of the Establishment Clause

A. The Rejected Drafts

Professor Kurland mentions in passing the most important fact concealed by the proponents of nonpreferential aid: the First Congress considered and rejected at least four drafts of the establishment clause that explicitly stated the “no preference” view.\textsuperscript{26} So far as we can tell from the legislative journal, the issue was squarely posed in the Senate and again in the Conference Committee.

The House of Representatives sent to the Senate a draft of the establishment clause somewhat like the version ultimately ratified:

\begin{quote}
Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.\textsuperscript{27}
\end{quote}

The first motion in the Senate clearly presented the “no preference” position. The motion was to strike out “religion, or
prohibiting the free exercise thereof,” and to insert, “one religious sect or society in preference to others.” The motion was first rejected, and then passed. The proposal on the floor then read:

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

Next, the Senate rejected two substantively similar substitutes. First, the Senate rejected language providing:

Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society.

Second, it rejected an alternative that stated:

Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.

The two motions to amend by substitution appear to have presented stylistic choices. But the first vote appears to have been substantive. At the very least, these three drafts show that if the First Congress intended to forbid only preferential establishments, its failure to do so explicitly was not for want of acceptable wording. The Senate had before it three very clear and felicitous ways of making the point.

Still later the same day, the Senate appears to have abandoned the “no preference” position. It adopted a draft that spoke of all religion generically:

28. See 1 Documentary History, supra note 27, at 151 (Senate Journal). This motion also deleted the free exercise clause, but that deletion does not seriously affect the analysis. The Senate also voted on two nonpreferential drafts that included the free exercise clause. See infra notes 32 & 34 and accompanying text. The two issues were ultimately separated, the free exercise clause was adopted, and the nonpreferential drafts of the establishment clause were rejected. See infra notes 35-36 and accompanying text.

29. 1 Documentary History, supra note 27, at 151 (Senate Journal).

30. Id.

31. Id.

32. Id.
Congress shall make no law establishing religion, or prohibiting
the free exercise thereof.\textsuperscript{33}

A week later, the Senate again changed its mind and adopted the
narrowest version of the establishment clause considered by either
House:

Congress shall make no law establishing articles of faith or a
mode of worship, or prohibiting the free exercise of
religion. . . .\textsuperscript{34}

The House of Representatives rejected this version. James
Madison and two others represented the House on the Conference
Committee\textsuperscript{35} that produced the version of the establishment clause
ultimately ratified:

Congress shall make no law respecting an establishment of reli-
gion, or prohibiting the free exercise thereof. . . .\textsuperscript{36}

The establishment clause actually adopted is one of the broadest
versions considered by either House. It forbids not only establish-
ments, but also any law respecting or relating to an establish-
ment.\textsuperscript{37} Most important, it forbids any law respecting an establish-
ment of "religion." It does not say "a religion," "a national
religion," "one sect or society," or "any particular denomination of
religion." It is religion generically that may not be established.

Malbin is a major proponent of the "no preference" position. While
parsing the legislative history for support of his position, he
argues that there is a big difference between establishing "a

\textsuperscript{33} Id.
\textsuperscript{34} Id. at 166.
\textsuperscript{35} See id. at 181.
\textsuperscript{36} U.S. CONST. amend. I; 3 DOCUMENTARY HISTORY, supra note 27, at 228 (House Jour-
nal). There is a mistranscription in the Annals of Congress, substituting "a" for "the"
before "free exercise." 1 ANNALS OF CONG. 913 (J. Gales ed. 1834) (Sept. 24, 1789).
\textsuperscript{37} See Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). One effect of forbidding any law
"respecting" an establishment is that a statute requiring a state to disestablish religion
would have violated the establishment clause. I assume that the drafters understood this,
but I have seen little direct evidence that anyone feared such a statute or had a specific
purpose to prevent it. For textual arguments that the clause protected state establish-
ments, see W. Katz, RELIGION AND AMERICAN CONSTITUTIONS 9-10 (1964); Snee, Religious Disestab-
lishment and the Fourteenth Amendment, 1954 Wash. U.L.Q. 371, 379-89. For an unex-
plained assertion that these arguments are "historically unconvincing," see M. Howe, THE
GARDEN AND THE WILDERNESS 22-23 (1965).
religion” and establishing “religion.” He notes that to forbid establishment of “a religion” would clearly state the nonpreferentialist position, but that to forbid establishment of “religion” would not.  

On that point, he is absolutely right. The rejected drafts pose the distinction even more clearly: establishing “religion” is not the same as establishing one sect or society, any particular denomination, or articles of faith and a mode of worship. If Congress paid any attention at all to the language it fought over, it rejected the “no preference” view.

The nonpreferentialists tend not to mention the rejected drafts, or to pass over the drafts as insignificant. Some nonpreferentialists rely heavily on similar resolutions from the state ratifying conventions. The Virginia, North Carolina and New York, conventions proposed establishment clauses similar to the rejected Senate drafts. James Madison’s original bill in the First Congress provided: “nor shall any national religion be established.” Like the Senate drafts, however, all of these proposals were rejected.

An approach to interpretation that disregards the ratified amendment and derives meaning exclusively from rejected proposals is strange indeed. The “no preference” position requires a premise that the Framers were extraordinarily bad drafters—that they believed one thing but adopted language that said something

38. M. MALBIN, supra note 7, at 8.
39. R. CORD, supra note 8, at 8-9; M. MALBIN, supra note 7, at 12-13. Smith speculates that the Senate drafts were rejected only because they would have permitted aid to a coalition of two or more religions in preference to the rest. Smith, supra note 9, at 614. Reasonable construction would have avoided that absurd result; a simple amendment would have eliminated any risk. For example, the first Senate draft could have been amended to provide: “Congress shall make no law establishing one or more religious sects or societies in preference to others.” Smith’s speculation does not dispel the inference that arises from rejection of all drafts written in nonpreferentialist terms.
40. See R. CORD, supra note 8, at 6-7; Cord, supra note 8, at 136-37; Comment, supra note 10, at 570-71.
41. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 659 (J. Elliot 2d ed. 1836) (Virginia) [hereinafter cited as ELLIOT’S DEBATES]; 4 id. at 244 (North Carolina); 1 id. at 328 (New York). The similar proposal from Rhode Island, 1 id. at 334, came too late to influence the text of the first amendment.
42. 1 ANNALS OF CONG. 434 (J. Gales ed. 1834) (June 8, 1789). A committee of Maryland’s ratifying convention considered and rejected a similar proposal. 2 ELLIOT’S DEBATES, supra note 41, at 552-53. For analysis of Madison’s puzzling language, see infra notes 85-95 and accompanying text.
substantially different, and that they did so after repeatedly attending to the choice of language.

Perhaps the Framers did not understand what they were doing and viewed the textual choices as stylistic. All sorts of things become possible once one begins to speculate about what the Framers might have thought instead of giving primary weight to what they enacted. But responsible constitutional interpretation does not allow us to assume a mistake of this magnitude. When the record reflects a textual choice as clear as this one, only extraordinarily clear contrary evidence should persuade us not to follow the text.

This conclusion is bolstered by the Framers' own textualism. The Senate met in secret and did not record its debates; obviously, future generations were not intended to look to those debates for interpretive guidance. Jefferson Powell has shown that the Framers' generation thought it illegitimate to refer to legislative history even when it was known. They applied to the Constitution the prevailing common law methods of interpreting statutes, contracts, and other operative legal texts. These methods looked to the objective meaning of the words in light of the evil addressed and the remedy proposed. References to "intention" usually meant the objective intention of the document as revealed by these methods; the subjective intention of the drafter or the members of the adopting body was deemed irrelevant. These findings present an extraordinary problem for intentionalists. If the intention of the Framers is binding, we cannot look to evidence that the Framers intended us to disregard and that they considered irrelevant to a proper understanding of their intention. At the very least, the intentionalists have the burden of explaining why they can disregard the Framers' own understanding of their intention.

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43. This possibility is considered more thoroughly infra notes 149-65 and accompanying text.
44. For a full statement of my commitment to textualism, see Laycock, Constitutions, supra note 2; see also Schauer, supra note 17, at 804-12 (rejecting interpretation of constitutional language within the "intentional paradigm," focusing on the perceived intent of the drafters at the expense of clear textual meaning).
45. 1 ANNALS OF CONG. 15 (J. Gales ed. 1834) (ed. note).
47. At one point, Powell quotes Madison as rejecting reliance on the Convention's rejection of an alternative draft. Id. at 921. Whether Madison meant that the particular
B. The Malbin Interpretation

Some nonpreferentialists offer a figleaf of textual argument to go with their intent argument. To Malbin and Cord, the key textual choice is that the ratified version forbids any law respecting "an establishment of religion," as distinguished from a hypothetical draft forbidding any law respecting "the establishment of religion."\(^{48}\) Malbin, who invented the argument, says: "[B]y choosing 'an establishment' over 'the establishment,' [the Framers] were showing that they wanted to prohibit only those official activities that tended to promote the interests of one or another particular sect."\(^{49}\) The only reason he offers for this claim is that "the establishment" "would have emphasized the generic word 'religion.'"\(^{50}\)

Malbin's argument is frivolous, and Cord's repetition does not make it any stronger. The argument is wrong for at least four reasons. First, and most important, the repeated rejection of clear language that would have stated Malbin's position overwhelms the attenuated inference he draws from the choice of "an" over "the." Second, Malbin assumes that the article in front of one noun—"establishment"—critically changes the meaning of a different noun—"religion." Recall that Malbin himself argues that putting even an indefinite article in front of "religion" would have clearly made his point.\(^{51}\) Third, there is no evidence whatever that anyone thought of Malbin's hypothesized alternate draft or consciously chose "an" over "the."

Fourth, "an" is perfectly consistent with the view that the amendment forbids any kind of establishment, including multiple or nonpreferential establishments. "The" establishment might have connoted that only one kind of establishment is

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\(^{48}\) R. Cord, supra note 8, at 11-12 (quoting M. Malbin, supra note 7, at 14). For a similar argument, see Smith, supra note 9, at 618.

\(^{49}\) M. Malbin, supra note 7, at 14 (emphasis added).

\(^{50}\) Id.

\(^{51}\) See supra text accompanying note 38.
possible—perhaps the English kind. "An" establishment more clearly communicates that any establishment—any kind of establishment—is forbidden. I would not put much weight on that argument, but it is more plausible than Malbin's. My inference from "an" at least depends on the word's effect on the noun it modifies. I do not insist that the Framers used "an" for the reason I suggest. But the possibility that they used it for my reason further reduces the likelihood that they used it for Malbin's less plausible reason.

III. THE DEBATE IN THE FIRST CONGRESS

A. The Relevance of the Debate

The nonpreferentialists rely heavily on the debate in the First Congress, but that debate adds little to current understanding. The only recorded debate occurred in the House. No verbatim record exists, the reporter's notes are incomplete and sometimes inaccurate, and the notes fill slightly less than two columns in the Annals of Congress. Because the Senate met in secret, only the Journal entries recording its votes are available. Thus, the attempt to override the evidence of the rejected drafts depends on those two columns of notes from the House. The nonpreferentialists rely on a puzzling statement by Madison that is probably wrong and in any event does not state the nonpreferentialist understanding of the clause. They also rely on attenuated inferences from the remarks of others. These remarks must be examined in light of the preliminary draft to which they referred.

The House debate occurred on August 15, 1789, before any of the events in the Senate. The debate concerned the draft submitted by a Select Committee, a draft somewhat narrower than the amendment ultimately adopted. Two things about this draft are important. First, it was ambiguous concerning nonpreferential aid.

52. See Wallace v. Jaffree, 472 U.S. 38, 93-98 (1985) (Rehnquist, J., dissenting); R. Cord, supra note 8, at 9-10; M. Malbin, supra note 7, at 6-11; Smith, supra note 9, at 608-17; Comment, supra note 10, at 572-73.

53. Tinling, Thomas Lloyd's Reports of the First Federal Congress, 18 WM. & MARY Q. 519 (3d ser. 1961). Madison wrote that the notes gave "some idea of the discussion," but that they showed "the strongest evidences of mutilation & perversion, and of the illiteracy of the Editor." Id. at 532-33 (emphasis in original). See supra notes 27 & 36.

54. 1 ANNALS OF CONG. 729-31 (J. Gales ed. 1834) (Aug. 15, 1789).

55. Id. at 15 (ed. note).
Second, and more important, the House promptly rejected this draft and substituted a version that was not ambiguous on this issue.

The Select Committee draft provided:

[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed. 56

The reference to “no religion” is consistent with the view that many religions exist, and that no one of them may be established by law. The possibility is best illustrated by comparing the following two formulations, which are identical except for the placement of the negative:

1. No religion shall be established by law.
2. Religion shall not be established by law.

The first formulation is the Select Committee draft. It might mean that no particular religion, or no specific religion, shall be established by law. It is not plausible to read the second formulation that way; it seems clearly to mean that religion generally shall not be established by law.

Again, I do not want to make too much of this textual inference. The first formulation is not unambiguous, especially if it is not compared to the second formulation. If the Select Committee meant to say “no particular religion,” it could have said so. Nothing suggests that anyone thought of the second formulation and deliberately chose the first formulation instead. Finally, what the Select Committee draft meant ultimately makes no difference, because the House did not adopt it and the subsequent Senate and Conference Committee choices are much less ambiguous. The possible meaning of the Select Committee draft matters only because of the emphasis that has been placed on the August 15 debate. Anyone who thinks that the debate concerning this draft shows an intention to ban only preferential aid must keep in mind that the draft might have been so limited, or that some of the speakers might have so understood it.

56. Id. at 729 (Aug. 15, 1789).
Even more important, the House rejected the Select Committee draft at the end of the August 15 debate. Instead, it adopted the sweeping substitute offered by Mr. Livermore:

Congress shall make no laws touching religion, or infringing the rights of conscience.\footnote{57. Id. at 731.}

Any law aiding religion in any way would “touch” religion. Malbin concedes that the Livermore amendment would have forbidden nonpreferential aid and even incidental religious effects of secular programs.\footnote{58. M. Malbin, supra note 7, at 10.} But the surviving notes of the debate do not mention that point, and nothing clearly indicates why a majority voted for the amendment. Livermore’s language had been proposed by the ratifying convention in his home state of New Hampshire,\footnote{59. See 1 Elliot’s Debates, supra note 41, at 326.} and he may have been the draftsman.\footnote{60. See 1 A. Stokes, Church and State in the United States 315-16 (1950).} Probably no one will ever know whether he offered the amendment for a substantive reason, out of state pride, or out of personal pride of authorship.

Malbin speculates that the Antifederalists supported Livermore’s amendment because it was more restrictive than the Select Committee’s draft and, in their view, any restriction on federal power was good.\footnote{61. M. Malbin, supra note 7, at 9-11.} I wish I thought he were right, because that theory devastates the claim that the Framers meant to permit nonpreferential aid. Indeed, a similar claim that the Framers intended the meaning that most severely limited federal power is a principal element of Leonard Levy’s attack on the nonpreferentialists.\footnote{62. See infra notes 166-75 and accompanying text.} Malbin’s Antifederalist explanation of the Livermore amendment suggests that a substantial block of congressmen understood the restrictive implications of the Livermore amendment and supported it because of those implications. Malbin’s claim that those who spoke on August 15 wanted to permit nonpreferential aid is inconsistent with his claim that the House adopted the Livermore amendment precisely because it forbade nonpreferential aid and even incidental aid.
Malbin offers his Antifederalist explanation of the Livermore amendment to show that the House was sparring on collateral issues. That is plainly true of some of the debate, and it further reduces the importance of the debate. To the extent that the members were really talking about collateral issues, it is that much more difficult to infer specific intentions about the establishment clause from their remarks.

The bottom line concerning the Livermore amendment is this: If the House had the distinction between preferential and nonpreferential aid in mind, its vote for the Livermore amendment was a vote to forbid nonpreferential aid, and the “no preference” interpretation of the debate must be wrong. If the House did not have the distinction in mind, the debate cannot speak to the issue. Either way, the debate is little help.

B. The Content of the Debate

Fifty-one representatives were present to vote on the Livermore amendment. Only eight of them said anything the reporter took down, and few of the eight addressed the meaning of the Select Committee draft. Mr. Vining suggested transposing the two clauses. Mr. Sherman said that the amendment was unnecessary because the Constitution conferred no power to establish religion. Mr. Carroll responded that the amendment would reassure those with honest doubts. Mr. Madison agreed with Mr. Carroll. Mr. Livermore offered his substitute without explanation. These remarks do not support any inference about the meaning of the amendment.

Elbridge Gerry spoke twice. His longer speech concerned a wholly collateral issue. Madison had suggested clarifying the amendment by inserting the word “national,” and Gerry took the

63. The most obvious example is Elbridge Gerry's speech. See M. Malbin, supra note 7, at 10; infra notes 71-72 and accompanying text.
64. 1 ANNALS OF CONG. 731 (J. Gales ed. 1834) (Aug. 15, 1789).
65. See id. at 729-31.
66. Id. at 729.
67. Id. at 730.
68. Id.
69. Id.
70. Id. at 731.
opportunity to denounce the Federalists. The opponents of the Constitution had argued all along that it created a national rather than a federal government, and Madison seemed to be confirming the charge. Madison withdrew his motion.

Gerry’s other comment was a suggestion that the amendment “would read better if it was, that no religious doctrine shall be established by law.” This substitute would have stated a narrow variant of the nonpreferentialist position, but it does not show the meaning of the draft under discussion. No one spoke in support of Gerry’s substitute, it was not adopted, and it closely paralleled the final Senate draft that was rejected in the Conference Committee.

That leaves three speakers for the nonpreferentialists to rely on: Mr. Sylvester and Mr. Huntington, who appeared to resist the establishment clause, and Madison, who sponsored it. Sylvester feared that the Select Committee draft “might . . . have a tendency to abolish religion altogether.” From this comment some have argued that Sylvester was friendly to religion and convinced that religion was dependent on state aid, so that he must have intended not to forbid such aid. Those inferences are not unreasonable, but it does not follow that Sylvester wanted to forbid preferential aid and permit nonpreferential aid. No one knows what kind of aid Sylvester would have permitted. A fair inference is that Sylvester opposed the establishment clause, that he wanted it narrowed in any way possible, and that he would have supported any kind of aid he could get. Whatever he thought, no evidence indicates that a majority shared his views. The Select Committee draft was not changed to accommodate his objection.

Mr. Huntington was the only speaker who endorsed Sylvester’s remarks. Specifically, Huntington feared that the amendment would render federal courts unable to enforce pledges of money to the support of churches. On its face, Huntington’s statement seems to say that the amendment would go too far if it rendered church contracts unenforceable. But context reveals that

71. Id.
72. Id.
73. Id. at 730.
74. Id. at 729.
75. M. MALBIN, supra note 7, at 6-7; Comment, supra note 10, at 572 n.124.
76. 1 ANNALS OF CONG. 730-31 (J. Gales ed. 1834) (Aug. 15, 1789).
Huntington probably meant more than that. He offered the example of "congregations to the Eastward." These congregations were presumably in his home state of Connecticut, because Congress then met in New York. Pledges of money to churches in Connecticut were not voluntary contracts; every citizen was required to pay a church tax to the church of his choice. This scheme of taxation could be viewed as a form of multiple or nonpreferential establishment, although dissenters viewed it as preferential and oppressive. However the Connecticut scheme is characterized, Huntington seems to have said that these taxes should be enforceable in federal court. Count one vote for financial aid to religion. But like Sylvester, Huntington probably opposed the clause, and there is no evidence that the majority shared his views.

The reporter's notes of Huntington's speech continue:

By the charter of Rhode Island, no religion could be established by law; he could give a history of the effects of such a regulation; indeed the people were now enjoying the blessed fruits of it. He hoped, therefore, the amendment would be made in such 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.

This passage may contain more than meets the eye. Perhaps Huntington was serious about the "blessed fruits" of disestablishment so long as the concept was not taken too far, but more likely his reference to Rhode Island was sarcastic and his concluding remark was a request to omit the establishment clause altogether. Much of the country viewed Rhode Island as radical, libertine, and unsavory, and supporters of establishment thought that disestablishment was an important part of that state's problems.

The remark about patronizing those who professed no religion at all appears to be a second allusion to disputes in Connecticut about collection of the church tax from nonbelievers. Connecticut

77. See T. Curry, supra note 3, at 180-81.
78. 1 Annals of Cong. 730-31 (J. Gales ed. 1834) (Aug. 15, 1789).
79. See T. Curry, supra note 3, at 203.
81. T. Curry, supra note 3, at 203.
was willing to let each citizen pay the church of his choice, but it
was not willing to exempt nonbelievers altogether. Huntington had
just urged that the federal courts be available for suits to collect
this tax; perhaps he thought that a refusal to collect the tax from
those who did not pay voluntarily would "patronize those who pro-
fessed no religion at all." References to the rights of conscience
and to free exercise already had appeared in various drafts of the
religion clauses. 82 Huntington appears to have urged Congress to
adopt the rights of conscience and free exercise clauses and to re-
ject the establishment clause.

Nussbaum and Smith apparently conclude that Huntington au-
thoritatively explained the establishment clause. 83 But Huntington
was probably an opponent of disestablishment, or at best a grudg-
ing supporter. His view that the clause should be construed nar-
rowly is based on his preference for establishment. The clause was
not changed to eliminate Huntington's fears. Further, as Professor
Kurland mentions, the Constitution already patronized nonbe-
lievers in an important way: the test oath clause made them eligi-
ble for federal office. 84 Huntington probably thought the ban on
test oaths was a bad idea too, but that is no reason to construe the
test oath clause to require belief in God. It is no more plausible to
impute Huntington's views of the establishment clause to the
majority.

The heart of the argument is Madison's puzzling comments
about a national religion and compelled worship. Madison's tactic
was not to argue with Sylvester and Huntington, but to reassure
them and their sympathizers by portraying the establishment
clause in the narrowest possible light.

Madison spoke twice. The first time, he obviously was respond-
ing to Sylvester's fear that the amendment might abolish religion

82. The draft under debate protected "the equal rights of conscience." 1 ANNALS OF CONG.
729 (J. Gales ed. 1834) (Aug. 15, 1789). The Virginia Declaration of Rights contained a free
exercise clause, see 1 A. Stokes, supra note 60, at 303 (quoting the clause), and Virginia's
ratifying convention also had proposed an amendment containing a free exercise clause, see
3 Elliot's Debates, supra note 41, at 659 (quoting the proposed amendment). The first
recorded congressional draft containing the phrase "free exercise" appeared on Aug. 20,
1789. 1 ANNALS OF CONG. 766 (J. Gales ed. 1834) (Aug. 20, 1789).
83. Smith, supra note 9, at 611, 613; Comment, supra note 10, at 573 n.124.
84. See Kurland, supra note 1, at 845-50, 856.
altogether: "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."

Huntington responded that he understood the amendment to mean what Madison had said, but he feared "that the words might be taken in such latitude as to be extremely hurtful to the cause of religion."

Huntington then made his speech about collecting Connecticut church taxes and the blessed fruits of disestablishment in Rhode Island.

Madison then spoke a second time. He proposed that the House insert the word "national" before the word "religion," so that the establishment clause would read: "No national religion shall be established by law." Madison explained that

he believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought that if the word "national" was introduced, it would point the amendment directly to the object it was intended to prevent.

Madison's two statements are obviously inconsistent with modern interpretations of the establishment clause, but they are equally inconsistent with the view that only preferential aid is forbidden. Almost everyone agrees that the establishment clause means more than Madison mentioned on August 15. If Congress appropriated one million dollars for the support of the United Methodist Church, it would not be enforcing the observation of Methodism by law. Nevertheless, the appropriation would be preferential aid, unconstitutional even under the "no preference" view of the clause. If Madison's second statement described the entire meaning of the clause, the later Senate draft forbidding uniform

85. 1 ANNALS OF CONG. 730 (J. Gales ed. 1834) (Aug. 15, 1789).
86. Id.
87. Id. at 731.
88. Id.
89. But compare Wallace v. Jaffree, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting) ("[Madison] saw the amendment as designed to prohibit . . . a national religion, and perhaps to prevent discrimination among sects." (emphasis added)) with id. at 113 (same two goals; "perhaps" omitted).
“articles of faith or a mode of worship”\textsuperscript{90} would have captured the meaning perfectly. But that draft also was rejected.

It is hard to know what Madison was thinking. The two statements are inconsistent with all his previous and subsequent statements concerning establishment.\textsuperscript{91} Nevertheless, he appears to have said the same thing clearly and twice, which reduces the risk that the reporter’s notes are materially inaccurate. The statements also are consistent with Madison’s June 8 draft of the clause, which provided only that no “national religion be established.”\textsuperscript{92}

Perhaps Madison was willing to settle for such a narrow amendment if that were all he could get, but subsequent developments in the Senate and the Conference Committee opened the way to more. Perhaps he believed that pressure for a single establishment with compelled observance was the issue most likely to arise, so that he believed he was accurately describing the principal consequence of the amendment. Perhaps Professor McConnell is right that coercion rather than preference is the essence of the establishment clause,\textsuperscript{93} and Madison was describing the classic example of coercion. Perhaps he was dissembling. We will never know. But Madison plainly did not describe a ban on preferential aid.

Madison’s proposal to insert “national” before “religion” would have strengthened the implication that only a single national establishment was forbidden. But he promptly withdrew that motion in the face of Gerry’s attack on the word “national.”\textsuperscript{94} He could have substituted a less offensive adjective; “particular,” “specific,” or “single” would have done nicely. Either he did not think of these words or he chose not to offer them. His failure to offer such alternatives is consistent with Professor Levy’s suggestion that the word “national” was intended to emphasize that the clause bound

\textsuperscript{90}. See supra note 34 and accompanying text.
\textsuperscript{91}. See The Complete Madison: His Basic Writings 298-312 (S. Padover ed. 1953) [hereinafter cited as The Complete Madison]. For Madison’s reaction to a bill aiding a particular church without coercing others to conform to it, see id. at 308 (vetoing bill as unconstitutional).
\textsuperscript{92}. 1 Annals of Cong. 434 (J. Gales ed. 1834) (June 8, 1789).
\textsuperscript{94}. 1 Annals of Cong. 731 (J. Gales ed. 1834) (Aug. 15, 1789).
only Congress. But even if Levy's suggestion explains Madison's attempt to insert "national" into the text of the clause, it does not account for Madison's narrow explanations of the meaning of the clause.

After Madison withdrew his amendment, someone called the question on Livermore's substitute, and the House adopted it. The only reported debate thus ended a lot further from the "no preference" position than it began. Gerry's substitute was ignored, Madison's amendment was withdrawn, and Livermore's sweeping substitute was adopted. No one explicitly argued that preferential establishments were bad while nonpreferential establishments were acceptable. Two of the remarks most relied on by nonpreferentialists came from apparent opponents of the clause, and neither they nor Madison stated the "no preference" position. Compared to the clear textual choices made in the Senate and in the Conference Committee, nothing in this brief debate casts any useful light on the problem.

IV. THE DEBATES IN THE REVOLUTIONARY STATES

Independence was an occasion for reviewing church-state relations in the revolutionary states. In the states with established Anglican churches, the King was the head of both the church and the state, and the question of succession extended to both his secular and his religious authority. Several states wrote constitutions in the wake of independence, and they addressed church-state questions in their bills of rights. The ferment concerning this issue affected churches as well as governments. For example, in 1788 the

95. L. Levy, supra note 2, at 76, 97. The draft did not yet explicitly mention Congress. See id.
96. 1 Annals of Cong. 731 (J. Gales ed. 1834) (Aug. 15, 1789).
97. See T. Curry, supra note 3, at 134.
98. The situation in Virginia exemplified the turmoil that followed independence in these states. Delegates to the Revolutionary Convention of 1776 ordered all references to King George III deleted from the liturgy, and ordered prayers for the new civil magistrates instead. T. Buckley, Church and State in Revolutionary Virginia, 1776-1787, at 21 (1977). These changes created a serious problem of conscience for those Anglican clergy who felt bound by their ordination oaths to support the Crown and the Book of Common Prayer. Id. at 43.
Presbyterians in the United States amended their Confession to renounce the Calvinist tradition of establishment.  

For obvious reasons, the debates in the states are not direct evidence of the meaning of the federal religion clauses. Nothing in these debates was offered as an explanation of those clauses, and the Framers could support one regime of church-state relations for their respective states and a quite different regime of church-state relations for the new federal government. At the very least, the framing of a federal rule required a choice among the diverse practices in the states. Moreover, as Professor Van Alstyne has pointed out with respect to the speech clause, the Framers' understanding of federalism predisposed them to restrict federal power more severely than state power.

Thus, I do not offer the state debates as legislative history in anything like the usual sense. Instead, I offer them as intellectual history. The state debates help show how the concept of establishment was understood in the Framers' generation. Learning how that generation understood the concept may be more informative than the brief and unfocused debate in the House. If the Framers generally understood the concept in a certain way, and if nothing indicates that they used the word in an unusual sense in the first amendment, then we can fairly assume that the Framers used the word in accordance with their general understanding of the concept.

A. Votes Against Nonpreferential Aid

For several reasons, the debates in Virginia were most important. First, the arguments were developed most fully in Virginia. Second, Madison led the winning coalition, and he played a dominant role in the adoption of the establishment clause three years later. Third, the debates in Virginia may have been the best known. I am not sure of that, and the subject deserves further


investigation, but most of the national figures from Virginia were involved, some in leadership roles on each side. Further, the debate dragged on for ten years. It would be surprising if the leading Virginians had said nothing to their correspondents in other states. Virginia’s Act for Establishing Religious Freedom was published widely in Europe, and was the subject of at least one pamphlet published in Philadelphia. Curry also notes a Connecticut clergyman discoursing on the Virginia debates in 1791.

The Virginia fight came to a head in 1785 and 1786. The defenders of establishment offered a compromise known as a general assessment, under which all Christian churches could receive tax money and every taxpayer could designate a church to receive his tax. The bill would have included Catholics, and it tried to

101. Patrick Henry was the principal proponent of financial aid to Christian ministers. T. Curry, supra note 3, at 142. George Washington and Richard Henry Lee also took that position, T. Buckley, supra note 98, at 101-02, 136, but Washington eventually abandoned the measure on the ground that it had become too divisive, id. at 136; L. Levy, supra note 2, at 59. John Marshall, then a young legislator, was defeated for reelection because of his support for the bill. T. Buckley, supra note 98, at 117 n.11.

Thomas Jefferson and James Madison led the opponents. T. Curry, supra note 3, at 139, 142. Edmund Randolph also was opposed to the bill. T. Buckley, supra note 98, at 124, 129-30. George Mason drafted the religious liberty clause in the Virginia Declaration of Rights and the first statute suspending collection of the tax, 1 A. Stokes, supra note 60, at 303-05, and he circulated Madison’s Memorial and Remonstrance for signatures, T. Buckley, supra note 98, at 147.

Virginia’s religious leaders also were actively involved in the dispute, and they attended national meetings of their denominations during this period. Id. at 117-19, 123, 152 (Anglicans); id. at 120 (Methodists); Presbytery Board of Education and Sabbath-School Work, Records of the Presbyterian Church in the United States of America 1706-1788, at 514, 528, 542-43 (1969) (Presbyterians).

102. The full ten years are reviewed in T. Buckley, supra note 98, and in 1 A. Stokes, supra note 60, at 366-97.

103. Ch. 34 (1786), 12 Hening’s Statutes at Large 84 (1823). The Act also may be found in T. Buckley, supra note 98, at 190-91, R. Cord, supra note 8, at 249-50, and 1 A. Stokes, supra note 60, at 392-94.

104. 3 A. Stokes, supra note 60, at 688-89 (quoting letter from Thomas Jefferson to James Madison, Dec. 16, 1786).

105. J. Swanwick, Considerations on an Act of the Legislature of Virginia, Entitled an Act for the Establishment of Religious Freedom (Philadelphia 1788), cited in T. Buckley, supra note 98, at 165 n.59. The pamphlet attacked the Act, and in the political practice of the times, Swanwick’s attack should have produced a responsive pamphlet defending the Act.

106. T. Curry, supra note 3, at 182; see also id. at 171 (Massachusetts advocate citing Virginia law in 1780-81).
accommodate Quaker and Mennonite objections to paid clergy. Any taxpayer could refuse to designate a church, with undesignated church taxes going to a fund for schools. These provisions were substantial improvements over superficially similar systems in Massachusetts and Connecticut. Supporters of the bill invoked the slogan “Equal Right and Equal Liberty,” and argued that it imposed not “the smallest coercion” to contribute to the support of religion.

Madison’s *Memorial and Remonstrance Against Religious Assessments* was published to rally the citizenry against this non-preferential establishment. Many similar petitions also were circulated, especially by Presbyterians and Baptists, and support for establishment collapsed. The assessment bill died without a vote, and the legislature enacted Jefferson’s Act for Establishing Religious Freedom instead. Thus, the great debate about disestablishment in Virginia culminated in a decisive vote against non-preferential aid.

Professors Cord and Smith try to make this choice go away by showing that Madison considered the general assessment bill preferential. Madison and others were able to imagine the bill’s
effects on Jews, Muslims, and other non-Christians, and Madison also objected that Quakers and Mennonites were not the only religious groups that needed or deserved partial exemption. Both of these objections tended to show that the proposal was not quite as nonpreferential as its supporters claimed. Consequently, according to Professors Cord and Smith, some of the votes against the bill may have been votes against these preferential features rather than votes against a pure system of nonpreferential aid.

That is conceivable, but it is wholly unrealistic. It is anachronistic to view aid to all denominations of Christians as preferential in 1786. There were hardly any Jews in the United States at that time, and no other non-Christians to speak of. Indeed, when it suits his purpose, Cord correctly states that aid to all Christians was viewed as nonpreferential in the late eighteenth century. That some Virginians could imagine the effects of establishment on non-Christians only shows how far Virginians had thought through the problem. No public figure had talked that way since Roger Williams.

The provision for Quakers and Mennonites in the general assessment bill was facially preferential, but it was an attempt to make the bill less preferential in its impact. The bill would have been more objectionable without this provision. Madison did not want

115. T. Buckley, supra note 98, at 151; T. Curry, supra note 3, at 145; Memorial and Remonstrance, supra note 111, ¶ 3-4. An amendment to include non-Christians had been tentatively accepted and then rejected in the legislature. T. Buckley, supra note 98, at 108.

116. Memorial and Remonstrance, supra note 111, ¶ 4.

117. Stokes reported that the nation’s Jewish population did not reach 10,000 until well after the Revolution, with that small number concentrated largely in Newport, New York City, Philadelphia, and Charleston. 1 A. Stokes, supra note 60, at 286. He did not cite a source for these data. Deism among the Framers “usually amounted to a severely stripped down version of Christianity, with all that smacked of mystery and superstition pared away.” J. Turner, Without God, Without Creed: The Origins of Unbelief in America 51-52 (1985). Most of the prominent Framers maintained membership in some Protestant church. See 1 A. Stokes, supra note 60, at 293, 299, 302, 306, 310, 311, 314, 333, 339, 350, 353, 507-14. The most notable exceptions were the Roman Catholic Carrolls of Maryland. See id. at 324.

118. E.g., R. Cord, supra note 8, at 161; Cord, supra note 8, at 138 n.45.

the Quakers and Mennonites compelled to conform; he wanted everyone to be exempt.

Virginians understood the vote against the bill as a rejection of any form of financial aid to churches. The proof of that is that the ten-year-old controversy died with this bill. No one at the time perceived that only preferential aid had been rejected; no one proposed a new bill that included non-Christians and eliminated the exemptions for Quakers and Mennonites. Instead, the Act for Establishing Religious Freedom provided that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever"—language comprehensive enough to ban taxes for either preferential or nonpreferential aid. The Act also declared that any subsequent bill narrowing its terms would be a violation of natural right.121

An equally clear vote occurred in Maryland. Supporters of establishment there proposed a tax even less preferential than the tax proposed in Virginia. Non-Christians were exempt, and Christians could pay either a minister of their choice or a fund for the poor.122 The proposal was defeated in 1785 after substantial public debate.123

The votes in Virginia and Maryland show that whenever a choice between nonpreferential aid and no aid was squarely posed, Americans in the 1780's voted for no aid. When they focused on the question, they concluded that nonpreferential aid was a form of establishment and inconsistent with religious liberty.

B. Developments Elsewhere

The debates in other states provide little evidence of a different understanding. Curry's thorough survey reports little support for nonpreferential establishment. Georgia did have a nonpreferential tax on the books, but the tax appears never to have been collected,

120. Ch. 34, ¶ II (1786), 12 Hening's Statutes at Large 84, 86 (1823).
121. Id. ¶ III, 12 Hening's Statutes at Large 86.
122. T. Curry, supra note 3, at 155-57. The bill may have been proposed as a political diversion, but the ensuing debate was genuine and robust. See F. McDonald, supra note 80, at 43-44.
123. T. Curry, supra note 3, at 156-57.
and it therefore stirred little debate.\textsuperscript{124} Such taxes were prohibited in the Georgia Constitution of 1798.\textsuperscript{125}

The Anglican establishment in South Carolina was abolished without substantial controversy.\textsuperscript{126} The new law was called an establishment, and its recitals endorsed Protestantism,\textsuperscript{127} but its substantive sections merely provided for the incorporation of churches.\textsuperscript{128} Occasional proposals for nonpreferential financial aid drew no support.\textsuperscript{129}

The vestigial Anglican establishments in North Carolina\textsuperscript{130} and New York\textsuperscript{131} were abolished without major controversy. No recognized establishment had ever existed in Pennsylvania,\textsuperscript{132} Delaware,\textsuperscript{133} New Jersey,\textsuperscript{134} or Rhode Island,\textsuperscript{135} and thus these states had nothing to repeal. No one seriously proposed nonpreferential establishment in any of these six states.

Massachusetts had a system that might arguably be characterized as nonpreferential aid.\textsuperscript{136} It was written into the Constitution of 1780, amidst considerable debate. Under this system, Massachusetts imposed a tax to support the minister elected by each town, who was nearly always a Congregationalist. Dissenters could file an exemption certificate and pay the tax to their own minister, at least in theory. In practice, the Massachusetts system was preferential, and it fell especially harshly on Quakers and Baptists. Quakers had no ministers,\textsuperscript{137} and Baptists conscientiously objected to supporting their ministers through taxes collected by the

\textsuperscript{124} Id. at 152-53.
\textsuperscript{125} See 1 A. Stokes, supra note 60, at 440 ("No person within this State shall . . . ever be obliged to pay tithes, taxes, or any other rate, for the building or repairing any place of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or hath voluntarily engaged to do.").
\textsuperscript{126} T. Curry, supra note 3, at 149-51.
\textsuperscript{127} See 1 A. Stokes, supra note 60, at 432-34 (quoting this lengthy provision).
\textsuperscript{128} T. Curry, supra note 3, at 150-51.
\textsuperscript{129} See id. at 149-51.
\textsuperscript{130} Id. at 151.
\textsuperscript{131} Id. at 161-62.
\textsuperscript{132} Id. at 159-60.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 162.
\textsuperscript{136} See id. at 163-77.
\textsuperscript{137} See T. Buckley, supra note 98, at 108; 1 A. Stokes, supra note 60, at 759.
Baptists were a substantial minority, and their property frequently was seized for unpaid church taxes.\textsuperscript{139}

The Massachusetts statutes referred to the minister elected by the majority as the minister "established by law."\textsuperscript{140} I think the system was regarded as a Congregational establishment, with what the Congregationalists thought was generous toleration for dissenters. It was a deliberate move in the direction of a nonpreferential multiple establishment, but it does not appear to have been seriously considered nonpreferential. Nor was it a model for the federal establishment clause. Neither the system nor the controversy was widely known outside New England.\textsuperscript{141}

Connecticut's system was quite similar to the one in Massachusetts, and it engendered similar controversies with dissenters known as Separates.\textsuperscript{142} Somewhat similar systems were on the books in Vermont and New Hampshire, but they were not well developed and a lot of local variations were tolerated in practice.\textsuperscript{143}

Now add one more fact: Massachusetts and Connecticut did not ratify the first amendment.\textsuperscript{144} I do not want to overstate the importance of this. Failure to ratify need not mean strong opposition; insufficient support to overcome legislative inertia is the more likely explanation.\textsuperscript{145} Moreover, we have no theory for summing up the disparate intentions of all the Congressmen and legislators entitled to a say in the amendment process.

But one does not need a full-blown theory to show that the understanding of religious liberty in states that ratified the religion clauses is more important than the understanding of religious liberty in states that did not. Massachusetts and Connecticut were to

\textsuperscript{138} See T. Curry, supra note 3, at 89-90, 166, 171, 175.

\textsuperscript{139} Id. at 168. Not surprisingly, many Baptists accommodated to the system, especially when it worked to their advantage. See L. Levy, supra note 2, at 30-32, 40.

\textsuperscript{140} T. Curry, supra note 3, at 173.

\textsuperscript{141} Id. at 205.

\textsuperscript{142} See id. at 178-84.

\textsuperscript{143} See id. at 184-90.

\textsuperscript{144} Id. at 215. Georgia also failed to ratify the amendment. Id. All three states ratified the amendment in 1939, L. Levy, supra note 2, at 85, but by then their understanding of religious liberty had caught up with the rest of the country.

\textsuperscript{145} The Massachusetts legislature took some favorable votes on the amendment but failed to proceed to final passage. Part of the opposition in all three nonratifying states was based on the view that no amendments were necessary. T. Curry, supra note 3, at 215; L. Levy, supra note 2, at 85-86.
the ratification process what Huntington and Sylvester were to the House debate:146 probably opposed to disestablishment, and at least suspicious of it. The existence of systems in Massachusetts and Connecticut that arguably resembled nonpreferential multiple establishments reveals little about what the eleven ratifying states meant by the establishment clause. No evidence suggests that the Massachusetts and Connecticut systems generally were thought consistent with disestablishment.

This survey shows that none of the Framers had a working model of nonpreferential establishment on which to draw. Every time a nonpreferential establishment had been proposed, it had been rejected. The allegedly nonpreferential systems in New England did not work well and demonstrably caused bitter religious strife. It is unlikely that out of this background emerged a Congress and a set of state legislatures that specifically intended to forbid preferential aid and permit nonpreferential aid. A far more plausible explanation is that the textual choice in the Senate and the Conference Committee meant what it appears to mean.

V. THE CURRY AND LEVY INTERPRETATIONS

The theses of the important recent books by Thomas Curry147 and Leonard Levy148 now can be considered. Curry, Levy, and I agree on the central point: the framers of the establishment clause had no specific intention to permit nonpreferential aid to religion. Levy and I agree on the stronger formulation that the Framers intended to forbid such aid. But we take three different positions on important subsidiary points.

A. The Understanding of the Rejected Drafts

Like the nonpreferentialists,149 Curry believes that the whole debate was over style. Unlike the nonpreferentialists, he offers a reason for that conclusion. Curry believes that the Framers simply did not understand the distinction between preferential and nonpref-

146. See supra notes 74-84 and accompanying text.
147. T. CURRY, supra note 3.
148. L. LEVY, supra note 2.
149. See supra notes 39-42 and accompanying text.
Levy waffles on this issue. At one point, he argues that the First Congress made a clear choice when it rejected nonpreferentialist drafts. Later, he seems to endorse Curry's judgment that the Framers did not recognize the difference.

The votes in the Senate and the Conference Committee are equally devastating to the intentionalist supporters of nonpreferential aid under Curry's view or mine. If the Framers had no concept of nonpreferential establishment—if they could not understand the difference between the drafts they were debating, and if they thought it all a matter of style—they could not possibly have intended to permit nonpreferential establishments. The Framers could not have specifically intended something they had never heard of. If the various drafts all meant the same thing to them, they are as likely to have intended no aid whatever as to have intended no preferential aid. The only difference between Curry's view and mine is that I think the Framers did understand the distinction and that they rejected nonpreferential aid as firmly as they rejected preferential aid.

Curry is surely right that not all of the Framers understood the distinction or had it in mind all the time. He shows that some of the Framers used language loosely or without understanding the distinction, although not all of his examples support his point. But he is unpersuasive in his broader claim that the Framers collectively failed to understand the distinction between preferential and nonpreferential establishments.

As shown above, defenders of establishment often offered allegedly nonpreferential establishments as a compromise. The Congregationalist defenders of the New England establishments regularly contrasted them with the objectionable establishment in England—an exclusive Anglican establishment. The New England establishments remained preferential in fact, and the dissenting sects were not satisfied with their treatment, but the idea had been to make establishment fair to everyone.

150. See T. Curry, supra note 3, at 207-15.
151. L. Levy, supra note 2, at 82-84.
152. Id. at 111-14.
153. See supra notes 107-10, 122-23 & 136-43 and accompanying text.
154. T. Curry, supra note 3, at 131-32 (quoting John Adams as an example).
The Maryland and Virginia proposals would have been much more effectively nonpreferential, and they had been thoroughly and recently debated. The 1776 statute that suspended collection of the Anglican tax in Virginia drew the distinction explicitly. It recited that the question of a general assessment for all faiths had aroused a "great variety of opinions" that "cannot now be well accommodated," so that "nothing in this act . . . shall be construed to affect or influence [that] question . . . in any respect whatever." From 1776 to 1786, the issue in Virginia had been whether to repeal the Anglican tax or to extend it to all denominations. It is inconceivable that Madison had forgotten that distinction. He likely had the distinction in mind when he served on the Conference Committee that rejected the narrow Senate draft and substituted the broad language that was ultimately ratified. Many others familiar with the debates of the 1780's also must have understood the distinction.

Curry refuses to draw this inference. What chiefly troubles him is the vocabulary of the debates about general assessments. Curry's argument contains three interwoven threads, each containing a different mistake.

First, Curry argues that general assessments often were debated on grounds of religious liberty rather than establishment. The problem with this argument is the equation between religious liberty and free exercise. To subsume both free exercise and establishment under religious liberty is a perfectly sensible usage and, as Professor Kurland notes, it was a common usage among the Framers. Further, as Curry concedes, the word "establishment" often was used in debates over general assessments. Madison used "establish," "established," or "establishment" thirteen times in the

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155. The provision is reprinted in T. Buckley, supra note 98, at 35, and I A. Stokes, supra note 60, at 305.
156. Curry says, for example:
    Neither side . . . attempted to show that a general assessment constituted an essentially different kind of establishment or to differentiate it from an exclusive state preference for one religion. The parties to the general assessment dispute concerned themselves with showing whether it violated or did not violate freedom of religion.
T. Curry, supra note 3, at 210-11. For similar equations of religious liberty and free exercise, see id. at 146, 217.
157. Kurland, supra note 1, at 844.
Memorial and Remonstrance, and he described the general assessment bill as “the proposed establishment.”

Second, Curry notes that opponents of general assessment in Virginia argued that the bill would violate the free exercise clause of the Virginia Declaration of Rights. Curry may exaggerate this point: he is presumably reading “free exercise” every time the opponents said “religious liberty.” But the opponents did invoke the free exercise clause, and the reason is plain. The Declaration of Rights did not contain an establishment clause. The Declaration and the statute suspending the Anglican tax had been passed in 1776, at the very beginning of the debate about disestablishment. Together, the Declaration and the statute guaranteed free exercise and postponed decision on establishment. Advocates of religious liberty thereafter claimed as much as they could for the free exercise clause; the rhetorical benefits of invoking a constitutional right were already understood. That rhetorical strategy is entirely consistent with believing that a general assessment would also and primarily be an establishment. Indeed, the 1776 agreement to postpone establishment questions would have been illusory if the parties to the compromise had understood a general assessment to violate the free exercise clause.

Third, Curry concedes that general assessments often were attacked as establishments, but he argues that no one “attempted to show that a general assessment constituted an essentially different kind of establishment or to differentiate it from an exclusive state preference for one religion.” On the opponents’ side, this statement is true and entirely understandable. Their whole claim was that a tax for all churches is not essentially different from a tax for one church; they found any church tax objectionable.

158. Memorial and Remonstrance, supra note 111, ¶ 9; see also id. ¶ 6 (“the establishment proposed”); id. ¶ 8 (“the establishment in question”).
159. See T. Curry, supra note 3, at 146 (quoting Virginia Declaration of Rights, ¶ 16 (1776), 9 Henig's Statutes at Large 109, 111-12 (1821)).
160. Memorial and Remonstrance, supra note 111, ¶¶ 4, 15; T. Buckley, supra note 98, at 115, 148-49.
161. See T. Buckley, supra note 98, at 19 (quoting the provision); 1 A. Stokes, supra note 60, at 303 (same).
162. For a discussion of the understanding of the relationship between free exercise and establishment in 1776, see T. Buckley, supra note 98, at 18-19, 22, 115.
163. T. Curry, supra note 3, at 210.
On the proponents' side, Curry's statement is simply false. Their whole claim was that a tax for all churches is essentially different from a tax for one church. Curry's point apparently is that he found few statements like "We want an establishment but it will be a different kind of establishment."\textsuperscript{164} That finding is no surprise. Establishments were unpopular, and avoiding any mention of establishment was rhetorically more effective. Thus, Curry says the proponents defended their proposals "primarily as fair, equitable, and compatible with religious freedom and concerned themselves very little with the issue of establishment."\textsuperscript{165} That is exactly how I would make the argument if I were hired as their media consultant. Note also how Curry's formulation of this argument again depends on the false equation of religious freedom with free exercise.

In my judgment, Curry's analysis of the debates ignores the realities of political rhetoric and elevates labels over substance. That many in the Framers' generation understood the difference between exclusive and nonpreferential establishments seems as certain as can be for a proposition about what people were thinking two hundred years ago. That they understood the language of the House and Senate drafts as stating the two competing propositions is less certain. Perhaps they paid no attention to the meaning of the language, and perhaps they never thought of the most prominent religious liberty issue of the period when they drafted that language. Those things are possible, but they are not likely.

Equally important in my view, it is illegitimate to assume such things. If one assumes that the Framers paid no attention to the meaning of what they wrote and that they were oblivious to the most prominent issues of their time, the Constitution really can be read any way at all. That is not a legitimate approach to constitutional interpretation.

\textbf{B. The Arguments From Federalism}

Part of Curry's argument, and a much larger part of Levy's argument, turns on a mistaken inference from the Framers' concern

\textsuperscript{164} Id.
\textsuperscript{165} Id. at 217. The pro-assessment petitions are summarized in T. Buckley, \textit{supra} note 98, at 113-43.
with federalism. The starting point for Curry is the position of two Antifederalist supporters of establishment, Patrick Henry and Elbridge Gerry. Henry and Gerry are two of Curry's prime examples of Framers who did not understand the distinction between preferential and nonpreferential aid. Each of them proposed language that would have barred only preferential establishments. Curry finds this inconsistent with their Antifederalism: a ban on all establishments would have further restricted federal power. He therefore concludes that Henry and Gerry did not understand the distinction, and that they intended to bar all establishments even though their language mentioned only preferential establishments.\textsuperscript{166} Levy makes a similar point about Patrick Henry.\textsuperscript{167}

This reliance on Henry and Gerry is an example of a larger background puzzle about the drafting of the Bill of Rights. The Federalists erroneously believed that the amendments were unnecessary because the government had no power to do any of these things anyway. Their error was to focus on the lack of any express power to restrict speech, establish religion, or violate other liberties, and to overlook the risk that delegated powers might be exercised in ways that would accomplish some of the same purposes.\textsuperscript{168} Without the establishment clause, the power to tax and spend for the general welfare would authorize a nonpreferential subsidy to religious organizations. That specific risk probably was not in contemplation at the time, but the underlying theory that the spending power is not limited by the enumeration of other legislative powers can be traced to Alexander Hamilton’s Report on Manufactures in 1791.\textsuperscript{169} When he introduced the Bill of Rights, Madison explained that even limited powers could be abused, that Congress had discretion as to means, and that a bill of rights could protect against abusive measures that might otherwise be necessary and proper means of implementing delegated powers.\textsuperscript{170}

\textsuperscript{166} See T. Curry, \textit{supra} note 3, at 209, 214.  
\textsuperscript{167} L. Levy, \textit{supra} note 2, at 74, 109-10.  
\textsuperscript{168} See J. Ely, \textit{supra} note 2, at 36.  
\textsuperscript{169} See 10 \textit{THE PAPERS OF ALEXANDER HAMILTON 302-04} (H. Syrett & J. Cooke eds. 1966); \textit{see also} United States v. Butler, 297 U.S. 1, 64-67 (1936) (adopting Hamilton’s view that power to tax and spend for the general welfare is not limited by enumerated powers).  
\textsuperscript{170} 1 \textit{ANNALS OF CONG.} 432-33, 438 (J. Gales ed. 1834) (June 8, 1789).
The Federalist theory was widely believed even though erroneous. Under that theory, the amendments were of no substantive effect. A failure to bar nonpreferential aid in the establishment clause would not create a power to grant such aid; powers were conferred only by the original document.

It does not follow that the Framers paid no attention to the content of the amendments. Whatever the Federalists thought, the Antifederalists were demanding amendments, and many uncommitted citizens believed amendments were necessary. To build support for the new government, the Federalists indulged these fears and agreed to amendments. Thus, the Antifederalists believed, and the Federalists assumed for the sake of argument, that the Constitution might somehow confer dangerous powers that would make the amendments necessary. The amendments were drafted on that assumption, and any effort to make sense of them must indulge the same assumption.

Once the Framers set to the task of drafting amendments, the evidence suggests that they tried to forbid only what they considered to be abuses. Thus, Huntington was concerned that the establishment clause not preclude federal jurisdiction over suits to collect state church taxes; he did not notice the complete absence of any basis for such jurisdiction in article III. Henry and Gerry proposed language inconsistent with their antifederalism, but quite consistent with their continued support for some kind of establishment. Henry and Gerry simply proposed for the federal government the view of establishment they supported in their own states. Nothing supports the notion that they did not understand the familiar language they proposed. Rather, these examples suggest that when the Framers debated the details of the religion clauses, their views on religious liberty were more salient than their views on federalism.

Levy derives a much broader argument from the relationship between federalism and establishment. He argues that the federal government had no power to aid religion and that no one thought

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171. See supra notes 76-77 and accompanying text.
172. This attention to the merits when debating details coexisted with a willingness to support or oppose the whole Bill or Rights for the collateral purpose of increasing or reducing public support for the new Constitution. See L. Levy, supra note 2, at 87, 108-09.
the establishment clause created such power. He concludes that the establishment clause must therefore forbid any aid to religion, even nonpreferential aid. He finds it inconceivable that the establishment clause implicitly creates a previously nonexistent power to grant nonpreferential aid.173

Levy is correct that the clause creates no power, but that is not the issue. The issue is not what powers the clause creates, but what powers it forbids. Levy fallaciously assumes that the clause must forbid any power it does not create, ignoring the possibility that the clause might be neutral on some things. If no part of the Bill of Rights were necessary, as the Federalists argued and as Levy insists, then a fortiori it was unnecessary for the prohibitions in the Bill of Rights to match point for point the powers not created by the original Constitution.

As I have already argued, the establishment clause was debated on the assumption that the government may have some power to aid religion. The Framers fought over how much of that hypothetical, unspecified, and possibly nonexistent power to restrain. They could have agreed to forbid or not to forbid nonpreferential aid to religion, without agreeing, or without having any view at all, on whether the rest of the Constitution created power to grant nonpreferential aid. The remarks of Henry, Gerry, and Huntington suggest that the Framers did exactly that. At one point, even Levy recognizes a long list of federal powers that could be used in aid of religion.174 The Framers foresaw and even exercised some of these uses of federal power.175 But Levy fails to see how these alternative sources of power affect his argument.

Certainly the modern nonpreferentialists are not guilty of claiming that the establishment clause creates power to aid religion. Under modern understandings of the spending power and of executive and legislative power to issue proclamations, resolutions, and endorsements, the federal government can aid religion unless the establishment clause forbids it. Moreover, Levy’s argument is wholly irrelevant to the states. So far as the federal Constitution is

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173. See id. at xii, 65-66, 74, 84, 93, 106, 109-10, 114-17.
174. Id. at 172-74.
175. Id. (missionaries to Indians, government land set aside for support of religion, congressional chaplains, Thanksgiving proclamations); see supra notes 168-70 and accompanying text.
concerned, the states have plenary power to aid religion unless the establishment clause, applied to the states through the fourteenth amendment, forbids it. It is therefore irrelevant to show that the establishment clause does not create a power to aid religion; Levy must show that the establishment clause affirmatively forbids such a power. The two are not the same.

Levy and I agree that the establishment clause affirmatively forbids nonpreferential aid to religion, and that the Framers so intended. But I do not think his argument from federalism supports that conclusion.

C. Levy's View of the Surviving State Establishments

Levy views the establishments in Massachusetts, Connecticut, New Hampshire, and Vermont as multiple rather than exclusive. He also notes that the constitutions of Maryland, South Carolina, and Georgia authorized multiple establishments, although he concedes that they were never put into effect. Finally, he argues that the establishment in colonial New York was a multiple establishment. He makes these arguments to show that multiple establishments were part of the Framers' concept of establishment, and therefore that the establishment clause must have forbidden multiple as well as exclusive establishments. This is a useful response to scholars who claim that "establishment" can only mean an exclusive establishment.

Levy goes further, arguing that these multiple establishments were also nonpreferential, and therefore that the clause forbids nonpreferential establishments as well. An essential part of this argument is to elide the distinction between multiple and nonpreferential establishments. An establishment can be multiple in the sense that more than one church gets state support, and also

176. L. Levy, supra note 2, at 15-20, 26-33 (Massachusetts); id. at 20-22, 41-44 (Connecticut); id. at 23-24, 38-40 (New Hampshire); id. at 44-46 (Vermont).
177. Id. at 47.
178. Id. at 10-15. However characterized, this establishment was abolished in 1777. Id. at 26.
179. Id. at 6-9, 61-62.
preferential in the sense that one church gets more support than others. Indeed, this is a fair characterization of the New England establishments on which Levy bases most of his case. New England dissenters who were willing to take advantage of the coercive power of the state could get some forms of state aid, through their power to collect taxes from members who filed exemption certificates and through their occasional success in electing local ministers.\(^{182}\) Thus, Levy concludes, even the dissenters were established. He is right in a sense, and to that extent these were multiple rather than exclusive establishments. But they were not nonpreferential establishments. They were enacted by Congregationalist majorities for their own benefit, and the equality of Congregationalists and dissenters remained wholly theoretical.

Levy devotes two chapters to showing that multiple establishments existed in both the colonial and early national period.\(^{183}\) He devotes only scattered and conclusory passages to showing that these establishments were nonpreferential.\(^{184}\) Significantly, he has an index entry for multiple establishments but not for nonpreferential establishments.\(^{185}\) He simply does not distinguish the two concepts on any sustained basis.

Levy and I agree that New England tried to cover establishment with a veneer of nonpreferentialism. I believe that he is fooled by that veneer and by his desire to show that the Framers were familiar with nonpreferential establishments. Levy emphasizes the nonpreferential legal theory of the New England establishments, but he gives less weight to their oppressive practical operation, which he blames on unfair administration and the Congregationalist voting majority.\(^{186}\) He repeatedly says that Congregationalists benefited from demography rather than law.\(^{187}\) But the demography was perfectly understood when the law was enacted and, as Levy

\(^{182}\) Id. at 15-16, 21-22, 28, 30-32, 40.

\(^{183}\) Id. at 1-62.

\(^{184}\) Id. at 20, 28-30, 61-62, 110. At one point, Levy concedes that the establishment in Connecticut was preferential in fact, though not in theory. Id. at 41. At another point, he says the Connecticut establishment was nonpreferential. Id. at 22.

\(^{185}\) Id. at 231. At one point, Levy explicitly equates exclusive and preferential establishments. Id. at 62.

\(^{186}\) Id. at 19-20, 31, 40.

\(^{187}\) Id. at 19, 45, 61-62.
concedes in the case of Massachusetts, the Congregationalists were the intended beneficiaries of the New England establishments. He agrees that dissenters were often oppressed by the system, but he never reconciles this reality with his assertions that the establishment was nonpreferential. Nor does he make any effort to explain how a system could be nonpreferential when compliance violated the conscientious beliefs of the two largest minority sects. In general, he elevates form far above substance.

Levy also equates local option establishments with nonpreferential establishments. In a system in which each town could elect the established minister, dissenters were able to win a few towns. Levy looks at this from a statewide perspective and proclaims it nonpreferential. But from a local perspective, each town had an exclusive establishment, mitigated only by the exemption available to local dissenters. And as noted, in a state with a large Congregationalist majority, Congregationalist dominance of local elections was foreseen and intended.

Whether the New England establishments were evenhanded enough to be called nonpreferential is not crucial to either Levy’s argument or mine. The effort to appear nonpreferential, in New England and elsewhere, shows that the Framers understood the concept of a nonpreferential establishment. Unlike Levy, I think an additional step is needed to complete the argument: that when the Framers squarely focused on the choice between nonpreferential establishment and no establishment at all, they chose no establishment at all.

Without that additional step, Levy’s characterization of the surviving establishments as nonpreferential can be turned against him. A nonpreferentialist could respond that the establishment

188. Id. at 15.
189. Id. at 20-22, 28, 31, 41-42.
192. See supra notes 26-51 & 101-23 and accompanying text.
clause reflects the views of the large number of states that, in Levy's view, had recently replaced exclusive establishments with nonpreferential establishments. That response should fail, because the more direct evidence is to the contrary, and because Levy's characterization of the New England establishments as nonpreferential is so unconvincing. Surely not even today's nonpreferentialists believe that Congress could constitutionally mandate local option establishments modeled on the Massachusetts Constitution of 1780. However they are characterized, the New England establishments were not the model for what is permitted under the establishment clause.

VI. THE FRAMERS' OTHER INTENTION: NONFINANCIAL AID TO RELIGION

The state debates concerning establishment centered on financial aid. Nonfinancial government support for Protestantism was rampant and largely noncontroversial. Nonpreferentialists also invoke these practices in support of their theory.193 Supporters of government aid to religion also make the more general claim that the establishment clause does not forbid anything analogous to a practice that was common in 1791. The creche case194 and especially the legislative prayer case195 are based on that claim.

The argument cannot be merely that anything the Framers did is constitutional. The unstated premise of that argument is that the Framers fully thought through everything they did and had every constitutional principle constantly in mind, so that all their acts fit together in a great mosaic that is absolutely consistent, even if modern observers cannot understand the organizing principle. That is not a plausible premise. Of course the state and federal establishment clauses did not abruptly end all customs in tension with their implications. No innovation ever does. Momentum is a powerful force in human affairs, and the Framers were busy building a nation and creating a government. Their failure to spend

193. See Wallace v. Jaffree, 472 U.S. 38, 99-104 (1985) (Rehnquist, J., dissenting); R. Cord, supra note 8, at 23-80; Cord, supra note 8, at 139-48; Smith, supra note 9, at 620-28; Comment, supra note 10, at 573-74.
time examining every possible establishment clause issue is hardly surprising. The Framers did not think that everything they did was constitutional. Professor Kurland quotes Madison's 1787 observation that many of the state bills of rights were widely violated.\textsuperscript{196} Indeed, one of the arguments against the federal Bill of Rights was that the state bills of rights had been ineffectual.\textsuperscript{197}

Those who would rely on early government aid to religion must identify some principled distinction between the practices the Framers accepted and those they rejected. We can then consider whether we are bound by, or are willing to adopt for ourselves, the implicit principle on which they appear to have acted. The search for patterns requires a brief review of the kinds of aid to religion that the Framers supported or at least tolerated.

The Constitutional Convention did not appoint a chaplain,\textsuperscript{198} but the First Congress appointed chaplains, and even Madison apparently acquiesced.\textsuperscript{199} Presidents Washington, Adams, and Madison issued Thanksgiving proclamations,\textsuperscript{200} although Madison did so only in time of war and at the request of Congress, and his proclamations merely invited citizens so disposed to unite their prayers on a single day.\textsuperscript{201} President Jefferson refused to issue Thanksgiving proclamations, believing them to be an establishment.\textsuperscript{202} In retirement, Madison concluded that both the congressional chaplains and the Thanksgiving proclamations had violated the establishment clause.\textsuperscript{203} He said he had never approved of the decision to appoint a chaplain.\textsuperscript{204}

\begin{itemize}
  \item \textsuperscript{196} Kurland, \textit{supra} note 1, at 852.
  \item \textsuperscript{197} See \textit{1 Annals of Cong.} 439-40 (J. Gales ed. 1834) (June 8, 1789) (remarks of Mr. Madison, conceding the fact but arguing that the federal judiciary would effectively enforce a federal bill of rights).
  \item \textsuperscript{198} R. Cord, \textit{supra} note 8, at 24-25.
  \item \textsuperscript{199} Id. at 23.
  \item \textsuperscript{200} Id. at 51-53.
  \item \textsuperscript{201} Madison issued Thanksgiving proclamations from 1812 to 1815. Id. at 53 n.12. Three of these proclamations are reprinted in Cord's book, \textit{id.} at 257-60, and Madison's later explanation of his carefully chosen language also is quoted, \textit{id.} at 31.
  \item \textsuperscript{202} Id. at 39-41. There is evidence that Jefferson drafted a Thanksgiving bill for Virginia during a revision of the Virginia statutes. See Cord, \textit{supra} note 8, at 135.
  \item \textsuperscript{203} Fleet, \textit{Madison's Detached Memoranda}, 3 \textit{WM. & MARY Q.} 555, 558-62 (3d Ser. 1946).
  \item \textsuperscript{204} Letter from James Madison to Edward Livingston (July 10, 1822), \textit{quoted in L. Levy, supra} note 2, at 97.
\end{itemize}
Congress also subsidized missionary work among the Indians, and even Jefferson signed a treaty agreeing to build a church and supply a Catholic priest in exchange for tribal lands of the Kaskaskias. Congress continued to support sectarian education on Indian reservations until 1898. Commentators have alleged that the First Congress reenacted the Northwest Ordinance, with its recital that "religion, morality, and knowledge" are necessary to good government. The claim is false, but I do not doubt that a large majority of the First Congress would have subscribed to the sentiment.

These examples undoubtedly evidence support for religion, but they are hard to explain as nonpreferential. Supplying a Catholic priest to a tribe of Catholic Indians may be a cheap way to buy land, but it is not a form of nonpreferential aid. A missionary or a church-run school inevitably represented a particular denomination, whatever that denomination might be. So did the congressional chaplain. Congress did not hire a chaplain from every faith, or even one from every faith represented by a Congressman. I assume that most of the Framers saw no constitutional problem with a chaplain, but I doubt that they rationalized the practice on the ground that it was nonpreferential.

Professor McConnell's theory that the establishment clause forbids only coercive aid to religion comes much closer to explaining the early activities of the federal government. But sectarian education of Indians required tax money, which McConnell agrees is

205. R. Cord, supra note 8, at 53-80, 261-70.

206. The treaty is reprinted in Cord's book. Id. at 261-63. The United States promised to pay $1000 to build a church, and to pay a priest for seven years. The priest was to "perform the duties of his office" and also to instruct the tribe's children "in the rudiments of literature." Id.

207. The practice was ended by the Act of June 7, 1897, ch. 3, 30 Stat. 62.

208. R. Cord, supra note 8, at 43; T. Curry, supra note 3, at 218; L. Levy, supra note 2, at 172; Smith, supra note 9, at 627-28; Comment, supra note 10, at 574.

209. All that Congress enacted were two technical amendments. Section 1 substituted "the President of the United States" for all references to "the United States in Congress assembled." Act of Aug. 7, 1789, ch. 8, § 1 Stat. 50, 52-53. Section 2 provided that the secretary of the territory should perform the duties of the governor in the event of a vacancy. Id. § 2, 1 Stat. at 53.

210. Congress did hire two chaplains of different denominations and rotated them between the House and Senate. Cord, supra note 8, at 139-40.

211. See McConnell, Coercion, supra note 93.
coercive. So noncoercion cannot explain everything the government did either.

The substantial political resistance to establishment focused on tax support for churches. The Framers' generation must have seen tax support for missionaries to the Indians as different from tax support for churches. Probably they found missionaries a cheap and effective way to educate the Indians: they were hiring churches to provide government services. Even so, religious teaching was also an accepted part of the mission, and nobody talked of any accounting to separate the costs of education in secular and religious subjects.

Once again, the practice of the states helps to flesh out the pattern. The federal government had limited legislative powers; the states' general police power gave them more opportunities to act with respect to religion. Most state constitutions guaranteed religious liberty. The federal religious liberty clauses did not necessarily mean the same thing as the state religious liberty clauses, but again state practices may help show how the Framers' generation understood religious liberty.

State aid to religion was both preferential and coercive. The states continued practices that no one would defend today. All but two states had religious qualifications for holding public office, and at least five states denied full civil rights to Catholics. Blasphemy was commonly a crime; in Vermont blasphemy against the Trinity was a capital offense, although it presumably was not enforced as such. Observance of the Christian Sabbath was widely

212. See supra notes 107-13, 122-23 & 136-43 and accompanying text.

213. For an application of this analysis to the controversy about "aid" to church-sponsored schools, see Laycock, Religious Liberty, supra note 2, at 443-44.

214. For the texts of 12 such religion clauses, see 1 A. Stokes, supra note 60, at 303 (Virginia); id. at 402-03 (North Carolina); id. at 405 (New York); id. at 423-24 (Massachusetts); id. at 429 (New Hampshire); id. at 432-34 (South Carolina); id. at 435 (New York); id. at 437 (Delaware); id. at 438 (Pennsylvania); id. at 440 (Georgia); id. at 440-41 (Vermont); id. at 442-43 (Rhode Island). For a summary of the Maryland provisions, see id. at 439. The important Connecticut provisions were statutory; for the text of one of them, see id. at 412.


216. See 1 A. Stokes, supra note 60, at 402 (North Carolina); id. at 406 (New York); id. at 430 (New Hampshire); id. at 435 (New Jersey); id. at 441 (Vermont).

217. T. Curry, supra note 3, at 190.
enforced, with little in the way of fictitious explanations about a neutrally selected day for families to be together. These laws aroused little controversy, and almost no one thought them inconsistent with constitutional guarantees of religious liberty. Yet tax support for churches was deeply controversial and widely thought inconsistent with religious liberty.

Several reasons probably contributed to the differing reactions to financial and nonfinancial aid. First, there is always opposition to taxes, whatever their purpose. In Virginia, the general assessment was debated at a time of high taxes and low tobacco prices in a tobacco economy. Second, the tax for churches was associated with earlier unitary establishments: Anglicans in the South, and Congregationalists in the North. Broadening the tax to include other denominations did not remove the taint or end the hostility. The Anglican clergy were far more dependent on tax support than denominations already accustomed to voluntary support. Third, and perhaps most important, the tax for churches split the Protestant denominations. Baptists and Quakers objected even to a nonpreferential system in which every taxpayer designated the church to receive his tax. When the Virginia Presbyterians reached the same conclusion in 1786, the assessment bill was doomed.

For all these reasons, there were widespread objections to tax support for churches. What is largely the same thing, there were Protestant objections. This opposition forced the Framers’ generation to think about the tax issue. Once they thought about it, they concluded that any form of tax support for churches violated religious liberty. By the time of the first amendment, church taxes were repealed or moribund outside New England, and they were not working well in the four New England states that still tried to collect them.

218. See McGowan v. Maryland, 366 U.S. 420, 484-95 (1961) (separate opinion of Frankfurter, J.); T. Buckley, supra note 98, at 181-82; Cord, supra note 8, at 135.
219. This and similar secular purposes were the rationale for upholding Sunday closing laws in McGowan v. Maryland, 366 U.S. 420 (1961).
220. T. Buckley, supra note 98, at 153-55.
221. See e.g., id. at 137-38, 151, 175-76; T. Curry, supra note 3, at 147; id. at 157 (quoting Catholic leader John Carroll).
222. See T. Buckley, supra note 98, at 136-39, 143, 175.
The other government supports of Protestantism never aroused enough controversy to trigger similar examination. The nation was overwhelmingly Protestant and hostile to other faiths. Bare tolerance of other faiths was a major accomplishment, not yet safe from reaction; accepting other faiths as equals was far in the future. John Jay led an unsuccessful movement to banish Catholics from New York, and John Adams boasted that Catholics and Jacobites were as rare as comets and earthquakes in his hometown of Braintree. Professor Kurland quotes other examples of Protestant bigotry among political leaders. Non-Protestants could practice their religion, but they often could not vote, hold public office, or publicly criticize Protestantism. Non-Protestants certainly could not expect the government to refrain from preaching Protestantism. These conditions would not change easily. Half a century later, mob violence, church burnings, and deaths would result when Catholics objected to studying the “Protestant Bible” in public schools. The anti-Catholic, anti-immigrant Know Nothing Party would sweep elections in eight states.

In 1791, almost no one thought that government support of Protestantism was inconsistent with religious liberty, because almost no one could imagine a more broadly pluralist state. Protestantism ran so deep among such overwhelming numbers of people that almost no one could see that his principles on church taxes

223. See, e.g., id. at 181-82; T. Curry, supra note 3, at 140, 166, 170, 177; F. McDonald, supra note 80, at 42-43; Borden, supra note 215, at 472-73, 478, 482. Maryland was a partial exception; it had begun as a Catholic colony, although it later had an Anglican establishment; T. Curry, supra note 3, at 153-54, and Catholics were disenfranchised for a time. See F. McDonald, supra note 80, at 42-43. A Catholic, Charles Carroll of Carrollton, signed the Declaration of Independence and served in the first Senate, and his distant relative, Daniel Carroll, signed the Constitution and served in the first House of Representatives. J. Hennessey, American Catholics: A History of the Roman Catholic Community in the United States 58-59 (1981); see also 1 Annals of Cong. 18 (J. Gales ed. 1834) (Apr. 13, 1789) (Charles Carroll seated in the Senate); 1 A. Stokes, supra note 60, at 325 (relationship between Charles and Daniel). Charles Carroll was well respected nationally, but at least some political opponents attacked his Catholicism in bigoted terms. J. Hennessey, supra, at 58-59.

224. T. Curry, supra note 3, at 162.


227. L. Levy, supra note 2, at 170; 1 A. Stokes, supra note 60, at 830-35.

228. 1 A. Stokes, supra note 60, at 836-37.
might have implications for other kinds of government support for religion. The exclusion of non-Protestants from pronouncements of religious liberty was not nearly so thorough or so cruel as the exclusion of slaves from pronouncements that all men were created equal, but both blind spots were species of the same genus.

In short, the appeal to the Framers’ practice of nonfinancial aid to religion is an appeal to unreflective bigotry. It does not show what the Framers meant by disestablishment; it shows what they did without thinking about establishment at all. I believe that the relevant intention of the Framers is the one they thought about. But if that view is rejected—if both the considered and the unconsidered intentions of the Framers are binding—then the result would not be to approve nonpreferential aid. The Framers’ implicit distinction was between financial aid and other aid. If both their intentions are followed, all financial aid will be forbidden, whether or not preferential. But unlimited financial aid will be permitted even if it is preferential and coercive. Few nonpreferentialists would defend that.

I am not even suggesting that we modify the principle the Framers considered. I would apply uniformly the very principle the Framers considered and accepted: that aid to religion is not saved by making it nonpreferential.

VII. MAKING SENSE OF THE ESTABLISHMENT CLAUSE TODAY

The United States today is more religiously diverse than anything the Framers could have imagined. Waves of immigration from Europe, Asia, and Latin America have created large and influential populations of Catholics and Jews, and significant populations of Muslims, Hindus, Buddhists, Haitian voodooists, and others. Geographic concentration and residential segregation make some of these groups invisible to the majority, but they are numerous and important to many local communities.\(^{229}\) The Solicitor General and Supreme Court justices worry about equal treatment

\(^{229}\) For example, the “Yellow Pages” in Honolulu list 50 Buddhist and four Shinto temples and shrines. They also list one Moslem Mosque, one Baha’i temple, one Church of Krishna Consciousness, one Church of Scientology, three institutions under the category “Churches—Cosmology, Ontology, and Metaphysics,” and two under the category “Churches—Spiritualism.” HAWAIIAN TELEPHONE CO., OAHU YELLOW PAGES 250-56 (1986).
of Sikhs and Rastafarians. New sects as disparate as the Mormons, the Jehovah’s Witnesses, and the Scientologists have developed indigenously, and imported sects such as Krishna Consciousness and the Unification Church have attracted highly visible followers. Significant numbers of atheists and agnostics have been with us since the late nineteenth century; to the Framers, they were merely a theoretical possibility. What does the establishment clause mean in this context?

One approach would be to imitate the Framers’ conduct. Under that approach, all these new religious groups would be expected to quietly endure state-sponsored Protestantism. The government would tolerate the new faiths, but they would forever be outsiders of not quite equal status. Alternatively, we can try to identify an intelligible principle that makes sense of what the Framers ratified. I believe that the task of interpretation is to apply the principle of the establishment clause to the situation that exists today.

A distinction between preferential and nonpreferential aid is not the principle the Framers intended. Even if it were, that distinction has become illusory. No aid is nonpreferential. Differences among Baptists, Quakers, Congregationalists, and Anglicans made nonpreferential aid unworkable in the eighteenth century. The vastly greater religious differences today make it vastly more unworkable.

For the issues that are most controversial, nonpreferential aid is plainly impossible. No prayer is neutral among all faiths, even if one makes the mistake of excluding atheists and agnostics from consideration. On that point, Michael Malbin and I agree. Government-sponsored religious symbols or ceremonies, whether in schools, legislatures, courthouses, or parks, are inherently preferential. They nearly always support Christianity, and when implemented by their most ardent supporters, they support a particular strain of evangelical Christianity.

231. See J. Turner, supra note 117.
It is theoretically possible to award equal and nonpreferential financial aid to every religious group, or perhaps to every religious leader. But the experience of the eighteenth century again suggests that workability problems are inevitable. And if the debates of the 1780's support any proposition, it is that the Framers opposed government financial support for religion.

Professor McConnell suggests the more workable principle that the establishment clause bars any aid to religion that coerces nonbelievers.\textsuperscript{234} He sensibly views taxation and school prayer as coercive,\textsuperscript{235} although the supporters of school prayer disagree. I hope he would agree that legislative prayer is equally coercive. Adults may have greater capacity to resist, but the coercion is identical. It is easier to listen quietly to the government prayer than conspicuously walk out and back in again. I also hope he would view small expenditures in support of religion as coercive, even though the taxation required to pay for them is equally small.

Taken seriously, Professor McConnell's coercion test would eliminate all government support for religion except endorsements that cost no money. Crosses and creches would abound on government property, perhaps paid for by private contributions. Thanksgiving proclamations, resolutions encouraging church attendance, and posters of the Ten Commandments\textsuperscript{236} would be unobjectionable. The Great Seal of the United States could be a flaming cross with the words "in this sign conquer,"\textsuperscript{237} so long as the government only portrayed Constantine's vision and did not emulate his persecutions.\textsuperscript{238} Government leaders and media preachers could unite their efforts to persuade the populace to a particular set of political and

\begin{footnotes}
\item[234] McConnell, \textit{Coercion, supra} note 93, at 938.
\item[235] Id. at 933.
\item[237] Cf. Friedman v. Board of County Comm'rs, 781 F.2d 777 (10th Cir. 1985) (en banc) (invalidating similar seal that was prominently displayed on police cars), \textit{cert. denied}, 106 S. Ct. 2890 (1986).
\item[238] On the eve of a decisive battle on the banks of the Tiber, Constantine saw a vision of a flaming cross and the Greek words meaning "in this sign conquer." He consequently ordered his troops to mark their shields with crosses, and he put a cross on the army's banner. \textit{W. Durant, Caesar and Christ} 654 (1944). Constantine won the battle and became the undisputed emperor, first in the west, \textit{id.}, and later over a reunited empire, \textit{id.} at 655. As emperor, he established Christianity and diligently persecuted heretics. \textit{Id.} at 658, 660, 664.
\end{footnotes}
religious views. These are not happy results, but I share McConnell's view that they are not as bad as coercion, and I suspect that he would find a theory to constrain some of the most egregious examples.

I have two problems with his test. First, it allows government to endorse or prefer one religious faith over others, with the inevitable result that adherents of the others will feel their inferior status. Second, it makes the two religion clauses redundant. Religious coercion by the government violates the free exercise clause. Coercion to observe someone else's religion is as much a free exercise violation as is coercion to abandon my own. If coercion is also an element of the establishment clause, establishment adds nothing to free exercise.

VIII. Conclusion

The principle that best makes sense of the establishment clause is the principle of the most nearly perfect neutrality toward religion and among religions. I do not mean neutrality in the formal sense of a ban on religious classifications, but in the substantive sense of government conduct that insofar as possible neither encourages nor discourages religious belief or practice. This is the principle that maximizes religious liberty in a pluralistic society, and this is the principle that the Framers identified in the context

239. Government officials can do this to some extent in their individual capacity as politicians. I leave to another time the difficult task of distinguishing the personal and official speech of government officials. See M. YUDOF, WHEN GOVERNMENT SPEAKS (1983).

240. In his article on accommodation, McConnell says that accommodations must not favor one form of religious belief over another. McConnell, Accommodation, supra note 93, at 39. But he is reluctant to apply that standard to preferential displays of religious symbols, lest the public sphere be wholly secularized. Id. at 49-50. My understanding of these passages has been clarified by conversation and correspondence.

241. This is the principle proposed in Kurland, Of Church and State and the Supreme Court, 29 U. CHI. L. REV. 1 (1961).

242. See Laycock, Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers, 81 NW. U.L. REV. 1, 3 (1986) (forthcoming). This distinction is best illustrated by facially neutral laws that violate religious conscience. In Professor Kurland's view, a law prohibiting the consumption of alcohol could not contain an exception for sacramental wine. Such an exception would prefer religion. In my view, an exception would be required. A law banning wine at the Eucharist and the Seder would prohibit the free exercise of religion, however neutral its wording and however general its application. In this example, no compelling interest would justify the prohibition.
of tax support for churches. They did not substitute nonpreferential taxes for preferential taxes; they rejected all taxes. They did not substitute small taxes for large taxes; three pence was as bad as any larger sum.\textsuperscript{243} The principle was what mattered. With respect to money, religion was to be wholly voluntary. Churches either would support themselves or they would not, but the government would neither help nor interfere.

That is what disestablishment meant to the Framers in the context in which they thought about it. They applied the principle only in that context—only to tax support. Their society was so homogeneous that they had no occasion to think about other kinds of support. Now that we have thought about it, we are not unfaithful to the Framers' intent when we apply their principle to analogous problems. Congress cannot impose civil disabilities on non-Protestants or ban blasphemy against the Trinity just because the Framers did it. It is no more able to endorse the predominant religion just because the Framers did it. Our task is not to perpetuate the Framers' blind spots, but to implement their vision.

\textsuperscript{243.} \textit{Memorial and Remonstrance}, supra note 111, ¶ 3.