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COMMENT

ONE NATION INDIVISIBLE: HOW CONGRESS'S ADDITION OF "UNDER GOD" TO THE PLEDGE OF ALLEGIANCE OFFENDS THE ORIGINAL INTENT OF THE ESTABLISHMENT CLAUSE

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Throughout American history, public officials, religious leaders, scholars, and ordinary citizens have debated the proper relationship between religion and government. Despite the volume of discussion on this topic, a commonly-accepted answer remains elusive—the issue remains one of the primary wedges dividing the American populace. In the past, this debate has centered on taxpayer support for religious institutions¹ and Sunday operation of postal services.² Today, the discussion has shifted to controversies over the display of religious symbols on public property,³ the use of school vouchers to subsidize religiously-affiliated private schools,⁴ and the inclusion of “intelligent design” in public school science curricula.⁵ Few of these issues have flashed as suddenly into the national consciousness, however, as the constitutionality of the words “under God” in the Pledge of Allegiance.

Despite United States Supreme Court dicta alluding to the Pledge of Allegiance as unquestionably constitutional,⁶ on June 26, 2002, the Ninth Circuit Court of Appeals held that both the 1954 Act

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1. See Isaac Kramnick & R. Laurence Moore, *The Godless Constitution: The Case Against Religious Correctness* 114–19 (paperback ed., W.W. Norton & Co. 1997).

2. See *id.* at 131–43.

3. See e.g. *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005).

4. See e.g. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. Cin. L. Rev. 151 (Fall 2003).

5. See e.g. *Kitzmiller v. Dover Area Sch. Dist.*, 2005 WL 2230024 (M.D. Pa. 2005); Jay D. Wexler, *Darwin, Design, and Disestablishment: Teaching the Evolution Controversy in Public Schools*, 56 Vand. L. Rev. 751 (Apr. 2003).

6. E.g. *County of Allegheny v. ACLU Greater Pitt. Chapter*, 492 U.S. 573, 602–03 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984).

of Congress inserting “under God” into the Pledge and the state-sponsored recitation of the Pledge of Allegiance in public schools violate the First Amendment prohibition of laws “respecting an establishment of religion” (hereinafter “Original *Newdow*”).⁷ The ruling drew immediate criticism. According to President George W. Bush’s spokesperson, “[t]he president’s reaction was that this ruling is ridiculous.”⁸ The President’s political foe, Democratic Senate Majority Leader Tom Daschle, referred to the decision as “just nuts.”⁹ Senator Joseph Lieberman, the Democratic vice presidential nominee in 2000, declared: “There may have been a more senseless, ridiculous decision issued by a court at some time, but I don’t remember it.”¹⁰ The Ninth Circuit subsequently amended its order, limiting the decision to the recitation of the Pledge in public schools (hereinafter “Amended *Newdow*”).¹¹ The Supreme Court eventually overturned this ruling, but avoided the substantive legal question by holding that the plaintiff, Michael Newdow, lacked standing to bring the case.¹² The substantive controversy, however, is far from dead. On September 14, 2005, a federal judge in the Eastern District of California again found the Pledge of Allegiance unconstitutional in a new case brought by Mr. Newdow and two other families with children in the California public schools.¹³

The recent litigation surrounding the Pledge of Allegiance, including the Amended *Newdow* decision, has focused primarily on the context in which it is recited—the recitation by school children, led by a teacher, in a public school classroom. The litigation’s focus on state and local government actions requires application of the establishment clause beyond the federal government through the due process clause of the Fourteenth Amendment.¹⁴

7. *Newdow v. U.S. Cong.*, 292 F.3d 597 (9th Cir. 2002).

8. E.g. David Kravets, ‘Under God’ Unconstitutional; Appeals Court Rules Phrase in Pledge Endorses Religion, *Chicago Sun-Times* 3 (June 27, 2002).

9. *Id.*

10. E.g. Tom Vanden Brook, *Critics Say Court was ‘California Dreaming,’ USA Today* 4A (June 27, 2002).

11. *Newdow v. U.S. Cong.*, 328 F.3d 466 (9th Cir. 2003).

12. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). Mr. Newdow brought this case on behalf of his daughter, a student in the Elk Grove Unified School District; the girl’s mother, however, had sole legal custody.

13. *Newdow v. Cong. of U.S.*, 383 F. Supp. 2d 1229 (E.D. Cal. 2005).

14. The First Amendment expressly limits its application to the federal government. U.S. Const. amend. I. The first Congress considered and rejected an amendment applying many of the First Amendment provisions, but not the establishment clause, to the states: “no State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases.” 1 *Annals of Cong.* 783 (1789). Nonetheless, the Supreme Court has applied most of the Bill of Rights, including the establishment clause and the remainder of the

This paper focuses on the text of the Pledge of Allegiance itself, as adopted by Congress in federal statute, rather than the context of its recitation. Section I examines the history of the Pledge of Allegiance and Congress's insertion of the phrase "under God." Section II investigates the original intent of the establishment clause by analyzing the text, the legislative history, and the philosophical underpinnings of the Constitution; the federalist structure of the new United States government; and historical evidence from the early years of the republic. Section III applies this interpretation to the 1954 Act of Congress adding "under God" to the Pledge of Allegiance and the two primary arguments justifying this action. Through this analysis, one conclusion becomes apparent: the inclusion of "under God" in the Pledge of Allegiance is wholly inconsistent with the founding generation's understanding, as embodied in the First Amendment establishment clause, of the proper relationship between religion and the federal government.

I. HISTORY OF THE PLEDGE OF ALLEGIANCE

The Pledge of Allegiance was written by Francis Bellamy as a children's recitation for the 400th anniversary of Columbus's discovery of America.¹⁵ The original language of the Pledge contained no reference to either God or the United States.¹⁶ In 1923 and 1924, the National Flag Conference, citing fears that immigrants may confuse the words "my flag" for the flag of their native land, amended the Pledge of Allegiance to reference the United States of America.¹⁷ Congress first recognized the Pledge of Allegiance in 1942 by adding it to the United States Flag Code as part of an effort to "codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America."¹⁸

First Amendment, to state and local governments through the due process clause of the Fourteenth Amendment. *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1 (1947). Despite this clear precedent, however, scholars continue to criticize incorporation. E.g. William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DePaul L. Rev. 1191 (1990).

15. National Flag Day Foundation, *The Story of the Pledge of Allegiance*, <http://www.flagday.org/Pages/PledgeHistory.html> (accessed Oct. 24, 2006); Home of Heroes, *The Pledge of Allegiance*, http://www.homeofheroes.com/hallofheroes/1st_floor/flag/1bfc_pledge.html (accessed Oct. 24, 2006).

16. "I pledge allegiance to my flag, and to the Republic for which it stands: one Nation indivisible, With Liberty and Justice for all." National Flag Day Foundation, *supra* n. 15; Home of Heroes, *supra* n. 15.

17. National Flag Day Foundation, *supra* n. 15; Home of Heroes, *supra* n. 15.

18. H.R. Rpt. 77-2047 (Apr. 22, 1942); Sen. Rpt. 77-1477 (June 11, 1942). The codified language reflected the changes made by the National Flag Conference in 1923 and 1924: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." *Act of June 22, 1942*, Pub. L. No. 77-623, § 7, 56 Stat. 380 (1942). In 1945, Congress amended the statute to officially designate, rather than

In the early 1950s, the Pledge of Allegiance again gained national attention. On April 22, 1951, the Board of Directors of the Knights of Columbus adopted a resolution adding the words “under God” to the Pledge of Allegiance recited at each of the organization’s meetings.¹⁹ The following year, the Knights of Columbus began adopting resolutions calling for Congress to formally insert “under God” into the Pledge.²⁰ The effort to amend the Pledge of Allegiance gained momentum with a February 1954 sermon by the Reverend George M. Docherty endorsing the addition. This service was attended by President Dwight Eisenhower and Senator Homer Ferguson, the author of the Senate bill.²¹ Congress officially inserted “under God” into the Pledge of Allegiance later that year.²²

The two motivating factors cited by Congress clearly manifest the religious intent behind the legislation. First, the words “under God” recognized Congress’s belief that America is a religious nation.²³ In support of this premise, Congress cited several examples of religious references from American history, including the 1620 Mayflower Compact, the 1776 Declaration of Independence, President Abraham Lincoln’s 1863 Gettysburg Address, and the 1864 inscription of “In God We Trust” on American coins.²⁴ Additionally, Congress focused on religion as the fundamental distinction between the United States, with a foundation of “individuality and the dignity of the human being,” and “the atheistic and materialistic concepts of communism with its attendant subservience of the individual.”²⁵ President

simply refer to, the language as the Pledge of Allegiance to the flag of the United States; the text of the Pledge itself was not affected. 79 H.R. Rpt. 79-611 (May 24, 1945); Pub. L. No. 79-287, 59 Stat. 668 (1945).

19. Knights of Columbus, *How the words “UNDER GOD” came to be added to the Pledge of Allegiance to the Flag*, <http://www.kofc.org/rc/en/about/activities/community/pledgeAllegiance.pdf> (accessed Oct. 17, 2005); see also Pew Forum on Religion & Pub. Life, *Legal Backgrounder: One Nation under God? A Constitutional Question*, <http://pewforum.org/religion-schools/pledge/backgrounder.pdf> (accessed Oct. 17, 2005); David Greenberg, *The Pledge of Allegiance: Why We’re Not One Nation “under God.”* <http://slate.msn.com/?id=2067499> (June 28, 2002).

20. Knights of Columbus, *supra* n. 19.

21. Sen. Rpt. 83-1287 (May 10, 1954); David Greenberg, *supra* n. 19.

22. *Act of June 14, 1954*, Pub. L. No. 83-396, 68 Stat. 249 (1954). This amendment to the Pledge of Allegiance brought it to the form we know today: “I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.” 4 U.S.C. § 4 (2000).

23. H.R. Rpt. 83-1693 (May 28, 1954) (reprinted in 1954 U.S.C.C.A.N. 2339) (“From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.”); Sen. Rpt. 83-1313 (May 10, 1954) (“Our forefathers recognized and gave voice to the fundamental truth that a government deriving its powers from the consent of the governed must look to God for divine leadership.”).

24. H.R. Rpt. 83-1693; Sen. Rpt. 83-1313. The House committee also cited a report from the Legislative Reference Service of the Library of Congress on the placement of the words to create “a fundamental and basic characterization” of the United States as a religious nation. H.R. Rpt. 83-1693.

25. H.R. Rpt. 83-1693; Sen. Rpt. 83-1313 (quoting Rev. Docherty: “There was something missing in the pledge, and that which was missing was the characteristic and definitive factor in the American way of life. Indeed, apart from the mention of the phrase, ‘the United States of

Eisenhower recognized both of these factors on June 14, 1954 in signing the legislation:

From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural school house, the dedication of our nation and our people to the Almighty. To anyone who truly loves America, nothing could be more inspiring than to contemplate this rededication of our youth, on each school morning, to our country's true meaning. . . . In this way we are reaffirming the transcendence of religious faith in America's heritage and future; in this way we shall constantly strengthen those spiritual weapons which forever will be our country's most powerful resource in peace or in war.²⁶

Nearly fifty years after officially inserting "under God," Congress again examined the language of the Pledge. Reacting to the Ninth Circuit's invalidation of the 1954 statute as an unconstitutional establishment of religion, Congress cited the references to God from American history and reaffirmed the text of the Pledge of Allegiance, including the words "under God."²⁷

II. THE ESTABLISHMENT CLAUSE AT THE FOUNDING

In its most basic sense, traditional religious establishment is "the promotion and inculcation of a common set of beliefs through governmental authority."²⁸ Although establishment is foreign to most modern Americans, the founding generation was knowledgeable and well-acquainted with it: "virtually every American—and certainly every educated lawyer or statesman—knew from experience what those words meant."²⁹ In Great Britain and many of the other European countries from which Americans emigrated, official state religions established by law were common.³⁰ Although the American colonies themselves were part of Great Britain and formally under the Church of England—colonial charters, the history of religious dissent among colonists, and the vast span of the Atlantic Ocean created significant diversity in the relationship between colonial governments and religious institutions. Nonetheless, nine of the thirteen colonies maintained some form of religious establishment at the onset of the Revolutionary

America,' it could be the pledge of any republic. In fact, I could hear little Moscovites repeat a similar pledge to their hammer-and-sickle flag in Moscow with equal solemnity.").

26. Dwight D. Eisenhower, *Statement by the President Upon Signing Bill to Include the Words "Under God" in the Pledge to the Flag*, in *Public Papers of the Presidents of the United States: Dwight D. Eisenhower 1954* 563 (Off. of the Fed. Register, Natl. Archives & Recs. Serv., Gen. Servs. Administration: U.S. Govt. Prtg. Off. 1960).

27. Pub. L. No. 107-293, 116 Stat. 2057 (2002).

28. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003) [hereinafter *Establishment and Disestablishment*].

29. *Id.* at 2107.

30. *Id.*

War.³¹ The traditional Anglican (Church of England) establishment remained common in the Southern colonies, while the New England colonies adopted a system of multiple local establishments; New York maintained a dual establishment of the Anglican and Dutch churches.³² As this diversity demonstrates, the broad concept of religious establishment permits wide variation in the breadth and coerciveness of the regulations and in their tolerance for dissenting religious views.³³

The First Amendment to the United States Constitution prohibits religious establishments by the federal government: “Congress shall make no law respecting an establishment of religion.”³⁴ As noted above, however, religious establishment is a broad concept with varied degrees of governmental entanglement with religion. Legal scholars and practitioners have long debated the proper relationship between the federal government and religion under the First Amendment. Although individual perspectives on establishment clause analysis span a continuum of interpretations, these viewpoints can be divided into four general schools of thought. Some scholars believe the establishment clause allows federal government interaction with religious institutions, even to the point of favoring or disfavoring specific religious beliefs, as long as the action does not have “the purpose and effect of coercing or altering religious belief or action” (hereinafter “noncoercion”).³⁵ Another school of establishment clause interpretation focuses on preference rather than coercion—the federal government may favor religion generally, but may not grant preferential treatment to particular religious sects or denominations (hereinafter “nonpreference”).³⁶ Third, according to the neutrality perspective, federal government conduct must “neither encourage[] nor discourage[] religious belief or practice. . . . [The federal government] may not take a position on questions of religion in its own speech, and it must treat religious speech by private speakers exactly like secular speech by private speakers.”³⁷ Finally, strict separationists, focusing on Thomas Jefferson’s “wall of separation” metaphor,³⁸ read the es-

31. *Id.*

32. *Id.* at 2116–29.

33. *Id.*

34. U.S. Const. amend. I.

35. Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 *Wm. & Mary L. Rev.* 933, 940 (1985/1986) [hereinafter *Coercion*].

36. *E.g.* Michael J. Perry, *What Do the Free Exercise and Nonestablishment Norms Forbid? Reflections on the Constitutional Law of Religious Freedom*, 1 *U. St. Thomas L.J.* 549, 566 (2003).

37. Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 *Nw. U. L. Rev.* 1, 3 (1986).

38. Thomas Jefferson, *Letter to the Danbury Baptist Association*, in *Jefferson & Madison on Separation of Church and State* 163, 163 (Lenni Brenner ed., Barricade Books 2004).

establishment clause as a prohibition of all governmental interaction with religion.³⁹

A cursory examination of American history may suggest the founding generation was not offended by governmental religious speech—a position consistent with the noncoercion and nonpreference positions. A deeper analysis, however, paints a different picture of the establishment clause, at least with respect to the federal government. Interpreting the text in light of its legislative history suggests the drafters intended to restrict more than religious coercion or preference by the federal government. Moreover, many of the philosophical developments of the period and the federalist structure of the Constitution, dividing governmental authority between a limited national government and the several states, suggest the federal government was intended to be removed from religious issues. Finally, the historical evidence, although somewhat ambiguous, supports a broad interpretation of the establishment clause.

Based on this analysis, the original intent of the establishment clause prohibits more than the coercion of religious practices or preference of particular religious groups—the First Amendment was intended to require official silence by the federal government about religion.

A. *The Text and Legislative History of the First Amendment*

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”⁴⁰ Although this text, on its face, may be interpreted to support any of the four general establishment clause perspectives described above, analyzing the text in light of the alternative proposals considered and rejected suggests an intent to prohibit more than religious coercion or preference of specific religious groups.⁴¹

The House of Representatives began debating constitutional amendments on June 8, 1789, when Representative James Madison proposed several amendments for consideration.⁴² These proposals included a first draft of the religious liberty clauses: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any man-

39. See Steven K. Green, *Of (Un)equal Jurisprudential Pedigree: Rectifying the Imbalance between Neutrality and Separationism*, 43 B.C. L. Rev. 1111 (2002).

40. U.S. Const. amend. I.

41. Professor Douglas Laycock clearly outlined the legislative history of the First Amendment religion clauses in an article analyzing the constitutionality of financial support for religious institutions. Douglas Laycock, “*Nonpreferential*” *Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 878 (1985/1986) [hereinafter *Nonpreferential Aid*].

42. 1 *Annals of Cong.* at 440–41, 451–53. Because different printings of the *Annals of Congress* have different pagination, the date is the most useful method for finding specific portions of the record. Laycock, *Nonpreferential Aid*, *supra* n. 41, at n. 27. The version cited throughout this paper is available online through the Library of Congress at <http://rs6.loc.gov/ammem/amlaw/lwac.html>.

ner, or on any pretext, infringed.”⁴³ The House of Representatives referred all of the proposals to a select committee.⁴⁴

On August 13, 1789, the House of Representatives resolved itself into a committee of the whole to debate the select committee’s proposed constitutional amendments.⁴⁵ Two days later, on August 15, the House of Representatives began debating the select committee draft of the religious liberty clauses: “no religion shall be established by law, nor shall the equal rights of conscience be infringed.”⁴⁶ James Madison, responding to concerns that the proposal would harm religion, stated 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.”⁴⁷ Madison later proposed amending the language to read: “No *national* religion shall be established by law.”⁴⁸ According to Madison, “the people feared one sect might obtain preeminence, or two combine together, and establish a religion to which they would compel others to conform. He thought that if the word ‘national’ was introduced, it would point the amendment directly to the object it was intended to prevent.”⁴⁹ Madison withdrew his amendment, however, after Elbridge Gerry attacked it as an attempt to establish a national, rather than a limited federal, government.⁵⁰

Near the end of the August 15 debate the House of Representatives voted, without significant recorded debate, to scrap the select committee draft in favor of alternative language proposed by Representative Samuel Livermore: “Congress shall make no laws touching religion, or infringing the rights of conscience.”⁵¹ On August 20, 1789, the House of Representatives returned to the religious liberty clauses and approved language between the narrow restrictions of the select committee draft and the broad restrictions proposed by Livermore: “Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.”⁵² The following day, the House of Representa-

43. 1 Annals of Cong. at 451.

44. *Id.* at 467–68.

45. *Id.* at 734.

46. *Id.* at 757.

47. *Id.* at 758.

48. *Id.* (emphasis added).

49. *Id.* at 759.

50. *Id.* at 758–59.

51. *Id.* at 759.

52. H.R. J., 1st Cong., 1st Sess. 85 (1789). This is the language reported from the Committee of the Whole to the House of Representatives for consideration. The version reported in the *Annals of Congress* differs slightly from the one included in the *Journal of the House of Representatives*, but the discrepancies are not in the establishment section and do not substantively affect the meaning of the language. 1 Annals of Cong. at 796; see also Laycock, *Nonpreferential Aid*, *supra* n. 41, at 879.

tives finally approved and sent to the Senate all of its proposals for constitutional amendments, including the religious liberty provisions.⁵³

The Senate began its consideration of the religious liberty clauses with the House of Representatives' draft of the language.⁵⁴ The first proposed modification in the Senate clearly reflected the nonpreferential perspective of the establishment clause: "Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed."⁵⁵ The Senate also considered and rejected, apparently for stylistic reasons, two proposed variations equally clear in prohibiting only the preference of particular religious groups over others.⁵⁶ Later that day, however, the Senate replaced this unambiguously nonpreferential language with the same establishment and free exercise language—without the freedom of conscience language—adopted by the House of Representatives.⁵⁷

A week later, the Senate again considered the religious liberty clauses. The Senate, rejecting its previous proposal, adopted and sent to the House of Representatives the narrowest version of the establishment clause considered: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion. . . ."⁵⁸ After the House of Representatives rejected this narrow proposal, a conference committee produced the language that ultimately became the First Amendment.⁵⁹

The noncoercion perspective interprets the establishment and free exercise clauses as protecting two sides of the same religious liberty right.

The free exercise clause forbids government proscription; the establishment clause forbids government prescription. . . . Thus, a broad free exercise right bars government inhibition, deterrence, or discrimination; a broad establishment clause right bars religious coercion, inducement, or, once again, discrimination—in one direction or the other.⁶⁰

In support of his noncoercion interpretation of the establishment clause, Professor Michael McConnell (now a judge on the Tenth Circuit Court of Appeals) cited James Madison's statement during the congress-

53. H.R. J., 1st Cong., 1st Sess. at 85.

54. Sen. J., 1st Cong., 1st Sess. 63 (1789). During the early Congresses, Senate proceedings were not open to the public; its debates are therefore not available for review or analysis. Because none of the floor debates are available, inferences must be drawn from the Senate action on proposals offered and considered.

55. Sen. J., 1st Cong., 1st Sess. at 70.

56. *Id.*; see also Laycock, *Nonpreferential Aid*, *supra* n. 41, at 880.

57. Sen. J., 1st Cong., 1st Sess. at 70.

58. *Id.* at 77.

59. H.R. J., 1st Cong., 1st Sess. at 121; Sen. J., 1st Cong., 1st Sess. at 86–88.

60. Michael Allen Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 *Notre Dame L. Rev.* 311, 313–314 (1986).

sional debate that 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” and that he “believed that the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform.”⁶¹ This statement, however, is irrelevant to understanding the clause; Madison made the statement about the select committee draft, which was notably different than the text ultimately adopted.

The noncoercion perspective, in addition to having little support in the legislative history, conflicts with generally accepted principles of constitutional interpretation. Constitutional and statutory provisions are presumed to have been added for a purpose; they are not interpreted as meaningless, superfluous, or duplicative of other provisions.⁶² The plain meaning of the free exercise clause, however, adequately protects against governmental coercion of religious belief: “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.”⁶³ Thus, the noncoercion interpretation of the establishment clause would render the free exercise clause meaningless, conflicting with traditional rules of interpretation.

This legislative history also suggests the establishment clause was intended to prohibit more than governmental preference of particular religious groups. The select committee language does support the nonpreference perspective—“no religion” allows an inference that “many religions exist, and that no one of them may be established by law,” especially when compared to the hypothetical formulation “[r]eligion shall not be established by law.”⁶⁴ James Madison’s comments during the initial debate and his proposed addition of the word “national” also support the nonpreference interpretation. The House of Representatives, during the early discussion of this amendment, appeared focused on preventing the creation of a “Church of the United States” along the lines of the Church of England. These inferences in support of nonpreference are destroyed, however, by the House of Representatives’ abandonment of the select committee language in favor of Samuel Livermore’s amendment—the broadest establishment language considered by either house of Congress. Although the language ultimately adopted is clearly narrower than the Livermore proposal, the rejection of language unambiguously reflecting the nonpreference perspective suggests an intent to prohibit more than the preference of particular religious groups.

61. McConnell, *Coercion*, *supra* n. 35, at 936–37.

62. *E.g. Marbury v. Madison*, 5 U.S. 137, 174 (1803).

63. Laycock, *Nonpreferential Aid*, *supra* n. 41, at 922.

64. *Id.* at 886.

The text and legislative history refute the noncoercion and nonpreference interpretations of the establishment clause. If the establishment clause were only intended to prohibit religious coercion, the establishment clause would add nothing to the free exercise clause; such an interpretation conflicts with fundamental principles of constitutional construction. Moreover, the express consideration and rejection of language unambiguously embodying the nonpreference view in favor of broader proposals clearly indicates an intention to restrict more than preferences for specific religious groups. Thus, the text and legislative history suggest the framers also intended to prohibit governmental preference of religion generally.

B. The Philosophy Underlying the Constitution and Church/State Relations

Properly understanding the new theory of government-religion relations implicit in the text of the First Amendment requires an analysis of the philosophical foundation of the new federal government. Although it is clear Americans were far from unanimous in their philosophical and religious beliefs, the new governmental structure created by the Constitution represents the culmination of several movements redefining the social, political, and religious institutions governing human behavior. It is impossible to precisely measure the influence of particular beliefs or movements, but the influence of some philosophical developments on the new American government is evident from the writings of the founding fathers and the text of the Constitution itself.

1. Roger Williams

The first signal of the philosophical shift away from religious establishment in America was Roger William's formation of Rhode Island following his banishment from the Massachusetts Bay colony. Massachusetts Bay was founded by Puritans believing themselves "heirs to the ideal of the Christian commonwealth."⁶⁵ Like the religious establishments in Europe, religion and civil government were fused in the colony.⁶⁶ Roger Williams, however, believed the purity of religion depended on godless government.⁶⁷ Government is a man-made creation necessary—because of man's sin and because God does not directly rule the world—to manage relationships among men.⁶⁸ Thus, the skills of successful governance are wholly unrelated to religious belief:

We know the many excellent gifts wherewith it hath pleased God to furnish many, inabling them for publike service to their Coun-

65. Kramnick & Moore, *supra* n. 1, at 47.

66. *Id.*

67. *Id.* at 52.

68. *Id.* at 54.

tries both in peace and war (as all ages and experience testifies) on whose soules hee hath not yet pleased to shine in the face of Jesus Christ.⁶⁹

According to Williams, “government was the business of men, while the church was the business of God”—it is blasphemous for a government to claim itself Christian or party to a divine contract, and the only way for government to promote religion is to ignore it.⁷⁰

2. *John Locke*

Much of the American Constitution, including the protection of religious liberty, was influenced by the political philosophy of John Locke. Locke’s philosophy centered on a social contract as the sole basis of legitimate government. Men are naturally in “a state of perfect freedom to order their actions and dispose of their possessions and persons, as they think fit.”⁷¹ In order to advance peace, safety, and the public good,⁷² men form civil governments by granting some of their natural freedom to the community.⁷³ Thus, a commonwealth is “a society of men constituted only for the procuring, preserving, and advancing their own civil interests,” which include life, liberty, health, and property.⁷⁴

Responsibility for the salvation of each man’s soul belongs exclusively to himself—because the salvation of a man’s soul requires free belief, this authority can not be transferred to the community.⁷⁵ “[A]ll the power of civil government relates only to men’s civil interests, is confined to the care of the things of this world, and hath nothing to do with the world to come.”⁷⁶ Churches—“voluntary societ[ies] of men, joining themselves together of their own accord, in order to the public worshipping of God, in such manner as they judge acceptable to him, and effectual to the salvation of their souls”—are responsible for facilitating man’s pursuit of the world to come.⁷⁷ Locke’s philosophy, therefore, saw civil government and religion as distinct institutions, with distinct spheres of influence, which must be strictly separated in order to effectuate the unique function of each.

John Locke’s philosophy on government is apparent from the text of the Constitution and the writings of its proponents. The Preamble of the

69. *Id.* at 53–54 (quoting Roger Williams).

70. *Id.* at 48, 57.

71. John Locke, *Second Treatise of Government*, in *Two Treatises of Government and a Letter Concerning Toleration* 100, 101, § 4 (Ian Shapiro ed., Yale U. Press 2003).

72. *Id.* at 156, § 131.

73. *Id.* at 136–37, §§ 87–88.

74. John Locke, *A Letter Concerning Toleration*, in *Two Treatises of Government and a Letter Concerning Toleration*, *supra* n. 71 at 211, 218.

75. *Id.* at 218–219.

76. *Id.* at 220.

77. *Id.*

Constitution clearly states that the authority of the new American government flowed from a social contract between each member of society:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, *do ordain and establish this Constitution for the United States of America.*⁷⁸

The Constitution also limited the powers of the new federal government to those expressly granted in the document (and thus granted by the people governed by it). These powers include only matters relating to the earthly interests of life, liberty, and property.⁷⁹ The Constitution also ensured the new government would remain open to all citizens, without regard to religious belief or practice, by stating unambiguously that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”⁸⁰ Finally, the influence of Locke’s social contract theory is apparent from the Federalist Papers.⁸¹ “Nothing is more certain than the indispensable necessity of government, and it is equally undeniable, that whenever and however it is instituted, the people must cede to it some of their natural rights in order to vest it with requisite powers.”⁸²

John Locke’s writings also played a vital role in the development of religious liberty during the founding generation.

Jefferson carefully read and made notes on Locke’s *The Reasonableness of Christianity* and his *Letters on Religious Toleration*. Major portions of Jefferson’s Bill for Establishing Religious Freedom derived from passages in Locke’s first Letter Concerning Toleration. Jefferson’s bill, in turn, was one of the major precursors of the religion clauses of the first amendment.⁸³

James Madison, a friend and political ally of Thomas Jefferson and the primary architect of the Constitution and First Amendment, was a vocal advocate for religious liberty and the floor leader for Jefferson’s bill in Vir-

78. U.S. Const. preamble (emphasis added).

79. U.S. Const. art. I, § 8; U.S. Const. amend. IX–X.

80. U.S. Const. art. VI, cl. 3.

81. The Federalist Papers were written by Alexander Hamilton, James Madison, and John Jay, and published in the popular press in New York to win support of the Constitution in the state’s ratifying convention.

82. *The Federalist No. 2* (John Jay), in *The Federalist: A Commentary on the Constitution of the United States* 7, 8 (Robert Scigliano ed., The Modern Library 2001); see also *The Federalist No. 1* (Alexander Hamilton), in *The Federalist: A Commentary on the Constitution of the United States*, *supra* n. 82, at 3, 3 (“It has been frequently remarked that it seems to have been reserved to the people of this country, to decide by their conduct and example, the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.”).

83. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1430–31 (1990) [hereinafter *Origins and Historical Understanding*].

ginia's struggle with this issue.⁸⁴ Writing in support of this bill, Madison stated:

[W]e hold it for a fundamental and undeniable truth, "that religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.⁸⁵

Thus, John Locke's philosophy is an "indispensable part of the intellectual backdrop" for the framing of the First Amendment religious liberty clauses.⁸⁶

3. *The American Baptists and Other Religious Dissenters*

Baptists and other religious dissenters built upon the religious beliefs of Roger Williams and the liberal political philosophy of John Locke. Throughout much of the colonial period, religious dissenters were persecuted in the assessment of religious taxes and in the right to preach and practice their religion by the religious establishments in New England and the southern colonies.⁸⁷ During the Great Awakening, traveling preachers and revivals led many individuals to abandon the established churches in favor of these dissenting religions, leading the established churches to increase their persecution of religious dissenters.⁸⁸

This persecution led many dissenting religious leaders to the realization that, in order to maintain religious purity and ensure the protection of religious liberty, civil government must be separated from religious institutions. Thus, in addition to supporting the destruction of Virginia's religious establishment with Thomas Jefferson's Statute for Religious Freedom,⁸⁹ American Baptists were vocal proponents of the inclusion of the no religious test clause in the Constitution. The Reverend Isaac Backus, a distinguished Baptist minister, echoed many of Roger Williams' views during the Massachusetts ratifying convention: "Nothing is more evident, both in reason and The Holy Scriptures, than that religion is ever a matter between God and individuals; and, therefore, no man or men can impose any religious test without invading the essential prerogatives of our Lord Jesus Christ."⁹⁰ Reverend Backus also stated, "the imposing of religious tests had

84. *Id.*

85. James Madison, *Memorial and Remonstrance Against Religious Assessments*, in *Jefferson & Madison on Separation of Church and State*, *supra* n. 38, at 68.

86. McConnell, *Origins and Historical Understanding*, *supra* n. 83, at 1430–31.

87. Kramnick & Moore, *supra* n. 1, at 113–15.

88. *Id.* at 116.

89. *Id.* at 119; Thomas Jefferson, *Draft of the Virginia Statute for Religious Freedom*, in *Jefferson & Madison on Separation of Church and State*, *supra* n. 38, at 48.

90. Kramnick & Moore, *supra* n. 1, at 39–40.

been the greatest engine of tyranny in the world.”⁹¹ The Reverend Samuel Langdon repeated similar beliefs at the New Hampshire convention, stating that he took “a general view of religion as unconnected with and detached from the civil power—that [as] it was an obligation between God and his creatures, the civil authority could not interfere without infringing upon the rights of conscience.”⁹²

4. *The Philosophy of Church/State Separation*

As the philosophies of Roger Williams, John Locke, and the colonial religious dissenters illustrate, the separation of civic government from religious institutions serves three important interests: (1) the protection of democratic government from religion; (2) the protection of religion from government; and (3) the protection of each individual’s freedom of conscience.

Separating governmental and religious institutions provides mutual protection to both democratic governance and religious doctrine. Although most Americans of the founding generation believed that religion, by instilling morals and preserving a stable public order, was an essential component of a functional civil society,⁹³ religion was historically used as a governing tool. By linking governmental policy to the word of God, rulers were able to link civil obedience to the religious promise of eternal salvation or damnation. The new democratic republican government created by the Constitution, however, required a new perspective on this link. Religion, which is primarily concerned with the word and command of God, focuses on absolute moral rights and wrongs. While this is consistent with monarchical government, where the king’s word is also absolute, it is inconsistent with the compromise necessary for successful republican self-government in a large population with diverse policy and moral perspectives. A strong link between self-government and robust religious institutions would require the sacrifice of either effective government or unbiased religion; by separating these institutions, both government and religion may be individually effective in their distinct spheres.

Separating religion from the coercive force of government is also necessary to protect each individual’s freedom of conscience. People form religious institutions to effectuate the salvation of their souls by worshipping God according to the dictates of their individual conscience. This fundamental purpose of religious institutions therefore requires free and honest acceptance of religious belief, which is hampered when government influences religious choice through coercion or preference of religion. Thus,

91. *Id.* at 40.

92. *Id.* at 39.

93. *E.g.* Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 Creighton L. Rev. 761, 775 (2005).

civil government is properly limited to the regulation of interactions among individuals to protect their civil, earthly interests.

When the text of the establishment clause is considered with its philosophical foundation, it is plain the noncoercion and nonpreference interpretations crumble. The preference of religion generally exceeds civil government's limited legitimate role in governing the earthly affairs of men, requires the same compromise of either effective governance or pure religion as the preference of particular religious sects, and hampers religion's proper function in facilitating the salvation of souls through uncorrupted worship according to each individual's conscience.

C. *The Federal Structure of the New American Government*

The American Constitution utilizes two distinct mechanisms to protect individual liberty from the new national government: (1) the governmental powers were divided between the new federal government and the governments of the several states; and (2) the powers of the federal government were divided between the legislative, executive, and judicial branches.⁹⁴ The first of these mechanisms—federalism—developed from the post-Revolution experience under the Articles of Confederation, offered affirmative liberty protections, and addressed the practical circumstances of the era.

Following the successful Revolution, each of the former colonies became independent, sovereign states. On March 1, 1781, these individual states entered “a firm league of friendship” to address matters of national importance under the Articles of Confederation.⁹⁵ Unlike the subsequent Constitution, which derived its authority directly from the citizens under it, the national government under the Articles of Confederation existed by agreement of the sovereign states.⁹⁶ The Articles of Confederation, however, quickly proved ineffective in addressing the interests of the new nation.

The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDU-

94. See *The Federalist No. 51* (James Madison), in *The Federalist: A Commentary on the Constitution of the United States*, *supra* n. 82, at 330, 333 (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”).

95. Articles of Confederation art. III.

96. Compare U.S. Const. preamble (“*We the People of the United States . . . do ordain and establish this Constitution for the United States of America*” (emphasis added)) with Articles of Confederation art. III (“*The said States hereby severally enter into a firm league of friendship with each other*” (emphasis added)).

ALS of whom they consist. . . . The consequence of this is, that though in theory their resolutions concerning those objects are laws, constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option.⁹⁷

To better address the national concerns while continuing to protect individual liberty and state sovereignty, the Constitution expands the power of the federal government while limiting its authority to the narrow spheres of national interest. On issues directly impacting the nation generally (for example, national defense and interstate commerce), the Constitution delegates broad authority to the federal government.⁹⁸ Over other matters, the states retain the governmental authority.

Assigning governmental authority to the smallest, most local level of government able to effectively address the matter protects individual liberty by allowing the greatest number of citizens to live according to their personal beliefs. This principle is exemplified by religious regulation in the early United States. Massachusetts and Virginia utilized dramatically different approaches to religion.⁹⁹ If the central government exercised authority to legislate in this sphere, a nationwide majority would be empowered to adopt one, or neither, of these distinct approaches. By restricting the central government's authority in this sphere and leaving the matter to the several states, by contrast, a majority in each individual state could legislate and live according to their unique vision. Thus, the First Amendment utilizes a dual structure to protect religious freedom—it contains a substantive religious liberty provision guaranteeing the free exercise of religion,¹⁰⁰ and a structure, as originally understood by the founding generation, to preserve this right by reserving religious regulation to the individual states.¹⁰¹

97. *The Federalist No. 15* (Alexander Hamilton), in *The Federalist: A Commentary on the Constitution of the United States*, *supra* n. 82, at 85, 89.

98. *E.g.* U.S. Const. art. I, § 8, cl. 1 (federal authority to raise money and pay debts to provide for the common defense and general welfare of the United States), cl. 3 (federal power to regulate international and interstate commerce), cl. 11–16 (federal power to declare war, raise an army and navy, and call up and train the militia); *see also The Federalist Nos. 3, 4* (John Jay), in *The Federalist: A Commentary on the Constitution of the United States*, *supra* n. 82, at 13–22 (federal government better suited to avoid hostilities); *The Federalist No. 11* (Alexander Hamilton), in *The Federalist: A Commentary on the Constitution of the United States*, *supra* n. 82, at 62–69 (federal government better suited to regulate commerce).

99. McConnell, *Establishment and Disestablishment*, *supra* n. 28, at 2116–2126. Massachusetts had a system of local establishment, under which each community voted on the church that would be the recognized church and receive the funds collected under the religious tax. Virginia, by contrast, abolished all religious establishment with Thomas Jefferson's Bill for Establishing Religious Freedom in 1786.

100. U.S. Const. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion].”).

101. *Id.* (“Congress shall make no law respecting an establishment of religion.”); Lietzau, *supra* n. 14, at 1191–1194 (proposing this dual structure of religious liberty protection and advocating the rollback of establishment clause incorporation).

In addition to the affirmative protection of religious liberty, the prohibition of federal religious regulation served important practical considerations in winning support for the Constitution. America was populated by many distinct religious sects and denominations with highly-divergent beliefs about interactions with broader society. At the time of the Constitutional Convention, states also had several distinct approaches to religious regulation. Because of the difficulty in compromising deeply-held, personal convictions, such as religious beliefs, and the history of religious persecution under the highly-centralized British Empire, the only consensus available in creating an already-controversial federal government was leaving religious regulation completely in the hands of the individual states.¹⁰²

A federalist foundation for the establishment clause is supported by the constitutional text and its legislative history. The First Amendment expressly applies only to the federal government.¹⁰³ While debating proposed constitutional amendments, Congress considered and rejected an amendment applying many of the First Amendment protections to the states: “no State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases.”¹⁰⁴ The rejection of this proposal indicates an intent to leave the regulation of these matters to the individual states. The intent to restrain the federal government, but not the states, from establishing religion is especially clear—Congress did not even consider applying a version of the establishment clause to the states.

102. *E.g.* Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 Nw. U. L. Rev. 1113, 1132–1134 (1988) (“Given this widespread and deep division, how could Congress and the ratifying state legislatures have reached agreement on the establishment clause? It was supported, after all, both by separationists and by those who were committed to programs of state-sponsored religion. These various political actors simply could not have agreed on a general principle governing the relationship of religion and government, whether it be the principle endorsed in *Everson* [v. Board of Education, 330 U.S. 1 (1947)] or any other. If the establishment clause had embraced such a principle, it would not have been enacted. What united the representatives of all the states, both in Congress and in the ratifying legislatures, was a much more narrow purpose: to make it plain that Congress was not to legislate on the subject of religion, thereby leaving the matter of church-state relations to the individual states. This purpose honored the anti-establishment policies of states such as Virginia, but it also protected the existing state establishments from congressional interference.”); Green, *supra* n. 93, at 767 (“Although the ultimate phrasing of the Establishment Clause may indicate the presence of federalism concerns, such was not primary or overriding impetus behind the call for or drafting of the First Amendment. Rather, the Establishment Clause reflects broad substantive values upon which a majority of early Americans could agree. While those who drafted and ratified the Establishment Clause may have disagreed over the precise meaning of ‘nonestablishment’ and its day to day application to issues such as days of Thanksgiving or Sabbath laws (in the same way that modern observers diverge over issues such as vouchers and the public posting of the Ten Commandments), they shared common, broad ideals that found their way into the language of the First Amendment: freedom of conscience; no compelled support of religion; no delegation of government authority to religious institutions; and equal treatment of all sects.”).

103. U.S. Const. amend. I (“Congress shall make no law. . . .” (emphasis added)).

104. 1 Annals of Cong. at 783.

The federalist interpretation is also consistent with the philosophical developments during the founding generation. As noted above, America was in the middle of a dramatic philosophical shift away from close ties between civil government and religion. While Virginia had already adopted the Lockean perspective on religious freedom, as demonstrated in James Madison's *Memorial and Remonstrance Against Religious Assessments*¹⁰⁵ and the adoption of Thomas Jefferson's Statute for Religious Freedom,¹⁰⁶ many New England states retained established churches into the early nineteenth century.¹⁰⁷ The only practical method of protecting existing state regulations until the emerging vision of disestablishment and church-state separation gained universal acceptance was to leave religious regulation exclusively to the discretion of the individual states.¹⁰⁸

The federalist understanding of the religious liberty clauses supports the neutrality interpretation of the establishment clause. Prohibiting only federal government coercion or preference of particular sects would not completely remove the national government from the religious sphere—the governmental preference of religion generally would conflict with states adopting the Roger Williams or John Locke philosophies of government-religion interaction. Similarly, the strict separation interpretation treats religion different than other topics. For the federal government to be completely removed from this sphere, it must be blind to religion and treat religious speech as it would any other speech.

Federalism was a central component of America's new government. The structure offered affirmative protection of individual liberty by dividing governmental authority among multiple political centers. It also allowed smaller groups of individuals to each live according to their individual political beliefs—even when the policies of different groups conflicted—and allowed individual states to serve as laboratories for new policy advances. Practically, federalism allowed the several independent states to compromise on the creation of a new central government by completely removing certain issues from the authority of the central government. The establishment and free exercise clauses are examples of this compromise and affirmative protection of liberty. The assurance of government neutrality on religious questions was necessary to ensure the continued vitality of these protections.

D. *America's Early Struggles with Church/State Relations*

The governing behavior of the early leaders—many of whom participated in the drafting of the text—is also useful in understanding the original

105. Madison, *supra* n. 85, at 68.

106. Jefferson, *supra* n. 89, at 48.

107. McConnell, *Establishment and Disestablishment*, *supra* n. 28, at 2126.

108. *E.g.* Conkle, *supra* n. 102, at 1132–34.

intent of the religious liberty clauses. This historical evidence, although not unanimous, supports the neutrality understanding of the establishment clause.

1. *The Declaration of Independence and the Constitution*

When the American Constitution was drafted, political documents routinely referenced God as the source for the authority and wisdom of the government. The Declaration of Independence famously stated: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."¹⁰⁹ The Articles of Confederation credited "the Great Governor of the World."¹¹⁰ Most of the early state constitutions also overtly acknowledged God and the necessity of Christian morality for civil order.¹¹¹ As one critic of the proposed Constitution noted, "there was never a nation in the world whose government was not circumscribed by religion."¹¹²

The delegates to the Constitutional Convention, on the other hand, created an intentionally secular Constitution as the foundation of the new federal government. In sharp contrast to the typical practices for the period, the Constitution makes no religious reference.¹¹³ Such a dramatic departure could not have been unintentional; it was also not unnoticed. In 1789, a group of religious leaders from New England sent a letter to President George Washington, who had presided over the Constitutional Convention, "complaining that the Constitution lacked any reference to the only true God and Jesus Christ, who he hath sent."¹¹⁴ Washington replied that "'the path of true piety is so plain as to require but little political direction.' Not the state and its institutions, . . . but ministers of the gospel were to further the 'advancement of true religion.'"¹¹⁵ Read together, this evidence strongly suggests that the consensus among the framers of the Constitution, even if it was not unanimously shared throughout society, was that God was intentionally omitted from the Constitution.

The Constitution was also religiously controversial because the one religious provision in the document outlawed religious tests for officers of

109. *Declaration of Independence* [¶ 2] (1776).

110. Articles of Confederation art. XIII, ¶ 2.

111. Kramnick & Moore, *supra* n. 1, at 28.

112. Aristocrotis, *The Government of Nature Delineated or an Exact Picture of the New Federal Constitution*, in *The Complete Antifederalist* vol. 3, 196, 205 (Herbert J. Storing ed., U. of Chi. Press 1981).

113. The Constitution does state: "Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth." U.S. Const. art. VII. This was not a religious statement, however, but a method of measuring dates.

114. Kramnick & Moore, *supra* n. 1, at 102 (internal quotations omitted).

115. *Id.*

the federal government.¹¹⁶ This provision was not controversial among delegates to the Constitutional Convention.¹¹⁷ Among the rest of the country, however, the issue was not so clear; eleven of the thirteen states had religious tests for public offices in their constitutions.¹¹⁸ Delegates to ratifying conventions across the country expressed concern that this clause would open control of the national government to atheists, Catholics, Jews, Muslims, and Quakers.¹¹⁹ Critics viewed the no religious test clause as the embodiment of a general rejection of Christianity.¹²⁰ This criticism led to specific proposals to amend the Constitution by adding religious references and by requiring a religious test for federal office.¹²¹ Many Americans also spoke out in support of the secular government and no religious test clause. These people made religious arguments supporting separation of civil government from religious institutions¹²² and practical arguments that the wide variety of religious sects in America made religious tests absurd.¹²³

The proponents of the secular government ultimately prevailed; the Preamble continues to be godless and the no religious test clause remains intact. The vigorous debate surrounding these issues clearly demonstrates that the founding generation was keenly aware of the arguments in support of and in opposition to the secular nature of the proposed federal government and suggests a clear decision to pursue the policy of separation.

2. *The Early Years under the Constitution*

During the first twenty years of the new nation, Americans struggled to apply the proper relationship between the government and religious institutions. One early conflict centered on the issuance of proclamations declaring days of fasting and thanksgiving. The nation's first two presidents—George Washington and John Adams—issued such proclamations without controversy.¹²⁴ Thomas Jefferson—the third president—refused on the ground that such proclamations violated the Constitution.¹²⁵ Jefferson ex-

116. U.S. Const. art. VI, cl. 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

117. Kramnick & Moore, *supra* n. 1, at 29. According to Maryland delegate Luther Martin, the no religious test clause was “adopted by a very great majority of the convention, and without much debate.” James Madison’s notes indicate that only one state voted no and one state delegation was divided on the question of the no religious test clause.

118. *Id.* at 29–30.

119. *Id.* at 32.

120. *Id.* at 34–37.

121. *Id.* at 37.

122. *Id.* at 39.

123. *Id.* at 42.

124. *Id.* at 96.

125. Responding to a request by a group of Baptists in Danbury, Connecticut to declare a day of fasting for national reconciliation following his bitter campaign with Adams, Jefferson stated:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign

plained his perspective on the religious liberty clauses in his second inaugural address:

In matters of religion, I have considered that its free exercise is placed by the [C]onstitution independent of the powers of the general government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it; but have left them as the [C]onstitution found them, under the direction and discipline of state or church authorities.¹²⁶

The fourth president—James Madison—gave in to political pressures surrounding the War of 1812 and reluctantly made one religious proclamation, although his draft was crafted as innocuously as possible.¹²⁷ In 1832, well into his retirement, Madison expressed regret he had caved to political temptation and issued the proclamation.¹²⁸

The early ambiguity surrounding the proper relationship between civil government and the federal government extended beyond presidential proclamations. On one hand, Congress appropriated money to pay for missionaries among the Native Americans. On the other hand, the Senate unanimously approved a treaty, apparently with little controversy, providing:

As the government of the United States of America is not in any sense founded on the Christian religion—as it has in itself no character of enmity against the laws, religion, or tranquility of Musselmen [Muslims],— and as the said States never entered into any war or act of hostility against any Mahometan [Islamic] nation, it is declared by the parties that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries.¹²⁹

It is not clear whether any inferences may be drawn from these governmental actions. In appropriating money for missionaries, Congress may have been purchasing civil services; religious actors were generally the only providers of education and social services in early America. Likewise, any insight into the founders' mindset on the relationship between the federal

reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State.

Jefferson, *supra* n. 38, at 163.

126. Thomas Jefferson, *Second Inaugural Address*, in *Jefferson & Madison on Separation of Church and State*, *supra* n. 38, at 178.

127. Kramnick & Moore, *supra* n. 1, at 105–06. After declaring war with Great Britain in 1812, Congress requested a national day of fasting “with religious solemnity as a day of public humiliation and prayer.” *Id.* at 105. Madison eventually acceded and issued such a proclamation on July 23, 1813. See James Madison, *A Proclamation of Thanksgiving*, in *Jefferson & Madison on Separation of Church and State*, *supra* n. 38, at 207.

128. Kramnick & Moore, *supra* n. 1, at 106.

129. *Treaty of Peace and Friendship between the United States of America and the Bey and Subjects of Tripoli of Barbary* art. XI (Nov. 4, 1796, ratified June 7, 1797), available at <http://www.yale.edu/lawweb/avalon/diplomacy/barbary/bar1796t.htm> (accessed Oct. 14, 2006).

government and religion from the Senate's unanimous passage of a declaration that the United States is not "founded on the Christian religion" is tempered by the context of the statement in a peace treaty with a nation founded on another religion. Finally, these controversies were relatively minor and not sufficiently contentious to engage the nation in a broad debate about the proper relationship between civil government and religious institutions.

3. *The Sunday Mail Debates*

The nation did become embroiled in a broad debate about the secular nature of the federal government when the local postmaster of a small Pennsylvania town was expelled from his church for opening the post office for a few hours on Sundays as a convenience for churchgoers from neighboring villages.¹³⁰ In 1810, Congress responded with legislation requiring the daily (including Sundays) transportation of mail and operation of every post office.¹³¹ Congress was immediately inundated with petitions stating the statute made "it necessary to violate the command of God" and "His justice will demand that adequate punishment be initiated on our common country."¹³² Postal officials argued that frequent mail movement was essential to the nation's economy and national defense.¹³³ This initial skirmish over Sunday postal operations was ultimately won by those supporting a secular federal government—although opponents attempted to repeal the 1810 law, the legislation died in 1817 without being brought to a vote.¹³⁴

A new campaign to stop Sunday postal operations began with the creation of the General Union for the Promotion of the Christian Sabbath in May 1828.¹³⁵ Learning from the earlier failure based on commercial considerations, the group organized merchants who supported their cause¹³⁶ and required members to boycott companies carrying mail on Sundays.¹³⁷ The petitions that supported repeal of the law made both anti-federalist¹³⁸ and religious¹³⁹ arguments. Proponents of Sunday mail delivery, rather than relying solely on commercial considerations as they had in the earlier struggle, focused on the secular nature of the federal government. This was em-

130. Kramnick & Moore, *supra* n. 1, at 132.

131. *Id.* at 133.

132. *Id.*

133. *Id.* at 134.

134. *Id.*

135. *Id.* at 135.

136. *Id.*

137. *Id.* The postal service contracted with passenger carrying companies to transport mail. *Id.* at 134.

138. *Id.* at 136 ("The general Government has not the constitutional power to authorize violation of the Sabbath.").

139. *Id.* (The United States is "a Christian Community, where all the chartered rights and political institutions, as well as the legislative provisions of the country, recognize the authority of the Christian religion.").

bodied in a report by General Richard M. Johnson, chair of the Senate Committee on the Post Office and Post Roads, entitled *Report on the Subject of Mails on the Sabbath*.¹⁴⁰ General Johnson's report focused on the unconstitutionality of "'the principle that the Legislature was a proper tribunal to determine what are the laws of God'" because Congress is "a civil institution, wholly destitute of religious authority."¹⁴¹ The report continued: "The framers of the Constitution recognized the eternal principle that man's relation with God is above human legislation and his rights of conscience unalienable."¹⁴² The federal government lacks the authority to "define God or point out to the citizen one religious duty," including recognition of the Sabbath.¹⁴³

Advocates of a separation between government and religion were initially successful in preserving Sunday mail delivery. Ultimately, however, new technologies eroded the necessity of Sunday mail service; in 1912, Congress officially closed all post offices on Sunday.¹⁴⁴

4. *Understanding America's Early History of Religious Separation*

The history, although not definitive, suggests the founding generation intended to create a secular federal government and interpreted the Constitution as prohibiting religious coercion, the preference of particular religious groups, and the preference of religion generally. This history also suggests the founding generation did not intend a strict separation where the government merely places religion on an equal footing with nonreligious beliefs or speech.

Thomas Jefferson was one of the founding generation's most vocal and most principled advocates of church-state separation. At first glance, his reliance on God in the Declaration of Independence as the source of the "unalienable rights" appears entirely inconsistent with his separationist principles. This understanding, however, does not properly account for the Lockean philosophy or practical differences between the Declaration of Independence and the Constitution. Jefferson, like Locke, was personally religious and believed that God was the source of human rights.¹⁴⁵ Both men

140. *Id.* at 138–39.

141. *Id.* at 139 (quoting Johnson).

142. *Id.* at 140.

143. *Id.* at 141 (internal quotations omitted).

144. *Id.* at 142.

145. See Locke, *Second Treatise of Government*, *supra* n. 71, at 101, § 4 ("there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection; unless the Lord and Master of them all should, by any manifest declaration of his will, set one above another, and confer on him, by an evident and clear appointment, an undoubted right to dominion and sovereignty."); *Declaration of Independence* [¶ 2] (1776) ("We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.").

also believed that religion was intensely personal and outside the sphere of legitimate government authority.¹⁴⁶ Thus, incorporating religious principles into the Declaration of Independence—a persuasive, rather than governing, document justifying the American independence movement and focused on winning the support of colonists and foreign governments—was entirely appropriate. The Constitution, however, was a document establishing and setting the boundaries for a civil government, and religious references would be inappropriate to adherents of Locke’s philosophy on church-state separation.

America’s early history includes two major national debates about the proper interaction between government and religious institutions and several instances of minor political actions that do not reflect consistent principles on the subject. America represented an experiment applying the still-developing philosophy of religious liberty through church-state separation. The minor actions of the early republic suggest a nation struggling to apply its philosophical principles to real-world governance. In the two instances in which the national attention was focused on the issue, America chose governmental neutrality toward religion generally. In both the constitutional ratification and the Sunday mail debates, America rejected attempts to link religion and government in circumstances that would not have coerced religious practice or preferred any of the particular Christian sects. When the national attention was elsewhere, however, the governing behavior lapsed from the constitutional neutrality principles toward the traditional church-state connection present throughout the founding generation’s previous experience. This hypothesis is supported by James Madison’s issuance of the Thanksgiving proclamation: when the nation was focused on war with England, Madison’s religious liberty principles bowed; when he later reflected on his action, however, he realized his error.

These lapses favor a government neutrality construction over a strict separation view of the establishment clause. Strict separation draws a bright, easy-to-follow line: government may not act in any way touching religion. Government neutrality, in contrast, requires greater thought because some actions that touch religion without preferring it are allowed. If government actions were uncontroversial, officials would have to specifically remember to analyze the establishment clause implications; where this was not done, actions violating the neutrality principle could escape notice. The history of some governmental action touching religion suggests all such relationships were not offensive to the First Amendment’s drafters.

146. See Locke, *A Letter Concerning Toleration*, *supra* n. 74, at 219 (“Nor can any power be vested in the magistrate by the consent of the people; because no man can so far abandon the care of his own salvation as blindly to leave it to the choice of any other, whether prince or subject, to prescribe to him what faith or worship he shall embrace.”); Kramnick & Moore, *supra* n. 1, at 96.

E. Defining the Boundaries of Interaction between the Federal Government and Religion under the Establishment Clause

The drafters and ratifiers of the establishment clause undertook an original experiment—the protection of religious liberty through the separation of religion from civil government. As the world's first modern democratic republic, civil government needed protection from uncompromising religious principles. The long history of religious establishments also demonstrated the need to protect religious doctrine from political corruption and to protect the individual right, and responsibility, to practice religion according to one's own conscience. Finally, the practical reality in the adoption of the Constitution required that, at least until the philosophy of separation fully emerged throughout the nation, the exclusive authority to regulate within the religious sphere be left to the individual states.

Professor Michael Perry defines the nonestablishment norm, inherent in the establishment clause, as prohibiting government from acting “for the purpose of favoring any church in relation to any other church on the basis of the view that the favored church is, as a church, as a community of faith, better along one or another dimension of value—truer, for example, or more efficacious spiritually, or more authentically American.”¹⁴⁷ This definition has one fundamental flaw—the First Congress unambiguously considered, and rejected, the nonpreference view. According to the original understanding of the establishment clause, government is prohibited from favoring both specific religious groups and religion generally. Modifying Professor Perry's definition to reflect this original intent, the establishment clause prohibits government actions from preferring any religion over another religion, or over no religion at all, on the basis that the favored religious belief is better along one or another dimension of value—for example, truer, more efficacious spiritually, or more authentically American.

The original intent of the establishment clause thus required official government silence on religious matters. The government may not write religious beliefs into the text of any statute or into any findings or policies supporting a statutory policy. Even general religious references necessarily exhibit preference for, and place the official government stamp on, religion itself.

Prohibiting government speech that takes positions on religious questions prevents these private speakers from bringing government power to bear in their efforts to persuade or convert; protects all views about religion from having to compete with the power of government promoting some other view; protects everyone from being coerced or manipulated into attending religious observances they would not freely choose to attend; and in gen-

147. Perry, *supra* n. 36, at 566.

eral, prevents government from either encouraging or discouraging any religious belief or practice.¹⁴⁸

It is undoubtedly true that religious rationales were written into many statutes in early America—even Thomas Jefferson, the most separationist of the founding fathers, cited a religious foundation for his famous Statute for Religious Freedom: “Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint.”¹⁴⁹ This example, however, merely demonstrates the emerging nature of the separation philosophy. Jefferson’s statute was drafted and adopted years before the establishment clause. To take a principled stand refusing to use the primary tools of the period, without the agreement of all political actors, would only ensure defeat. Effective reformers must use the tools of the existing system to change the existing system.

While the First Amendment requires official government silence, it does not require complete separation. Congress may not write religious motivations into the United States Code. Individual members of Congress, however, may discuss their personal religious beliefs in connection with any political issue without offending the First Amendment. These statements are no different from any other motivations for specific policy decisions, and represent the voice of the individual rather than the government. Balancing of official government silence with individual freedom of speech, even when the speaker is an elected official, ensures that government does not influence individual religious choice by preventing any religion from becoming the official or unofficial religion of the nation.

III. THE ORIGINAL UNDERSTANDING OF THE ESTABLISHMENT CLAUSE AND THE ADDITION OF “UNDER GOD” TO THE PLEDGE OF ALLEGIANCE

The establishment clause was drafted to prohibit federal government actions that prefer any religion over any other religion, or over no religion at all, based on the view that the favored religious belief is better along one or another dimension of value (for example, that the religious belief is truer, more efficacious spiritually, or more authentically American).¹⁵⁰ This provision, at a basic level, requires official federal government silence on all religious matters. By inserting the words “under God” into the Pledge of Allegiance in federal statute, the United States Congress violated the origi-

148. Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 218–19 (2004) [hereinafter *The Pledge of Allegiance*].

149. Thomas Jefferson, *Draft of the Virginia Statute for Religious Freedom*, in *Jefferson & Madison on Separation of Church and State*, *supra* n. 89. The second clause of this quote was deleted from the version ultimately adopted by the Virginia Assembly in 1786.

150. *See supra* at § II.E.

nal understanding of the establishment clause by exhibiting a preference of particular religious beliefs and of religion generally.

Proponents of the continued inclusion of “under God” in the Pledge of Allegiance rely on two primary justifications to overcome this constitutional violation: (1) that “under God” does not really have a religious meaning in the context of the Pledge of Allegiance; and (2) that the phrase is a legitimate recognition of the limited authority of the federal government. The first justification ignores the history and context of the words; the second is contradicted by the Lockean social contract philosophy underlying the Constitution. Thus, neither justification cures the phrase’s plain violation of the original understanding of the establishment clause.

A. *Congress’s 1954 Addition of “under God” to the Pledge of Allegiance Exhibits Federal Governmental Preference of Specific Religious Values, and of Religion Generally, as Authentically American*

The plain meaning of the words “under God” includes three facets of religious doctrine. First, the words are a statement that there is a God—a most basic, and most fundamental, religious belief. Second, the singular “God” is a statement there is only one God. Finally, the words define one aspect of the nature of God—stating that the nation is *under* God implies that God endorses and exercises supervisory authority over it. Thus, the two simple words embody governmental preference for religion over atheism or agnosticism, monotheist religions over polytheist religions, and the belief in an active God over the belief in a passive Creator.¹⁵¹ Inserting the words “under God” into the Pledge of Allegiance exhibits Congress’s religious preference by equating the three implicit religious doctrines with authentic American values. The Pledge of Allegiance is an affirmation of personal loyalty to the United States and its most fundamental characteristics. “To recite the Pledge is . . . to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism.”¹⁵² By adding religious doctrine to this list of fundamental characteristics, the Pledge forces atheists and agnostics, polytheists, and citizens who believe in a passive God into an impossible choice: be perceived as an inferior, disloyal citizen; become a hypocrite by reciting false beliefs; or conform to the congressionally-sanctioned religious doctrine.

The legislative history of the 1954 Act unequivocally demonstrates Congress’s intent to link religious doctrine with authentic American values. In support of the legislation, Congress stated, “our Nation was founded on a fundamental belief in God.”¹⁵³ Congress also cited religious belief as the

151. Laycock, *The Pledge of Allegiance*, *supra* n. 148, at 226.

152. *Newdow*, 292 F.3d at 607.

153. H.R. Rpt. 83-1693; *see also* Sen. Rpt. 83-1313.

distinguishing characteristic between America's core principles and Communism, thus making this one value the most authentically American.¹⁵⁴ In signing the bill, President Eisenhower described the new law as "the dedication of our nation and our people to the Almighty," and stated that, "[t]o anyone who truly loves America, nothing could be more inspiring than to contemplate this rededication . . . to our country's true meaning."¹⁵⁵ Congress thus explicitly sought to link monotheistic religious belief in an active God with the duties of a patriotic American citizen through this legislation.

B. In Arguing that "under God" in the Pledge of Allegiance is Historical or Ceremonial, Rather than Religious, Proponents of the Phrase Ignore the Plain Legislative History and the Context of the Pledge of Allegiance

Many defenders of "under God" in the Pledge of Allegiance argue the phrase is historical or ceremonial, rather than religious. Some argue the phrase "merely recognize[s] the historical fact that our Nation was believed to have been founded 'under God.'"¹⁵⁶ Others believe the words represent ceremonial deism—religious references "serv[ing], in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."¹⁵⁷ Such references are "protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content."¹⁵⁸

The historical and ceremonial justifications ignore the legislative history of the 1954 Act inserting "under God" into the Pledge of Allegiance. In passing this legislation, Congress did cite a long list of religious references—from the 1620 Mayflower Compact through the 1864 inscription of "In God We Trust" on American coins—to support a claim that America was founded on Christian principles.¹⁵⁹ The remainder of the legislative history, however, reveals Congress's true intention—to portray the United States as presently characterized by, not historically founded upon, Christian principles. "Under God" was added to the Pledge of Allegiance at the height of the Cold War because Congress believed America's religious character was its fundamental difference with "the atheistic and materialistic" Communism of the Soviet Union.¹⁶⁰ As President Eisenhower recognized in signing the legislation:

154. H.R. Rpt. 83-1693; see also Sen. Rpt. 83-1313.

155. Eisenhower, *Statement by the President upon Signing Bill to Include the Words "Under God" in the Pledge to the Flag*, *supra* n. 26, at 563.

156. *Sch. Dist. v. Schempp*, 374 U.S. 203, 304 (1963) (Brennan, J., concurring).

157. *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984).

158. *Id.* at 716 (Brennan, J., dissenting).

159. H.R. Rpt. 83-1693; Sen. Rpt. 83-1313.

160. H.R. Rpt. 83-1693; Sen. Rpt. 83-1313.

From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural school house, the dedication of our nation and our people to the Almighty. To anyone who truly loves America, nothing could be more inspiring than to contemplate this rededication of our youth, on each school morning, to our country's true meaning. . . . In this way we are reaffirming the transcendence of religious faith in America's heritage and future; in this way we shall constantly strengthen those spiritual weapons which forever will be our country's most powerful resource in peace or in war.¹⁶¹

Thus, the legislative history contradicts the argument that "under God" merely recognizes the historical fact of America's purported religious foundation and that the words are ceremonial and lack religious meaning—the words were inserted precisely because of their statement of the United States' present religious character.

The historical and ceremonial justification also ignores the context of the words. Some religious references, such as the use of "in the Year of our Lord" to date the Constitution, do not have a religious meaning.¹⁶² Many of the other historical examples cited, including the Declaration of Independence and Gettysburg Address, were not statements made by the government in its official capacity, and therefore do not violate the principle of governmental neutrality.¹⁶³ In a dissenting opinion of the Amended *Newdow* opinion, Judge O'Scannlain writes: "Most assuredly, to pledge allegiance to flag and country is a *patriotic* act. . . . The fact the Pledge is infused with an undoubtedly religious reference does not change the nature

161. Eisenhower, *Statement by the President upon Signing Bill to Include the Words "Under God" in the Pledge to the Flag*, *supra* n. 26, at 563.

162. The use of "in the Year of our Lord" was the customary method of counting years in colonial America. This system was introduced by Dionysius Exiguus, a Scythian monk, in about 527. He designated years based upon his calculation of the year of Christ's birth. The years following this date are designated *Anno Domini* (Latin for "In the Year of the Lord"), which is commonly abbreviated as A.D. This system of chronology spread across Europe, with England among the first areas to adopt its use—this system was found in Saxon texts dating to the seventh century. In western society, including mathematical and scientific communities, the use of A.D. continues to be the widely accepted method of counting years. See John Gerard, *Chronology, General*, III Catholic Encyclopedia 738 (Charles G. Herbermann et al. eds., Robert Appleton Co. 1908). There are many non-religious reasons for adopting a uniform system of dating and chronology, even a uniform system utilizing a religious reference. For example, the British Parliament recognized many of these reasons in switching from the *Julian* to the *Gregorian* calendar in 1751, including: (1) "frequent Mistakes . . . occasioned in the Dates of Deeds, and other Writings," and (2) the "general Convenience to Merchants, and other Persons corresponding with other Nations and Countries." *British Calendar Act, 1751*, 24 Geo. 2 c. 23 (Eng.). The triumph of uniformity over religious principle in this area is demonstrated by the British adoption of the Gregorian calendar, which was introduced by Pope Gregory XIII, despite the religious conflict between Great Britain and the Roman Catholic Church.

163. The Declaration of Independence was drafted as a persuasive document to gain the support of colonists and foreign governments. The Gettysburg Address was a speech by an individual member of the government, not a statement by the government acting through its governing power.

of the act itself.”¹⁶⁴ It is precisely this point—the inclusion of religious doctrine in an officially-sanctioned, personal affirmation of patriotism and obedience to the nation and its core values—that offends the original intention of the establishment clause.¹⁶⁵ The words, as written in the statute, require the reciter to pledge allegiance to “one Nation under God,” not to “one Nation founded by religious believers”—if we do not accept the plain meaning of the words in the Pledge of Allegiance, what value does it have as a loyalty oath or patriotic exercise?

C. *Although the Power of the Federal Government is Constitutionally Limited, the American People, Not God, are the Recognized Limiting Force*

Professor Thomas Berg offers an alternative rationale supporting the inclusion of “under God” in the Pledge of Allegiance—the phrase expresses the idea that government is a limited institution, subject to standards of authority higher than itself. “Under God” expresses the idea that the rights of persons—the “liberty and justice” guaranteed to all—are inalienable, stemming from a source higher than the nation or any other human authority.¹⁶⁶

The phrase is permissible, maybe even necessary, because it recognizes “a religious rationale for the ideal of limited government and inalienable rights.”¹⁶⁷

The first premise of this rationale is correct—the United States government, under the Constitution, is limited and subject to a higher authority. This higher authority, however, is not God. The drafters of the Constitution were well-acquainted with government “constrained” by God—centuries of European monarchs ruled under the divine right of kings, which theorized that monarchs derived their authority directly from God,¹⁶⁸ and did not recognize limited government or inalienable rights. The new American government was based on a new political theory—John Locke’s social contract theory. Government is created by men for their mutual benefit, and is subject to their continued consent to be governed. The Constitution itself rec-

164. *Newdow*, 328 F.3d at 478 (O’Scannlain, J., dissenting) (emphasis in original).

165. As the Ninth Circuit recognized in the Original *Newdow* decision:

The recitation that ours is a nation ‘under God’ is not a mere acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic. Rather, the phrase ‘one nation under God’ in the context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism.

Newdow, 292 F.3d at 607 (9th Cir. 2002).

166. Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 Tex. Rev. L. & Pol. 41, 52 (2003).

167. *Id.* at 67.

168. E.g. Edward Rubin, *The Conceptual Explanation for Legislative Failure*, 30 L. & Soc. Inquiry 583, 588 (2005).

ognizes this source of its authority: “We the People of the United States . . . do ordain and establish this Constitution for the United States of America.”¹⁶⁹ The American people—not God—are the higher authority and the limit on the authority of the federal government. Thus, this rationale cannot support the inclusion of religious doctrine in the Pledge of Allegiance.

IV. CONCLUSION

As originally understood, the establishment clause removes the federal government from the religious sphere—it prohibits federal government actions that prefer any religion in relation to any other religion, or in relation to no religion at all, on the basis of the view that the favored religious belief is better along one or another dimension of value (e.g. that the religious belief is truer, more efficacious spiritually, or more authentically American). This interpretation is supported by the constitutional text and legislative history, the philosophical foundation of the Constitution, the federal structure of the new government, and the historical practice of our early leaders. Despite considering alternative proposals unambiguously adopting other establishment clause interpretations, such as noncoercion and non-preference, the first Congress adopted the relatively expansive text of the First Amendment: “Congress shall make no law respecting an establishment of religion.” In crafting the new Constitution, the founding generation was greatly influenced by the philosophies of Roger Williams and John Locke—civil government is created by men to govern man’s earthly behavior, and must be separated from religious institutions so that each may effectively perform its unique function. By separating the federal government from religion, the drafters also implemented an important structural safeguard of religious liberty—allowing more citizens to live according to their personal convictions—and found a workable compromise for a highly-contentious issue. Finally, the actions of America’s early leaders demonstrate that, when the nation’s attention was focused on the proper relationship between government and religion, the nation repeatedly chose separation.

The continued vitality of the Constitution requires strict adherence to its requirements, regardless of popular opinion and short-term political expedients. In 1954, Congress adopted legislation inserting the words “under God” into the Pledge of Allegiance. In this context, the words are not merely historical, ceremonial, or meaningless, and do not represent the constitutional limit on the authority of the federal government—they attempt to link specific religious doctrine with America’s core values. By adopting this legislation, Congress thus broke America’s long constitutional tradition of secular government.

169. U.S. Const. preamble.