

**John J. DiIulio, Jr.**



# **GODLY REPUBLIC**

**A Centrist Blueprint for America's Faith-Based Future**

*The Methodists First Muslims Amendment Mormons to Catholics the*

**A Former White House Official Explodes Ten Polarizing**

**Myths about Religion and Government in America Today**

*Constitution Quakers of Jews the Baptists United Buddhists States*

*Sikhs of Presbyterians America: Chassids "Congress Anglicans Shall*

*Atheists Make Jehovah's Witnesses No Lutheran Law Witness Re*

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## ONE The Founders' Faithful Consensus

### A GODLY REPUBLIC, NOT A SECULAR STATE OR A CHRISTIAN NATION

- Myth 1 The framers of the U.S. Constitution founded a new government based on secular Enlightenment ideas that favored a strict and total separation between church and state.
- Myth 2 The framers of the U.S. Constitution founded a new government predicated on the belief that America was, and should ever remain, a Christian nation.
- TRUTH The framers of the U.S. Constitution founded a new government that they hoped would guide America's rise, not as either a secular state or a Christian nation, but as a godly republic marked by religious pluralism.

### ONE NATION, UNDER GOD, FOR ALL

In 1954, the U.S. Congress voted to insert the words "under God" in the Pledge of Allegiance. On June 6, 2002, the San Francisco-based U.S. Court of Appeals for the Ninth Circuit, in *Newdow v. U.S. Congress*, ruled that the Constitution requires that those words be stricken from the Pledge. "In the context of the Pledge," the opinion asserted, "the statement that the United States is a nation 'under God' is an endorsement of religion. It is a

profession of a religious belief, namely, in monotheism." "The Pledge, as currently codified," the federal judges insisted, "is an impermissible government endorsement of religion because it sends a message to unbelievers" that they are "not full members of the political community." They held that both the 1954 congressional act adding the words "under God" to the Pledge and local public school practice of "teacher-led recitation of the Pledge" violated the Constitution.

The *Newdow* opinion reflects the view that America is a secular state in which not even interfaith or nondenominational religious expression can receive any public endorsement, and no religious or religiously affiliated organization can receive government financial or other support for any purpose whatsoever, without violating the Constitution and federal laws.

In 1954, the same year that Congress added "under God" to the Pledge, the National Association of Evangelicals (NAE) lobbied for an amendment to the Constitution that included the following words: "This nation divinely recognizes the authority and law of Jesus Christ, Savior and Ruler of Nations, through whom are bestowed the blessings of Almighty God."<sup>1</sup> In the summer of 2002, following the *Newdow* decision, an official NAE publication was headlined ". . . One Nation, Under Jesus Christ." "One question," it proclaimed, "is worth asking: do evangelicals—even through the 'voluntary energies' of our churches—still believe in that vision? If not, then our culture-forming capacity is in doubt."<sup>2</sup>

This NAE vision reflects the view that America is a Christian nation in which Christian religious expression can and should receive special public endorsement, and Christian churches and other Christian organizations can and should receive special government support, without violating the Constitution and federal laws.

The federal judges' opinion is as wrong as the evangelical association's vision is wrongheaded. With regard both to interfaith or nondenominational religious expression and to financial or other support for religious or religiously affiliated organizations that serve civic purposes, the Constitution and federal laws neither enshrine orthodox secularism nor empower orthodox sectarianism.

In America, "God" is mentioned in numerous public songs, including the fourth stanza of the national anthem, "The Star Spangled Banner."

Since 1862, “In God We Trust” has been required under federal law to be printed on the dollar bill and other U.S. currency. To this day, most state constitutions explicitly reference “God” or “Almighty God,” often quite reverentially. As noted in the introduction, the Liberty Bell (on daily public display in Philadelphia) is inscribed with words from the Bible’s Leviticus 25:10: “Proclaim liberty throughout the land unto all the inhabitants thereof.” The U.S. Supreme Court building boasts religious references carved in stone. Both houses of Congress keep chaplains on the public payroll. The White House often hosts National Prayer Day gatherings, and presidents are commonly featured at prayer breakfasts.

Judge Ferdinand F. Fernandez, the lone dissenting judge in *Newdow*, rightly noted that the Constitution and federal laws are not now and never have been “designed to drive religious expression out of public thought.” To be sure, the Constitution and federal laws forbid government from supporting some creeds and suppressing others. But they leave ample room for diverse religious leaders and people to be who they are in the public square—even in the hallowed halls of Congress itself. For instance, here is how Senator Barack Obama, Democrat of Illinois, a self-avowed Christian believer, describes religion in the Senate, circa 2006:

Discussions of faith are rarely heavy-handed within the confines of the Senate. No one is quizzed on his or her religious affiliation. . . . The Wednesday morning prayer breakfast is entirely optional, bipartisan, and ecumenical . . . those who choose to attend take turns selecting a passage from Scripture and leading group discussion. Hearing the sincerity, openness, humility, and good humor with which even the most overtly religious senators . . . share their personal faith journeys during these breakfasts, one is tempted to assume that the impact of faith on politics is largely salutary, a check on personal ambition, a ballast against the buffeting words of today’s headlines and political expediency.<sup>3</sup>

As Obama is quick to add, the impact of faith on politics is hardly always so salutary, a point he illustrates by recounting how his first general election opponent for the Senate, Alan Keyes, publicly insisted that Obama’s claims to being a Christian were invalidated by the positions



Obama had taken on abortion and other issues.<sup>4</sup> But the broader point is that Obama (who won in a landslide) routinely joins others of both parties, meeting right there in the Senate, in discussing religious commitments and reading biblical verses. Doing so sends no unconstitutional or illegal “message to unbelievers” that they are not full-fledged citizens.

By the same token, through democratically enacted and completely constitutional measures, the national government has long partnered with sacred places that serve civic purposes. In particular, numerous national religious charitable organizations representing diverse faith traditions have for decades received federal grants and contracts to help deliver health care, child care, education, employment, housing, and other social services. This has been especially common in federal programs specifically designed to help low-income children, youth, families, or other people in need.

Such church-state collaboration to promote public well-being is constitutional and consistent with all relevant federal laws, provided that the religious or religiously affiliated organizations serve all citizens without regard to religion; use public support to administer social services, not to conduct worship services or for sectarian instruction or proselytizing; and otherwise follow the identical public accountability and performance rules as all other nonprofit organizations that receive public support.

As *Newdow* dissenter Judge Fernandez stressed, what the Constitution and federal laws require is “neutrality” and “equal protection” so as to ensure “that government will neither discriminate for or against” a particular religion. For instance, for government to promulgate that America is “one Nation, under Jesus Christ” would be tantamount to its endorsing a particular religion and therefore plainly unconstitutional. But, as Fernandez explained, for government to invoke “God,” even as in the God of Abraham, the God worshipped by Jews, Christians, and Muslims alike, does not seriously threaten “to bring about a theocracy or suppress somebody’s beliefs” and “is no constitutional violation at all.”

On April 28, 1952, two years before Congress added “under God” to the Pledge, Justice William O. Douglas penned the U.S. Supreme Court’s *Zorach v. Clauson* opinion. Douglas was the modern era’s most liberal Court member. But he reminded secular-state-minded jurists (himself in-

cluded) that the Constitution does “not say that in each and all respects there shall be a separation of Church and State.” He recited the “references to the Almighty that run through our laws, our public rituals, our ceremonies.” A “fastidious atheist or agnostic,” he reasoned, “could even object to the supplication with which the Court opens each session: ‘God save the United States and this Honorable Court.’” But, citing constitutional law and precedents and appealing to “the common sense of the matter,” he cautioned those who would “press the concept of separation of church and state to these extremes.” Americans, he matter-of-factly stated, “are a religious people whose institutions presuppose a Supreme Being,” namely, the biblical God of Abraham.

The Constitution and federal laws also require neutrality and equal protection in grant-making and public administration. No less than with respect to citizens’ religious expression, neutrality and equal protection are watchwords when it comes to government financial or other support for religious or religiously affiliated organizations. For instance, for government to fund a welfare-to-work program that required beneficiaries to recite a prayer before searching the help-wanted ads or receiving counseling, that used tax dollars to hire only co-religionists, or that exempted itself on religious grounds from complying with program-specific accountability and performance rules, would be plainly unconstitutional and illegal. But for government to fund a faith-based welfare-to-work program that involved voluntary prayer, that exercised the limited right afforded by the 1964 Civil Rights Act and other federal laws to take religion into account in making employment decisions (known as the “ministerial exemption”), and that complied with all program-specific accountability and performance rules just as all other participating nonprofit organizations must do, would be completely constitutional and legal.

The next chapter delves into greater detail concerning the so-called neutrality doctrine and how, according to the U.S. Supreme Court, the Constitution and federal laws are to properly regulate religion’s relationship to government in America today. For now, it is more important to understand that the founding fathers, especially those who figured most prominently among the Constitution’s framers, agreed from the first that

America should be neither a secular state nor a Christian nation, but instead should rise into a great and godly republic.

#### A WARM CIVIC WELCOME, NOT A HIGH LEGAL WALL

Start with the framer, the father of the Constitution, James Madison. Born in 1751, the Virginian served in the U.S. House of Representatives (1789–1797) and as America's fourth president (1809–1817). He spent his final decades as a revered senior statesman (he died in 1836 at age 86). For our purposes, however, no period is more instructive than the roughly four years he spent debating, drafting, and defending the U.S. Constitution (drafted in 1787, ratified in 1788) and the Bill of Rights (the first ten amendments to the Constitution, ratified in 1791).

Where Madison is concerned, those who believe that America is a Christian nation (Myth #2) stress such things as his service in Congress on a committee that put Protestant chaplains on the public payroll or his support, as president, for a law that helped to fund a Christian group that distributed Bibles. On the opposite side, those who believe that America is a secular state (Myth #1) emphasize the regrets Madison expressed late in life about supporting such measures or selectively highlight passages from his voluminous writings (such as his 1785 *Memorial and Remonstrance Against Religious Assessments*) wherein he counseled limits on church-state relations.

The truth, however, is that present-day America is blessed to be in religious terms pretty much what Madison and most of the other framers intended it to be. It is a godly republic with governmental institutions that (as Justice Douglas phrased it) “presuppose” monotheistic belief in the “Supreme Being” known to Jews, Christians, and Muslims as the God of Abraham. It is a godly republic that affords a special civic status to non-denominational and interfaith (God-centered) religious expression. It is a godly republic that respects, promotes, and protects religious pluralism: Methodists, Muslims, Mormons, and all other faiths are welcome. It is a godly republic in which both the Constitution and federal laws prohibit government from discriminating against citizens who profess no faith at

all (atheists have the same constitutional standing as Anglicans) or who are actively, but peacefully, hostile to all religion or to all church-state collaboration (Americans United for the Separation of Church and State is no more or less entitled to tax-exempt nonprofit status than the National Association of Evangelicals).

Madison and the other framers plainly did not intend for America to become a strictly secular state. They did not wish to exile religion to civic limbo by constitutionally and legally confining religious expression to the private sphere. Neither did they seek to separate religious organizations—churches, synagogues, mosques, or the diverse community-serving religious associations that were already a fixture in the early republic—from any and all collaboration with government institutions.

The words “wall of separation” or “church-state separation” appear nowhere in the Constitution, nor in any amendments to the Constitution, nor in any of the drafts (and there were dozens) of the First Amendment to the Constitution. That is because sentiments and theories favoring strict and total separation of church and state were nowhere in the framers’ hearts and minds.

Nor, however, did Madison and the other framers pray for America to become a nation in which either the national majority’s religion (then as now Protestant Christianity), or any other particular religion or sect, received preferred civic treatment. Like most of the framers, Madison was a committed Christian in the Reformed (or Protestant) tradition. Yet, almost to a man, the framers firmly believed that their Protestant faith opposed having the national government favor any one religion, including their own, over any other. It would be both morally wrong and imprudent, they agreed, for the new government to tax all citizens to support Christians or to establish any particular Protestant religion as the nation’s religion.

Far from etching any Christian nation notion into the Constitution, the framers took multiple measures explicitly to prevent any national religious favoritism or outright religious establishment. For instance, to prevent Christians or other religious people from accruing any exclusive public privileges under the new government, the Constitution (Article VI, concluding paragraph) expressly provides that “no religious test shall

ever be required as a qualification to any office or public trust under the United States," period.

In the same civic spirit, in 1791, the framers acted to require the national government to permit citizens to freely exercise whatever religion they might choose and to prohibit it from establishing any particular religion as the nation's religion. To that end, they included two religious freedom clauses in the First Amendment to the Constitution.

As chapter 2 explains, much confusion and controversy has been, and continues to be, wrought by historically off-the-wall decisions regarding religion handed down by the Supreme Court as late as the mid-twentieth century. Today in America, however, the religious beliefs shared and organizations led by Bible-believing Christians are still strongly protected by the First Amendment and by federal laws. So are the religious convictions held, congregations led, and community-serving nonprofit groups sponsored by Jews, Muslims, and American citizens of all faiths. Faith-friendly federal neutrality unto religious pluralism—neither a Christian nation nor a secular state—is precisely what Madison and most of the other framers wanted for America.

The Constitution's no-religious-test-for-federal-office provision and the First Amendment's religion clauses were conceived by the framers as a warm civic welcome, not a high legal wall. They were intended as official public invitations for all American citizens, present and future, to freely exercise whatever religion they might choose—or none at all. They were meant to be a civic guarantee that, with respect to we the people's assorted sacred beliefs, tenets, and institutions, the national government would ever aspire to effect equal treatment, not supply special treatment.

#### BETWEEN JEFFERSON AND WITHERSPOON: MADISON

In recent decades it has often been asserted that Madison and many of the other framers were not, in fact, committed Christians. Some have even suggested that Madison and company were not Christian believers at all. They assert that most framers were dedicated, not to Christianity or to any particular Protestant sect, but instead to a secular civic creed

grounded in ethical and moral precepts only loosely derived from the Judeo-Christian tradition.

The truth is far more interesting. The framers were not, in fact, secular-minded Enlightenment thinkers dressed in religious drag for the sake of political expediency. Most citizens in their day were professed Christian believers. Their constitutional machinery was not intended to run only on secular ethical fumes from the Judeo-Christian moral tradition (a.k.a. the Ten Commandments).

Rather, the framers' plainly expressed preference for religious pluralism is remarkable precisely because, like most other early Americans, most framers did believe what the New Testament taught about the divinity of Jesus Christ as Lord and Savior. As Christians in the Reformed tradition, they believed that coming to Christ was quite literally a matter of eternal life or death. Even many who would not have considered themselves evangelists believed in encouraging others to believe in Christ. At the same time, however, they steadfastly distinguished between "encouraging" and "coercing." They believed that nobody could or should be coerced, least of all by any national government, to believe in Christ. They were certain that both Christianity itself and the republican cause would suffer if the new national government were to privilege Protestantism in any official fashion, up to and including establishing Christianity as America's state religion.

Indeed, the Constitution's no-religious-test-for-federal-office provision was advocated and adopted on the heels of the Christian revival movement known as the Great Awakening. Led by evangelists like Jonathan Edwards and George Wakefield, from the 1730s to the 1770s this revival swept through Britain's American colonies. For the most part, colonial intellectual and political elites favored the movement. All the same, they were just as opposed to sanctioning a religious test for federal office as they were to having the national government grant any titles of nobility (outlawed by the Constitution's Article I, Section 9).

The framers varied in their Christian beliefs and practices. They ranged from the conventionally prayerful George Washington to the supremely heterodox Benjamin Franklin, from the occasionally anticlerical Thomas Jefferson to the unfailingly orthodox John Witherspoon. And the early re-

public had at least one justly famous antireligious radical, albeit one transplanted in body and spirit to France: Thomas Paine.

Still, the founding fathers arrived at a faithful consensus that America should be a godly republic rather than either a secular state or a Christian nation. Their consensus was captured and codified by the Christian who counted Jefferson and Witherspoon as his two most important mentors and whose work as father and chief defender of the Constitution both men sincerely praised: James Madison.

Before entering public life as a Virginia state delegate in the fateful year 1776, Madison attended Princeton University. The school's founding leaders and faculty members were all deeply committed Christians. Madison's bedrock ideas about the Constitution and hopes for the godly republic were seeded at the college.

Madison's main Princeton mentor was John Witherspoon, a "New Side" Scottish Presbyterian minister and the school's president. Madison affectionately called Witherspoon the "old Doctor."<sup>5</sup> After graduating from Princeton, Madison served with Witherspoon in the Continental Congress (1781–1782). Until recently, Witherspoon was largely a forgotten founder. But his influence on Madison and many other early leaders is beyond serious dispute, as is his role as one who debated and signed both the Declaration of Independence and the Constitution. Witherspoon taught Madison that no republic could survive and prosper without religion. "His formulation might be put this way: no republic without liberty, no liberty without virtue, and no virtue without religion."<sup>6</sup> Most framers, young and old, believed much the same.

For Witherspoon, however, the only religion that could reliably supply the civic virtue necessary to a republic was orthodox Christianity. Regarding the relationship between religion and government, he was "nearer the right bank of the mainstream" than even conservative Christian framers like Washington.<sup>7</sup> Following Reformed Scottish Presbyterian thought, Witherspoon believed "that civil magistrates should have power to advance true religion and punish impiety," and "true religion" for him meant "orthodox Christianity."<sup>8</sup> He would go so far as to claim that "non-establishment and liberty of conscience left room for civil magistrates to promote religion and even to 'make public provision for the worship of God.'"<sup>9</sup>

By contrast, Madison's other dear mentor and fellow Virginian, Thomas Jefferson, inhabited the left bank of the framers' mainstream views on government's relationship to Christianity and religion. Like Jefferson, many well-educated founding fathers knew not only the King James Bible and major Reformed Christian commentaries like John Calvin's *Institutes of the Christian Religion* but also ancient pagan philosophers such as Aristotle and Plato, Enlightenment philosophers such as Montesquieu and Voltaire, and classical historians such as Thucydides and Plutarch. Like Jefferson, several framers also knew more than a bit about experimental science and did more than a little themselves to advance it in their day. Yet few ever vented the hostility to Christianity that, superficially at least, punctuates many private letters authored by Jefferson.

But make no mistake: Jefferson "was no atheist."<sup>10</sup> Rather, he championed religious freedom, and almost every hostile remark he ever made about Christianity or particular Christian sects was made to challenge a religious practice or organization that he believed had "assumed a political character" adverse to both true piety and civil peace.<sup>11</sup> His own religious views "tended toward deism. He believed in one God, not no God, not twenty Gods; but he thought it much better for the human spirit if a country had twenty sects rather than only one."<sup>12</sup>

Jefferson wrote four references to God into the Declaration of Independence. As Virginia's governor, he designated a day for "prayer to Almighty God." As president, he attended church regularly, with services held in the House of Representatives. He permitted the Marine Band to play at worship services. Jefferson even approved a U.S. treaty with Indians that provided, at the Indians' request, federal funds to support a Catholic priest who had begun an outreach ministry to the tribe.

In his youth, Madison seriously contemplated becoming a Christian minister. In his early years and again in old age, Madison sometimes echoed Jeffersonian anticlericalisms. Throughout his life, however, Madison blended and balanced the best thinking on religion and government whispered by Witherspoon on his right and by Jefferson on his left. When all the "evidence is weighed, it is obvious that Madison . . . was as determined to protect religious believers from an oppressive state as he was to protect dissenting citizens from an oppressive church."<sup>13</sup>



Madison's most enduring civic legacy, however, resides in the beliefs about religion and republicanism in America that he publicly expressed and fought for from the mid-1780s through the mid-1790s.

In 1785 and 1786, the two years immediately preceding the Constitutional Convention in Philadelphia, Madison, then a Virginia assemblyman, battled in the state's legislature for the Act for Establishing Religious Freedom. He corresponded with Jefferson about the controversial act.<sup>14</sup> During the legislative fight, he "scolded Christian conservatives for trying to insert the words 'Jesus Christ' in the bill's preamble."<sup>15</sup> They would, he stated, give "better proof of reverence for that holy name" were they "not to profane it by making it a topic of legislative discussion."<sup>16</sup>

In the mid-1790s, just a few years after the First Amendment and its religion clauses were ratified with the rest of the Bill of Rights, Madison, then a U.S. representative in Congress, became a righteous voice for religious pluralism. For instance, in 1795, "during a congressional debate over naturalization, he bluntly repelled anti-Catholic prejudices."<sup>17</sup> In Catholicism, he stated firmly, "there is nothing inconsistent with the purest Republicanism."<sup>18</sup>

Nowhere, however, is Madison's civic rationale for the godly republic more powerfully and plainly expressed than in the essays he wrote in defense of the proposed Constitution and in the language on religious freedom that he drafted for the First Amendment. Jefferson, Witherspoon, and the many framers whose Christian worldviews lay between the two were most completely at one in admiring Madison's ideas about the godly republic and in endorsing his associated handiwork as father and chief defender of the Constitution.

#### NO FAITH IS BEYOND FACTION

To help win ratification for the proposed Constitution in the New York state convention, Madison joined Alexander Hamilton and John Jay, under the pen name "Publius," in writing for New York City newspapers eighty-five articles ("op-ed" pieces in today's journalistic parlance) defending the document. Their political essays appeared from late 1787

through 1788. The identity of the authors was kept secret at the time, but we know that Madison authored or co-authored over two dozen of the pieces. Known collectively as the Federalist Papers, they probably played only a small role in securing ratification. But this commentary has since assumed monumental importance as an authoritative and profound explanation of the Constitution.

In his contributions to the Federalist Papers, Madison speaks eternal truth to future power regarding religion's proper role in the American republic. Witherspoon's influence on Madison is abundantly evident in the predominantly Calvinist-Christian worldview that asserts itself on nearly every page and informs nearly every famous phrase.

To wit: Madison writes that "there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust" (No. 55); recommends a governmental structure designed to pit "ambition against ambition" (No. 51); worries that the "infirmities and depravities of the human character" make it exceedingly difficult for even well-meaning citizens to tame "mutual jealousies" or reconcile "discordant opinions" (No. 37); and warns that "enlightened statesmen" dedicated to "the public good and private rights" will be rare because "self-love," even among the wisest and most well-intentioned souls, is normally sovereign over both "opinions" and "passions," and because the propensity to "vex and oppress each other" is "sown in the nature of man" (No. 10).<sup>19</sup>

Madison's bedrock ideas about the Constitution plainly reflect his Calvinist-Christian worldview. James Bryce, an English lord, was among the first observers to duly credit the connection. Next to the Frenchman Alexis de Tocqueville's *Democracy in America* (vol. I first published in 1835, vol. II in 1840), Bryce's *The American Commonwealth* (1888) is arguably the greatest nineteenth-century commentary on American government. Bryce heralds the "hearty Puritanism in the view of human nature which pervades the instrument of 1787. It is the work of men who believed in original sin and were resolved to leave open for transgressors no door which they could possibly shut."<sup>20</sup> True, and Madison's most famous contributions to the Federalist Papers often distinctly echo "the *Westminster Confession*, the creedal authority of English Calvinism," which, in a typical teaching, admonishes that even "a

Christian continues to 'will that which is evil' by 'reason of his remaining corruption.'"<sup>21</sup>

Calvinist-Christian to his intellectual core, Madison thought it foolish to suppose that either Christian beliefs shared by rulers or Christian pieties practiced by the people would prove sufficient to keep the faithful from forming power-seeking "factions" that threatened freedom.<sup>22</sup> Americans, he had no doubt, had been specially favored by Providence in their break with Britain, and America could become an exceptional godly republic. A moment's "pious reflection," he wrote in the third solo-authored article he contributed to the *Federalist Papers*, would have one perceive "a finger of that Almighty hand" that had been "so frequently and signally extended to our relief in the critical stages of the revolution."<sup>23</sup>

Just the same, Madison admonished, Americans needed to humbly acknowledge that they were no different from any other people with respect to sinful human nature. Americans—both "We the People" and "our Posterity"—were assumed to be no less fundamentally flawed by nature, and hence no more likely to always hear and obediently heed God, than any other people, past, present, or future: "When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated."<sup>24</sup> Only "theoretic politicians" could ignore the civic lesson implied by this spiritual reality, namely, the need to frame the new government in ways calculated to detect, deter, and defeat any faction, whether a majority or a minority, whether religious or secular, that coveted power to serve its members' self-loving purposes.

Thus, as Witherspoon's prize pupil and lifelong intellectual disciple, Madison believed that only "a constitution that acknowledges this fallen nature of humanity and constructs 'checks and balances' to ameliorate its negative consequences can hope to avoid political oppression of one sort or another."<sup>25</sup> Witherspoon's classical formulation about republics, liberty, virtue, and religion was never far from Madison's mind.

Still, neither when Madison was drafting the Constitution nor at other moments did he ever succumb to Witherspoon's view that "true religion" (orthodox Christianity per se) should enjoy a special civic status in America. Neither, however, did he follow Jefferson's claim (in the draft consti-

tution for Virginia) that Christian ministers should be prohibited from holding public office. "Does not," he pointedly replied to Jefferson, "the exclusion of Ministers of the Gospel as such violate a fundamental principle of liberty by punishing a religious profession with the privation of a civil right?"<sup>26</sup>

When it came to religious pluralism, Madison, not Jefferson, was the more orthodox republican precisely because he was also the more orthodox Christian. Original sin, he believed, was real. It had followed the English settlers to the New World. To secure freedom and "a more perfect Union" in America, to translate colonial Puritanism into a national republicanism for the ages, government had to respect, promote, and protect religious pluralism.

Thus, in his two most famous articles, *Federalist Papers* Nos. 10 and 51, Madison outlined the civic case for founding a new government that he hoped and prayed would guide, not guarantee, America's rise as a godly republic defined by religious diversity.<sup>27</sup>

In No. 10, Madison began by observing that "a well constructed Union" can "break and control the violence of faction." He defined a faction as any group of citizens who attempt to advance their ideas or economic interests either at the expense of other citizens' rights or in ways that conflict with "the permanent and aggregate interests of the community" or "public good." It is, he reasoned, folly to try to defeat factions by removing whatever caused them to arise in the first place. "Liberty is to faction what air is to fire," and to extinguish liberty would be a "cure worse than the disease."

Government could try to make all citizens share the same ideas and economic interests, but the effort would crash against the "diversity in the faculties of citizens"; some are smarter or more hardworking than others. Besides, even if everyone shared the same ideas and economic interests, citizens would still "fall into mutual animosities." Sinful human nature is such that even "the most frivolous and fanciful distinctions" are "sufficient to kindle . . . unfriendly passions" and to "excite . . . violent conflicts." Madison listed a "zeal for different opinions concerning religion" first among the "latent causes of faction" that no government could ever completely erase.

So Madison proposed a second way of defeating faction, not by re-

moving its causes but by "controlling its effects." As America expanded and became home to ever more diverse citizens with widely varying economic interests and ideas, factions could be controlled by having them cooperate or compete with each other under the new government's evenhanded stewardship. The Constitution proposed a form of national government that was likely to serve the public good through the "regulation of these various and interfering interests." The Constitution's sacred civic mission was to "adjust these clashing interests and render them all subservient to the public good." The method to achieve this mission was to establish a republic rather than a pure or direct democracy.

A republic, unlike a pure or direct democracy, is "a government in which the scheme of representation takes place," delegating government decision-making "to a small number of citizens elected by the rest." A pure or direct democracy can only govern a relatively small territory, but a republic can govern a much "greater number of citizens" over "a greater sphere of country." Moreover, in "extensive republics" spread out over vast territories, citizens are less likely to choose as their national representatives men with "factious tempers" colored by "local prejudices" and more likely to "center on men who possess the most attractive merit and the most diffusive and established characters."

There was, however, an even more important advantage to the "extended" republican form of national government proposed under the Constitution. "Extend the sphere," Madison preached, "and you take in a greater variety of parties and interests," thereby making it "less probable that a majority" will find "a common motive to invade the rights of other citizens" or, "if such a common motive exists," rendering the majority faction, whatever its genesis in ideas or interests, less able to enlist the national government's support in exploiting or tyrannizing other citizens.

Fittingly, Madison's first and foremost illustration concerned religiously based factions and prescribed religious pluralism. He wrote, "A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source."

MADISON'S MULTIPLICITY OF SECTS VERSUS  
THE ANTI-FEDERALISTS

In No. 51, Madison was even more explicit in linking the new republic's fate to its tendency to respect, promote, and protect religious pluralism. His crowning passage on the multiplicity of sects is as fresh and true today as when he wrote it:

In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of the country and number of people comprehended under the same government.

Neither Witherspoon the orthodox Christian nor Jefferson the self-styled Deist would have written these exact words. Neither of Madison's mentors would have framed or defended the Constitution precisely as did their protégé and friend. Yet both Witherspoon and Jefferson agreed that Madison was right about the proposed Constitution, right about how the new republic should encourage religious expression, and right about how the national government should seek to seed, sustain, and support religious pluralism.

Witherspoon "approved of Madison's adaptation of his ideas into the new constitution."<sup>28</sup> To a young Princeton faculty colleague, Witherspoon characterized the Constitution "as embracing principles and carrying into effect measures, which he had long advocated, as essential to the preservation of liberties, and the promotion of the peace and prosperity of the country."<sup>29</sup> The most exhaustive studies to date document Witherspoon's "pro-Constitution sentiments and activities, and provide ample proof that Witherspoon was a vigorous Federalist both in and out of the New Jersey ratifying convention."<sup>30</sup> The Old Doctor was genuinely pleased with his Princeton pupil, and died grateful for the godly republic and its "multiplicity of sects."

Madison was more worried that Jefferson, not Witherspoon, would dislike the proposed Constitution. Would Jefferson disdain how "Pub-

lius" had defended its key provisions? Would he reject the overarching case for a multiplicity of sects or react against the fact that even orthodox Christian ministers would be free to compete for national public office? Not until the Constitution was ratified did Madison reveal to Jefferson his role in writing the Federalist Papers. As it turned out, Madison had worried in vain. Once Jefferson read the articles, he baptized them the "best commentary on the principles of government which ever was written."<sup>31</sup>

Unlike the more pragmatic Madison, Jefferson harbored theoretical misgivings about any political compact based on popular consent that purported to bind a people to a particular frame of government for more than a single generation (calculated with pseudo-scientific rigor by Jefferson to mean any period longer than 19 years).<sup>32</sup> Still, Jefferson regarded the proposed Constitution as "unquestionably the wisest ever yet presented to men."<sup>33</sup>

During the ratification struggles in Virginia and other states, Jefferson was in France. Among the many leading public figures who opposed the Constitution was Virginia's Patrick Henry, famous for the words "Give me liberty or give me death." In Virginia's ratification debate, Henry made selective and unauthorized public use of some of Jefferson's private letters, using Jefferson's "name against parts of the Constitution which he really approved."<sup>34</sup>

Naturally, Jefferson was upset by such intrigues, but what he really disdained were the factious, party-like clashes over the proposed Constitution. These bitter political battles had broken out between like-hearted patriots who only a decade earlier had clung to each other in the War for Independence. Jefferson declared that he was neutral, not on the Constitution's clear-cut merits, but between the two main contending parties—the so-called Federalists, like Madison, who supported the Constitution, and the so-called Anti-Federalists, like Henry, who opposed it. Were he forced, however, to pick a side, he would stand squarely with Madison, the Constitution, and the multiplicity of sects: "If I could not go to heaven but with a party, I would not go at all. . . . I am not of the party of the federalists. But I am much farther from that of the Antifederalists."<sup>35</sup>

Still, Jefferson shared the Anti-Federalists' concern that, at some future point, the "consolidation of the government" wrought by the Constitu-

tion might jeopardize states' rights.<sup>36</sup> In the Federalist Papers Madison had wrestled mightily with this critical concern. For instance, in No. 39 he painstakingly described how the Constitution "is, in strictness, neither a national nor a federal constitution, but a composition of both," creating a "compound" republic.<sup>37</sup> He argued that, even with the Constitution's "supremacy" clause (No. 44),<sup>38</sup> the states, not the national government, would retain most powers unrelated to interstate commerce and foreign relations (No. 45).<sup>39</sup> He intimated that the national government's powers would probably grow as the people became "more partial to the federal than to the state governments," but he insisted that the Constitution would nonetheless perpetually empower the states to stymie the "ambitious encroachments of the federal government" (No. 46).<sup>40</sup>

With such arguments, Madison largely persuaded Jefferson, but he failed to persuade Henry and the Anti-Federalists, among them several other great patriots like Samuel Adams of Massachusetts. Henry, Adams, and other Anti-Federalist leaders worked tirelessly, if unsuccessfully, to prevent the Constitution from being ratified.

The Anti-Federalists' core counterargument was that, for all its power-limiting and power-dividing features, the national government proposed by the Constitution was too strong and too centralized. They predicted that, in time, the compound republic would become the consolidated republic. The national government would absorb powers and functions that once belonged solely to the states. Congress would tax heavily, the Supreme Court would overrule state courts, and the president would come to head a large military establishment.

Since all of these things have happened, and with men like Henry and Sam Adams in their ranks, the Anti-Federalists cannot be ignored or dismissed as cranks or crackpots. Nor can the Anti-Federalists be pigeonholed as men united by narrow regional interests (they drew leaders from every state), by selfish economic interests (although some had land and financial capital, many had very little), or by antebellum solicitude for slavery (abolition-leaning Anti-Federalists, both north and south, would bloody any nose that dared to suggest as much).

Rather, the Anti-Federalists were united by their belief that the Constitution's mechanisms for making "ambition counteract ambition" would not work. They were united, as well, by their fear that the national gov-



ernment's "ambitious encroachments" against the states would prevail. Most profoundly, however, the Anti-Federalists were united by their visceral reactions against the Federalists' forward-looking vision of America as a large national republic encompassing diverse economic interests and a multiplicity of sects. Under this vision, rural life would recede as urban manufacturers rose. Christianity would ever be or long remain most citizens' respected old-time religion but would never be the country's official creed backed by the Constitution and favored by federal law.

Madison proposed controlling all factions including religious groups by having the national government evenhandedly regulate "these varying and interfering interests." The Anti-Federalists, however, were the era's religious conservatives. They wanted a national government that would reinforce such social, economic, and religious homogeneity as characterized each state. "For most Anti-Federalists a republican system required similarity of religion, morals, sentiments and interests."<sup>41</sup> The Anti-Federalists reflexively favored preserving religious homogeneity in each state, not stimulating religious pluralism throughout the land or inviting any present or future multiplicity of sects.

In a typical Anti-Federalist pamphlet, "Agrippa" opposed open immigration to America so that Pennsylvanians and the peoples of other sovereign states could "keep their blood pure" and preserve "their religion and their morals."<sup>42</sup> Even a few founders who were as pro-Constitution and as far removed from religious orthodoxy and romantic localism as the tolerant and cosmopolitan Benjamin Franklin, could on rare occasions stain their otherwise sterling civic legacies with such outbursts.<sup>43</sup> Among the Anti-Federalists were many towering intellects whose Christian morals strictly condemned such prejudices.

Still, the Anti-Federalists "were by and large less well educated and more intensely religious than the Federalists."<sup>44</sup> Too often, xenophobia and zealous intolerance marked their civic discourse about religion and government in America. Even the Anti-Federalists' leading latter-day academic apologist, the University of Chicago's Herbert J. Storing, emphasizes that "Agrippa" and company were against the Constitution largely because they were *for* states preserving their respective homogeneous religious cultures and local moral folkways.<sup>45</sup>

For instance, a Massachusetts Anti-Federalist was among the many

who howled at the proposed Constitution's no-religious-test-for-federal-office provision, fretting that it made "a papist, or an infidel . . . as eligible" for national public service as Christians.<sup>46</sup> Similarly, a North Carolina Anti-Federalist protested that "pagans, deists, and Mahometans might obtain offices among us."<sup>47</sup> Another Anti-Federalist asserted that since Christianity was uniquely fit for producing good citizens, "those gentlemen who formed this Constitution should not have given this invitation to Jews and Heathens."<sup>48</sup> Yet another Anti-Federalist declared that without "Christian piety and morals" the Constitution would result in "slavery and ruin," and so urged the national government to institute exclusively Christian "means of education" for the public.<sup>49</sup>

Most Anti-Federalists, however, were willing to compromise: Madison and the Federalists could have their large republic with diverse economic interests (including urban manufacturers) and a multiplicity of sects (including non-Christians and nonbelievers) so long as the national government was constitutionally forbidden from interfering with states' rights. This included the right to keep or establish a particular religion as a state's official religion, if the state's legislators and citizens so desired.

In the proposed Constitution, the Anti-Federalists identified two main threats to states' rights and states' sovereignty regarding religion. One threat, they argued, was immediate: the awesome powers already assigned to the U.S. Congress. The other threat, they insisted, was long term: the insidious powers likely to be acquired by the U.S. Supreme Court. Neither threat, they demurred, had been honestly acknowledged or adequately addressed by Madison and the Federalists.

The Anti-Federalists were suspicious of Madison and many other Federalists, and not without reasonable cause. Alexander Hamilton, Madison's co-author on several contributions to the Federalist Papers, was considered by many Anti-Federalists to be an irreligious "closet monarchist" who favored a unified national government dominated by the executive branch and with sovereign powers over the states. In fact, as a New York State delegate to the Convention, Hamilton had made a long speech arguing for something quite similar to elective monarchy. He favored a consolidated national government that vested great powers in an "energetic" presidency.

In the 1770s, Hamilton was also the primary voice for turning America into the world's leading manufacturing nation, complete with urban workforces and global finances. Having advanced this vision as the nation's first secretary of the treasury under President George Washington, Hamilton was convinced that the many compromises foisted on the Convention by both Anti-Federalists and pro-Constitution delegates from smaller states had almost fatally weakened the national government. He privately called the Constitution "frail and worthless," but in public he defended it with vigor because he deemed all the politically possible alternatives to be even worse.

Madison suffered from more than mere guilt by association with Hamilton. Madison was no monarchist and no siren for a strong executive. Still, he had entered the Convention advocating the so-called Virginia Plan. Under this strong-government blueprint, Congress would have had the power to veto acts of state legislatures. Unlike Hamilton, however, Madison truly warmed to the Constitution that he defended. As the Virginia Plan bled, he bargained. He soon developed a convert's zeal for the compromises necessitated by the political divides of the Convention.

Even during the heated ratification struggles, Madison's Calvinist-Christian rationale for the Constitution resonated with many Anti-Federalists. The passage in the Federalist Papers that best captures this rationale, and best defines American constitutionalism itself, appears in No. 51:

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither internal nor external controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.<sup>50</sup>

This constitutional credo drew few opponents. Where the Anti-Federalists parted ways with Madison was in insisting that the proposed Constitution did not, in fact, do nearly enough to oblige the national government "to control itself."

The Anti-Federalists' immediate concern was that Congress would enact laws to eradicate powers and functions that had long been enjoyed by the state governments. They correctly noted that the Constitution's Article I (longer than all the document's other sections combined) gave Congress potentially unlimited powers, both in absolute terms and relative to powers assigned to the presidency by Article II. They were sick at the thought of a monarchy-like presidency. And they were certain that the Court would yield black-robed tyrants. But they rightly determined that the Constitution made Congress far and away first in power and authority among the three "co-equal" branches of national government.

After all, in the U.S. Congress were vested the new republic's ultimate powers to lay taxes, spend money, and make all laws deemed by national representatives to be "necessary and proper" to effecting the body's own enumerated powers. Congress also held "all other powers vested by this Constitution in the government of the United States, and in any department or officer thereof" (Article I, Section 8, final paragraph).

Thus, the Anti-Federalists rationally feared that, should Congress ever deem states' rights to be in conflict with the "more perfect Union" referenced in the Constitution's Preamble, then states' rights might suffer in matters ranging from regulating commerce to sponsoring religion, from determining state voters' rights to delineating the rights of criminal defendants. Most thought that this would happen sooner rather than later: Hamilton and his fellow Federalists (many not nearly as sympathetic as Madison to Anti-Federalist concerns or as willing to compromise) were likely to dominate the first Congress and the new Cabinet departments.

#### MOST BLESSED COMPROMISE: THE BILL OF RIGHTS

Fortunately for all concerned, the Anti-Federalists, the pro-Constitution small-state delegates to the Convention, and the Federalists ultimately compromised in ways that reduced fears about the eradication of states' rights. One consequential compromise resulted in the provision that gave small states like Delaware and Georgia equal representation in the Senate (Article I, Section 3), accompanied by the clause that placed the fore-

going provision outside of the normal amendment process (Article V, specifying "that no state, without its consent, shall be deprived of its equal suffrage in the Senate").

The other major compromise wrought by the Anti-Federalists was the Bill of Rights. In the penultimate article of the Federalist Papers (No. 84), Hamilton had given no quarter to the Anti-Federalists' objection that the proposed Constitution contained no bill of rights. He noted that New York State's constitution had no bill of rights, either. He delineated the numerous "particular privileges and rights" already provided in the Constitution's body.<sup>51</sup> He lectured that "bills of rights are, in their origin, stipulations between kings and their subjects" and hence have no place in a Constitution "professedly founded upon the power of the people and executed by their immediate representatives and servants."<sup>52</sup>

Hamilton's most dismissive argument concerned not past precedents but future dangers. He stressed that to include "a minute detail of particular rights" in the Constitution would be perversely to imply that the national government's power extended beyond "the general political interests of the nation" to "every species of personal and private concerns. . . . Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? . . . [T]he Constitution is itself, in every rational sense, and to every useful purpose, a BILL OF RIGHTS."<sup>53</sup>

The Anti-Federalists bought little of this. Had they known that Hamilton was behind these arguments, they would have bought even less. Madison, however, quickly relented with but a few reservations. He and other Federalists promised small-state Convention delegates and Anti-Federalist friends that they would personally see to it that the Constitution, immediately after it was ratified in its proposed form, would be amended by a broad bill of rights. By the spring of 1790 all thirteen states had ratified the Constitution, and Madison moved at once to keep the promise. In the first session of the first Congress he introduced a set of proposals, many based upon the existing Virginia Bill of Rights.

The process was hardly simple. Proposals flew from all directions. Both the new Constitution's old friends and its unrepentant foes drafted long, complex amendments and demanded serious hearings for them. In

all, nearly two hundred amendments were proposed. Madison took the lead in helping to pen meaningful but concise amendments that were likely to spark consensus. Twelve amendments were approved by Congress; ten of these were ratified by the states and went into effect in 1791.

Nine of the ten amendments that constitute the Bill of Rights can be usefully grouped into three categories: protections against arbitrary police and court action (Amendments 4 through 8), protections of states' rights and unnamed rights of people (Amendments 9 and 10), and protections of specific property rights (Amendments 2 and 3 protect citizens' rights to bear arms and to refuse one's home to troops in peacetime).

Only the First Amendment, however, protects citizens' rights to participate in the political process:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Take note: "*Congress shall make no law. . . .*" When and as ratified, the First Amendment, and the rest of the Bill of Rights, did not limit the power of state governments over citizens. Rather, the First Amendment, and the rest of the Bill of Rights, limited only the power of the national government. As stated plainly in the monumental early twentieth-century work on the Constitution by Princeton scholar Edward S. Corwin, the Bill of Rights was originally designed to "bind only the National Government and in no wise limit the powers of the States of their own independent force."<sup>54</sup>

Take note once again: "Congress shall make no law respecting an establishment of *religion*, or prohibiting the free exercise thereof." The First Amendment mentioned religion first, even before speech. It featured two separate religion clauses: an "establishment of religion" clause and a "free exercise" clause. The First Amendment prohibited the national government, not state governments, from establishing a religion or restricting religious practices. As Lord Bryce marveled, it allowed a state to "establish a particular form of religion" and to "endow a particular form of religion, or educational or charitable establishments connected therewith."<sup>55</sup>

The two religion clauses in the First Amendment did not fall from heaven complete and unchallenged. There were drafts upon drafts of proposals. What is striking, however, is that many of the various drafts, whether proposed by Federalists or Anti-Federalists, embodied similar ideas and sentiments about religion and government in the new republic. For instance, Madison's fellow Virginian George Mason attended the Convention but refused to sign the Constitution. Mason, however, is the Anti-Federalist regarded by many as father of the Bill of Rights. Mason drafted Jefferson-like language invoking the natural right to religious freedom and specifying that neither Christianity, nor any particular Christian sect, should be privileged by the Constitution or under federal laws. For the Federalists' part, Madison wanted the First Amendment's religion clauses to read as follows:

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established.

Had either Mason's or Madison's preferred language been adopted, perhaps the secular state and Christian nation myths would have done less to cloud the founders' faithful consensus that America is meant to be a godly republic marked by religious pluralism.

Then again, even the First Amendment's actual religion clauses, obtuse as they are, make plain the framers' desire that citizens' religious rights and liberties must be respected, not reviled, by the national government and that no particular religion may ever be endorsed or established as the nation's official religion, or supported as such by federal officials or tax dollars.

#### NEO-ANTI-FEDERALISTS VERSUS JUDICIAL TYRANNY

Begat by political compromise, the Bill of Rights promised by Madison quieted "the fears of mild opponents of the Constitution."<sup>56</sup> The First Amendment's two religion clauses satisfied widely respected statesmen on both sides (including the Virginians Mason and Madison) and kept the

Anti-Federalists who had cursed Madison's multiplicity of sects from damning the Constitution. After 1791 only inveterate Anti-Federalists would insist that the national government give special treatment to Christianity and Christian sects. Together with the rest of the Bill of Rights, the two religion clauses were from the first, and remain to this day, a great national blessing. Without them, America would not have become, and could not remain, a godly republic.

Yet the compromise could not hold perfectly, or hold forever. The Anti-Federalists feared Congress and fretted over the presidency, but they hated the Supreme Court and the federal judiciary. It was a hate fueled by fear of the unknown—and the unelected.

The proposed Constitution (Article III) had said little about the extent of judicial power. It gave justices lifetime tenure pending good behavior. It specified the types of cases that the federal courts would oversee. It explicitly tethered and limited the Supreme Court's appellate jurisdiction (its right to hear cases on appeal from lower federal courts) to the legislature's will (Article III, Section 2, paragraph 2). Still, it left completely open critical questions concerning the federal judiciary's role, if any, in deciding whether democratically enacted federal laws were constitutional.

Given the Constitution's language about the supremacy of national law, this silence seemed ominous. Thus, even after the Bill of Rights was ratified, many Anti-Federalists continued to read Article III as a semi-secret Federalist plan to assert control over state governments via federal judges. In the *Federalist Papers* (No. 78), Hamilton had done little more than to pooh-pooh the Anti-Federalists' concerns about the Supreme Court and other federal judges:

Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution. . . . [The judiciary] has no influence over either the sword or the purse. . . . It may truly be said to have neither FORCE nor WILL but merely judgment.<sup>57</sup>

With pen names such as "Brutus," Anti-Federalist pamphleteers ripped into the Federalists' ostensible plot for judicial tyranny. Some



went so far as to raise the possibility that federal judges would soon shatter the Constitution's checks and balances, outlaw elections, and end by enthroning themselves as the New World's imperial monarchs.

While the Anti-Federalists' worst nightmares about judicial tyranny have not been realized, they made three specific predictions about how the Supreme Court would exercise its powers. Their first two predictions have proven to be perspicacious; the third, though hardly without any serious merit, has been, and continues to be, exaggerated.

First, the Anti-Federalists predicted that the Court would assume the power to declare acts of the legislature as well as of the executive branch unconstitutional and hence null and void. Before the Constitution was a half-decade old, the Court did just that in *Marbury v. Madison* (1803). While the Court has used this power sparingly in its history (only a few hundred laws have been declared unconstitutional in over two centuries), federal elected officials are ever cognizant of the possibility that a policy might be deemed unconstitutional and so normally seek before the fact to avoid any serious clash with the Court.

Second, the Anti-Federalists predicted that the Court would overrule state laws and use novel arguments to justify doing so. This began to happen after the Civil War. The Fourteenth Amendment, ratified in 1868, provided that no state shall "deprive any person of life, liberty, or property without due process of law" (known as the "due process clause"). It also specified that no state shall "deny to any person within its jurisdiction of the equal protection of the laws" (known as the "equal protection clause").

In the late 1890s, the Court began to use these two Fourteenth Amendment clauses as a way of applying certain provisions in the Bill of Rights to the states. On a case-by-case basis, the twentieth-century Court invoked either due process or equal protection, or both, and thereby applied the Bill of Rights to the states. This process, known as selective incorporation (selectively applying the Bill of Rights to the states), is now largely complete.

To wit: In 1925 in *Gitlow v. New York*, the Court ruled that the First Amendment's guarantees of free speech and free press applied to the states. In 1937 in *Palko v. Connecticut*, the Court declared that states must

honor all “fundamental” liberties. In 1940 in *Cantwell v. Connecticut*, the Court applied *Palko* to religious liberties. By the mid-twentieth century, the Court routinely held that the states must observe all fundamental freedoms and rights referenced in the Constitution. The only question was whether the Court deemed a given right or freedom to be “fundamental.”

Today, the entire Bill of Rights (all amendments and provisions thereof) is applied by the Court to the states except for the Second Amendment (the right to bear arms), the Third Amendment (the right to refuse your home to troops in peacetime), the Fifth Amendment provision affording a right to be indicted by a grand jury before being tried for a serious crime, the Seventh Amendment provision affording a right to a jury trial in civil cases, and the Eighth Amendment provision banning excessive bail and fines.

So, the Anti-Federalists saw both judicial review and selective incorporation coming. Their third prediction, however, has proven to be less plainly perspicacious. With great alarm, they prophesied that the Constitution’s failure to establish America as a Christian nation would eventually lead America to become a secular state.

The specter of judicial tyranny that haunted the Anti-Federalists centered upon the unelected and unaccountable Supreme Court. The misty logic of their civic nightmare went pretty much as follows: Corrupted by its ever-expanding and secretive powers, the Court would engineer a reverse national altar call. Having already kicked Christianity to the civic curb as just one American faith among many, Hamilton’s “least dangerous branch,” the federal judiciary, would work over time to confine all religions, and such multiplicity of sects as might emerge, to the purely private sphere. The end result for America’s godly people, Christian and non-Christian alike, would be national government neutrality and equal protection in name only. Rather, the end result would be legalized hostility and discrimination against the Protestant majority (if there still was one) and all other God-fearing citizens. The faithless would form powerful factions. Federal judges would lead these antireligious minions. In due course, the Court would establish in America a secular Promised Land.

“Experience,” counseled Madison in No. 20, “is the oracle of truth.”<sup>58</sup> The truth, thank God, is far less sad or sinister, and far more favorable to

America's history and future as a godly republic, than the Anti-Federalists feared and than their present-day neo-Anti-Federalist disciples often seem determined beyond all reason to believe.

Yes, there have been many moments over the past century, some quite shocking and dramatic, when the Supreme Court has spoken as if America was supposed to be a supremely secular state. There have been many lower federal court decisions, such as the one referenced in this chapter's opening pages, that have distorted constitutional history and deified secular ideology. Many federal judges have legislated that government must uniquely restrict public religious expression, aggressively remove religious symbols from public spaces, and wantonly discriminate against sacred places even if they do nothing but serve others in society without regard to religion.

Yet these moments, decisions, and extreme opinions have been, and continue to be, exceptions to the civic rule that are contradicted by prevailing Court doctrine. Just as Madison and the framers hoped, the national government norm on religion remains court-enforced neutrality plus equal protection. The reality is that modern America is the happy home to a multiplicity of sects.

From sea to shining sea, Protestant Christianity remains the majority's religion, and many other religions have gathered strength right alongside the Protestant majority. Roman Catholics, Jews, Muslims, Mormons, and many other religious peoples feel welcome in the godly republic. Albeit imperfectly, the federal government does partner with religious congregations and religiously affiliated community groups to serve the common good. If anything, over the last several decades the federal bench has become more faith-friendly, and Washington's big bureaucracies have become less apt to discriminate unfairly against religious nonprofit organizations. Citizens of virtually every demographic description and representing nearly every socioeconomic status now favor religious pluralism and support church-state partnerships to effect public good. Top political leaders in both parties are openly religious and support neutrality and equal protection. Even the hypersecular, elite academic community has responded to empirical data that proves that faith-based organizations are critical to mobilizing volunteers and helping the nation's needy.

Still, today some religious leaders loudly insist that judicial tyranny has overtaken the founders' faithful consensus. Some have gone so far as to intimate that adverse, antidemocratic court rulings ought to be ignored or resisted by whatever means are necessary. As chapter 2 suggests, this neo-Anti-Federalist cry is not entirely baseless, but it is highly overblown. Or, as Madison might have one say, it prescribes incendiary cures for an imaginary disease.