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THE REASONS WHY ORIGINALISM PROVIDES A WEAK FOUNDATION FOR INTERPRETING CONSTITUTIONAL PROVISIONS RELATING TO RELIGION

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Contemporary debates about the meaning of the Free Exercise Clause and the Establishment Clause of the First Amendment often are grounded on conflicting contentions about the original understanding of these constitutional provisions. There are various explanations for this emphasis on history in interpreting these specific constitutional clauses. To begin with, the Supreme Court's jurisprudence in this area has focused on history in interpreting the religion clauses.[1] It is also the case that many scholars and jurists are committed to some form of originalism as the controlling methodology for interpreting constitutional text. Finally, questions relating to the relationship between church and state were clearly of interest to the founders and at various times had been the focus of their political speech and actions.

The purpose of this brief essay is to challenge this convention. I suggest that whatever may be the justifications for, and utility of, employing originalism as a methodology for interpreting other constitutional provisions, it is a particularly poor approach to adopt for determining the meaning of the religion clauses of the First Amendment. I do not suggest that an historical analysis is irrelevant to understanding what the religion clauses mean. It certainly sets a foundation for further discussion. I argue simply that there are important reasons why originalism is particularly ill suited for resolving

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1 *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1 (1947); Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

a great many constitutional disputes relating to church-state relationships in our society today.

I. HISTORICAL DISSONANCE

The sobering reality is that there are an extraordinarily large number of books and articles that purport to accurately describe the original understanding of the religion clauses. Many of these works are written by highly reputable scholars. Many of them reach very different conclusions about their subject.[2]

Moreover, the scope and nature of the disagreements has not remained constant. Thirty years ago, for example, the historical account that challenged the separation of church and state thesis adopted in *Everson* maintained that the original understanding of the Establishment Clause was to prohibit preferentialism among faiths, as opposed to prohibiting the state from providing financial support to religious institutions and activities generally.[3] The current challenge to separationist history suggests that the Establishment Clause was not intended to provide any substantive protection to individuals or groups. Under this account, the Clause was designed to prohibit federal interference with the exercise of state autonomy in structuring local church-state relationships.[4]

Obviously, different readers will find certain historical works to be more persuasive than others. It is fair to say, however, that most judges, virtually all lay readers, and many scholars who work in the church-state area have not engaged in extensive independent research of primary sources in developing their views on this subject. Most of us, at least to some extent, formed opinions on the subject based on

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2 With regard to the meaning of the Free Exercise clause, compare Michael M. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 HARV. L. REV. 1409 (1990) with Philip A. Hamburger, A Constitutional Right of Religious Exemption, 60 GEO. WASH. L. REV. 915 (1992). With regard to the meaning of the Establishment Clause, compare LEO PFEFFER, CHURCH, STATE, AND FREEDOM (rev. ed. 1967) with ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982). These are only examples. The list of works in this area is extremely long. I assume that anyone familiar with the literature in this area acknowledges both its scope and the degree of disagreement that exists among authors.

3 *See, e.g.*, Robert L. Cord, *Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y 129 (1986).

4 *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J. concurring).

secondary sources. Our conclusions are derivative of the historical work performed by others.

When there is this level of dissonance as to the nature of the original understanding, choosing one historical account over another to resolve a religion clause dispute does little to legitimate the conclusion being asserted. This is particularly the case when history becomes a tool of legal advocacy. From my own perspective, some of the best discussions of the historical understanding of the religion clauses that I have read do not necessarily support my own doctrinal conclusions on various issues, but they reflect a healthy sense of ambivalence and uncertainty by their authors.[5] But that is only my perspective. Certainly, the level of disagreement among commentators cannot be disputed.

II. TEXTUAL INTERCONNECTIONS

If we look at the text of the Constitution it is clear that there are several explicit commands relating to religion,[6] several phrases that relate to religion more incidentally[7], and at least one noted lack of language, the absence of any explicit acknowledgement of G-d in the document. Some of the commands and related language are much more susceptible to a plain meaning analysis than others, but leaving that issue aside for the moment, we can ask another question. Since there are several provisions, and one noticeable omission, relating to the same subject, to what extent are the meanings assigned to one part of the text relevant to our understanding of another part of the text.

For example, does the lack of an acknowledgment to G-d tell us anything useful about the meaning of the First Amendment? One might argue that this omission reinforces the idea that the Constitution is a secular document designed to create a secular government, and that this objective should

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5 Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance*, 87 CORNELL L. REV. 783 (2002); Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Functional Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837 (1995).

6 *See, e.g.*, U.S. CONST. amend. I ("religion clauses"); id. art. VI, § 1, cl.3 ("no religious test" prohibition and the flexible requirement that office holders "shall be bound by Oath or Affirmation").

7 Id. art. I, § 7, cl. 2 (excepting Sunday from the counting of the ten days in which the President must return a bill presented to him); id. art. VII (reference to the "Year of our Lord" in stating the date of consent to the framing of the constitutional text).

influence our understanding of the Free Exercise and Establishment Clause.[8] Other scholars suggest very different explanations for this omission.[9]

Or to take another example, does the provision prohibiting religious tests as a qualification for office inform us about the original understanding of the religion clauses of the First Amendment? Since so many states required religious tests for office holding at the time the Constitution was adopted,[10] we might infer from the "No religious test" clause in Article VI that the new federal constitution was designed to challenge, or at least depart from, the conventions of most state constitutions. Accordingly, state constitutions would be a poor source to consider in interpreting other parts of the Constitution, such as the First Amendment.[11] Alternatively, we might look to the substantive foundation for the "No religious test" provision as a basis for understanding the Establishment Clause. Clearly, Americans believed at the time the Constitution was drafted and the Bill of Rights adopted that religion played a vital role in the moral development of the individual and society,[12] yet the Constitution prohibits religious tests for public office. Does this suggest a constitutional concern with using religion as a proxy for morality or other individual characteristics? Does it reinforce the idea that the Establishment Clause was intended to enforce James Madison's famous proscription that government should not "employ Religion as an engine of Civil Policy"?[13] Or are there other reasons that explain the polity's

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8 *See* ISAAC KRAMNICK AND R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS (1996).

9 *See, e.g.*, Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927 (1996); Steven D. Smith, *Our Agnostic Constitution*, 83 NYU L. REV. 120 (2008). As one author summarized the situation, the reason why "the framers [did] not make any reference to God" in the Constitution "is a topic that is battered back and forth in the advocacies of later times." WILLIAM LEE MILLER, THE FIRST LIBERTY: AMERICA'S FOUNDATION IN RELIGIOUS FREEDOM 97 (2003).

10 *See* FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 250-51 (2003); Daniel Dreisbach, *The Constitution's Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban*, 38 J. CHURCH & ST. 261, 284–89 (1996).

11 *See infra* notes 20–26 and accompanying text.

12 While the framers of the Constitution and the polity may have held varying beliefs about different church-state relationships, it was generally acknowledged that "the United States needed some kind of religious influence to cultivate the public and private virtue necessary for a free republic to survive." DARYL G. HART, A SECULAR FAITH: WHY CHRISTIANITY FAVORS THE SEPARATION OF CHURCH AND STATE 76 (2006).

13 James Madison, *Memorial and Remonstrance Against Religious Assessments*

willingness to accept a national restriction on religious tests while they supported such tests in their home state constitutions?

If the Constitution was a contemporaneous document, the information needed to answer questions about the relationship between different parts of the text might be relatively accessible. From the distance of over two centuries, answering these kinds of questions requires the exercise of judgment and arguably attenuated inferences drawn from limited facts. Our ability to fit the pieces of the textual puzzle together requires the application of contemporary intuition and values to historical information.

III. MULTIPLE OVERLAPPING AND CONFLICTING VALUES

Focusing on the original understanding of constitutional text is more or less coherent and accurate depending on the number of values and goals that are in play in interpreting a clause or provision, and whether those values and goals point in the same or conflicting directions. Put simply, it is much easier to determine the original understanding of a constitutional provision designed to serve one primary purpose than it is to determine the original understanding of a provision that weaved its way through a maze of conflicting and overlapping goals and values. What we know about the period in which the Constitution was drafted and adopted is that there were an extraordinary range of values relating to the relationship between church and state that were important to the various political constituencies of the time. That list, from one scholar's perspective, might include: liberty of conscience, free exercise of religious practice, a commitment to religious pluralism, equality and non-preferentialism, the separation of church and state and disestablishment,[14] all of which were to be superimposed on the value of religion to the community and public and private morality[15] and generic

(1785), *in* MICHAEL W. MCCONNELL, JOHN H. GARVEY, THOMAS C. BERG, RELIGION AND THE CONSTITUTION 50–51 (2d ed. 2006).

14 John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 388–405 (1996). Other scholars emphasize particular values and concerns. *See, e.g.*, Cord, *supra* note 3 (arguing that non-preferentialism was the core understanding of the religion clauses); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 NYU L. REV. 346 (2002) (focusing on the primacy of freedom of conscience as the core meaning of the religion clauses).

15 *See* Underkuffler-Freund, *supra* note 5, at 937–38.

concerns about state autonomy and the diffusion of power.[16] Attempting to identify dominant and controlling values is difficult when as one scholar put it, "the implementation of [church-state principles] was uneven and fraught with inconsistency, even among the influential reformers of the age."[17]

Because of this complex milieu, it is extraordinarily difficult to determine whether there was a coherent and accepted meaning of the religion clauses that sorted out the interplay of all of the various concerns that influenced the polity. In some circumstances, conflicting values had to be reconciled. Concerns about preferentialism, unequal treatment, the use of government funds to subsidize religious activities and the merging of religious and governmental power were tempered by beliefs about the importance of religion to morality and democracy and the government's interest in promoting the former to support the latter.

In other situations, several values or goals might point more or less in the same direction, and in some sense reinforce each other, but it is difficult to identify the order of priority. For example, the goal of preventing the federal government from interfering with local church–state arrangements may parallel the consequences to be anticipated from placing substantive constraints on the federal government's ability to establish religion in order to protect religious liberty. Because the federal government establishing religion A as the national faith may conflict with and undermine a state's attempts to establish religion B as the established faith of that particular state, both beliefs may support serious limitations on the federal government's ability to create a religious establishment. Indeed, the same individual might adhere to both beliefs with minimal dissonance. If religion A is the majority religion in a particular state, but a minority religion in the country as a whole, an (unenlightened) adherent of that faith might well endorse the jurisdictional meaning of the establishment clause to prevent the federal government from interfering with the religious preferentialism he enjoys in his own state. But the same individual might also oppose a federal establishment of religion on substantive grounds because he recognizes that such an establishment would burden his own liberty if it endorsed a faith other than his

16 *See* AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 32–44 (1998) (emphasizing the unique focus on federalism intrinsic to the meaning of the Establishment Clause).

17 *See* Underkuffler-Freund, *supra* note 5, at 960.

own. Similarly, a more principled citizen committed both to states rights and to anti-establishment principles might understand and support the Establishment Clause of the First Amendment because it prevents the federal government from interfering with church-state relationships at the state level, and it protects liberty of conscience by limiting the federal government's ability to establish a religion.

I do not suggest that thoughtful commentators cannot construct accounts of the original understanding that disentangle or merge several of the values in play or identify particular goals as dominant. Numerous scholars have attempted to do so. My argument is simply that such arguments involve so much intellectual maneuvering, and so many assumptions embedded in the construction of the finished project of describing what the religion clauses were understood to mean, that the results can only carry limited originalist force. A considerable amount of the weight on the interpretative scale comes from outside the historical record.

IV. THE DISUTILITY OF LOOKING AT STATE CONSTITUTIONS FOR GUIDANCE

In some cases, an originalist interpretation of a federal constitutional provision can look to language in contemporaneous state constitutions to provide assistance in understanding the federal language. Justice Scalia engaged in this kind of an analysis in *District of Columbia v. Heller*,[18] the seminal Second Amendment case decided in 2008. Scalia looked at state constitutions adopted prior to the federal constitution and those adopted in the period after the federal constitution was ratified to determine whether the right to keep and bear arms was generally understood to refer to the right to keep firearms for the purpose of self defense and the defense of one's home.[19] He found sufficient uniformity in state constitutional language to support his thesis about the meaning of the Second Amendment.

A similar analysis is unlikely to provide significant support for interpreting the religion clauses of the First Amendment, however. State constitutions did not explicitly use the words religious establishment when they authorized

18 128 S. Ct. 2783 (2008).
19 *Id*. at 2802–03.

establishment like arrangements.[20] Provisions protecting religious liberty were far longer and more detailed than the free exercise clause. Many states used language that limited their protection to acts of worship.[21] Some restricted their protection to Christians or theists.[22] Religious qualifications for office holding were widespread[23], although changes in constitutions after 1791 often removed those provisions.[24] Several state constitutions prohibited clergy from serving as elected officials and the number of states that imposed this restriction substantially increased after the Bill of Rights was adopted.[25] Acknowledgments to G-d were common.[26]

Thus, we know that Article VI, the "no religious tests" clause, clearly departed from the requirements of most state constitutions. The federal constitution also differed from state constitutions in its absence of any religious declaration. The language chosen for the First Amendment did not parallel the terminology of state constitutions. Given those distinctions, it is difficult to know whether and to what extent the language of the First Amendment was intended to correspond to the understanding of state constitutional provisions relating to religion or whether it was intended or understood to convey a different meaning.

V. THE PROBLEM WITH GROUNDING THE UNDERSTANDING OF THE RELIGION CLAUSES ON ACCEPTED PRACTICES

Many commentators and jurists who support an originalist interpretation of the religion clauses focus their attention on government practices after the Bill of Rights was adopted to support their contention that the First Amendment could not have been understood to prohibit particular

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20 *See* Steven K. Green, *"Bad History": The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717, 1751–53 (2006).

21 Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1459–60 (1990).

22 *Id.* at 1455.

23 Dreisbach, *supra* note 10, at 264–69.

24 *Id*. at 272–273.

25 "The disqualification of ministers from legislative office was a practice carried from England by seven of the original States; later six new States similarly excluded clergymen from some political offices." McDaniel v. Paty, 435 U.S. 618, 622 (1978).

26 *See* Dreisbach, *supra* note 9, at 929 n.5. Twenty-seven state constitutions in 1868 "contained an explicit reference to God in their preambles." Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 37 (2008).

governmental practices that the government engaged in at the time. The argument has generic weaknesses since it seems to assume a degree of government attention and fidelity to constitutional principles that is probably unwarranted. Government officials are not always focusing on the constitutional implications of their decisions. Moreover, they do not always live up to their highest ideals, constitutional or otherwise. One may wonder about a framework of interpretation that by presuming perfection of government actors ends up enshrining state failings as constitutional gospel. As Douglas Laycock noted years ago, "[o]ur task is not to perpetuate the Framer's blind spots, but to implement their vision."[27]

An additional, specific problem arises if we base the meaning of the religion clauses on past practices. If originalism is accepted as the foundation of constitutional law and constitutional legitimacy with regard to this part of the First Amendment, we have to live with the results. Judges cannot make choices based on contemporary values about whether certain practices should be excluded from contributing to the original understanding. Practices and understandings that were "born of bigotry"[28] are just as relevant and binding as those that reflect more noble sentiments.

For example, shortly after the Bill of Rights was added to the Constitution, and for decades thereafter, Congress provided government resources to particular missionary groups for the purpose of converting Native Americans to Christianity and civilizing them through religious education.[29] Does anyone seriously believe that such government activities are constitutional today? Yet if repeated practices relating to religion control the meaning of the religion clauses, the answer to my question should be an unequivocal, "Yes."

Or consider another example. Just as many state constitutions imposed religious restrictions on office holding prior to the adoption of the United States Constitution, several states barred clergy from holding elected office. After

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27 Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 923 (1985/1986).

28 Mitchell v. Helms, 530 U.S. 793, 828–29 (2000) (plurality opinion). Justice Thomas uses this phrase to describe the principle that government is prohibited from providing financial aid to religious schools. Whatever the merits of applying this phrase to constitutional limits on school funding may be, there can be little doubt that other government practices relating to religion 220 years ago would be characterized as bigotry under modern values.

29 Cord, *supra* note 3, at 142–48.

1791, however, state constitutions increasingly prohibited religious tests. No such change occurred with regard to provisions excluding clergy from office, however. To the contrary, the number of states barring clergy from office increased over time so that by the turn of the century, 13 states included such provisions in their constitutions.[30] Significantly, many of those state constitutions included religious freedom provisions and clauses prohibiting religious tests.[31] Thus, there is support for the argument that during the constitutional period, citizens did not understand free exercise guarantees or bans on religious tests, much less anti-establishment principles, to preclude barriers to clergy holding elected office. If originalism controls the interpretation of the religion clauses, this is another long discredited practice we might well have to accept as constitutionally permissible.

VI. CHANGED CONDITIONS REQUIRE CHANGES IN CONSTITUTIONAL MEANING

The general understanding of the role of government in 1791 was that of a state with limited authority. Most conduct was neither regulated nor subsidized by the state. Under such a system, the failure to subsidize religion could be easily understood as a refusal to advance or assist religion, and religious exemptions from general regulations could be easily understood as an attempt to leave religion alone by not interfering with it.

Today, however, we live in a regulatory and a welfare state. The baseline defining the role of government has fundamentally changed. Today, the failure to subsidize religion often seems like a penalty imposed on religion, since so many other activities and institutions receive government largess,[32] and the granting of a religious exemption often seems like the privileging of religion, since so many other

30 *See supra* notes 23–25 and accompanying text.

31 For example, the 1796 Tennessee Constitution prohibited ministers from serving in the state legislature. TENN. CONST. art VIII, § 1 (1796). The Constitution also provided that "no religious test shall ever be required as a qualification to any office or public trust under this State," *id.* art. XI, § 4, and included a long declaration proclaiming the individual's right to worship and conscience and prohibiting any preferences to religious establishments, *id.* art. XI, § 3. 6 FRANCIS NEWTON THORPE, AMERICAN CHARTERS, CONSTITUTIONS, AND ORGANIC LAWS 3414-3426 (1909).

32 Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 Univ. of Chi. L. Rev. 115, 183–86 (1992).

activities and institutions are subject to government regulations.

This change in the scope and nature of government has serious consequences for any attempt to ground the meaning of the religion clauses on the original understanding of these constitutional requirements. What people thought about government subsidies to religion, and exemptions for religion, 200 years ago many not be easily translated into constitutional doctrine that governs church-state relations today. There is no way to faithfully and accurately determine what the polity would have thought about either subsidies or exemptions in a world transformed from a minimal state to a modern government.

Another significant change involves the increase in religious diversity in the United States today compared with the religious demographics of 220 years ago. When the Constitution was drafted and adopted, the polity was all but exclusively monotheistic, almost universally Christian, and overwhelmingly Protestant.[33] For example, there were probably less than 1500 Jews in the United States in 1790 out of a population of 3,929,000. That means the population of Jews was less than four one hundredths of one percent (0.00038) of the U.S. population.[34] There were approximately 30,000 Catholics in the United States, about eight tenths of one percent (0.00764) of the population.[35] Today, Jews represent 1.7% of the population, Catholics 23% of the population, Buddhists, Moslem and Hindus together constitute 1.7% of the population and Atheists, Agnostics and Americans who believe "Nothing in Particular" make up 16.1%

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33 BRUCE T. MURRAY, RELIGIOUS LIBERTY IN AMERICA: THE FIRST AMENDMENT IN HISTORICAL AND CONTEMPORARY PERSPECTIVE 9 (2008); Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 VAL. U. L. REV. 37, 50 (1991).

34 The numbers and percentages are imprecise. According to the statistics compiled in U.S. DEPT. OF COMMERCE AND LABOR, BUREAU OF THE CENSUS, A CENTURY OF POPULATION GROWTH: FROM THE FIRST CENSUS OF THE UNITED STATES TO THE TWELFTH 1790-1900 116 (1909), there were 1243 Jews in the United States in 1790, but that does not reflect a survey of all the states. The areas covered result in a total population of 2,810,248. Based on those figures Jews represented 0.0442% of the United States population. The United States census in 1790 listed the United States population as 3,929,000, U.S. DEPT. OF COMMERCE AND LABOR, BUREAU OF THE CENSUS, THE STATISTICAL HISTORY OF THE UNITED STATES 8 (1976). If the total number of Jews in the country was still 1243, Jews would comprise 0.0316% of the population. The number in the text, 1500, attempts to split the difference. In any case, we are talking about an infinitesimal part of the population.

35 DAVID L. HOLMES, FAITH OF THE FOUNDING FATHERS 2 (2006).

of the population.[36] In terms of religious demographics, the United States is a fundamentally different country than it was in 1790.

The consequences of these changes are critical for interpreting the religion clauses. Government affirmations of religion that were inclusive and cohesive in a religiously homogenous population may be preferential and divisive in a heterogeneous society. The meaning and consequences of government actions related to religion are necessarily altered when the religious perspective of the polity diversifies.

VII. THE PROBLEM OF GENERALITY

The previous discussions about specific government actions related to religion and changes in religious demography lead to another critical difficulty in applying an originalist methodology to the religion clauses. A generic problem of orginalism arises when the current polity experiences substantial dissonance between the original understanding of a constitutional guarantee and specific applications of that guarantee that were accepted at the time the Constitution was adopted. What do we do with the fact that the polity of the 1790's understood state action A to be consistent with constitutional principle B when the polity of today would conclude that A is a blatant violation of B? The answer often depends on the level of generality that courts employ to interpret the constitutional provision at issue.[37] Thus, if a court focuses on the original understanding of the principle in the abstract at a high level of generality, it may discount the fact that government acted in ways that were inconsistent with the principle. Alternatively, a court may focus on a lower level of generality and look to accepted government conduct to define and limit the scope of the guarantee.

Perhaps the most famous example of the problem this issue may cause originalists was the dilemma it posed for Robert Bork during the confirmation hearings evaluating his

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36 THE PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 12 (Feb. 2008).

37 "The extent to which a clause may be properly interpreted to reach outcomes different from those actually contemplated by the adopters depends on the relationship between a general principle and its exemplary applications." Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 217 (1980).

nomination to the United States Supreme Court. Bork was confronted with evidence strongly suggesting that neither the framers of the Fourteenth amendment nor the polity of the country in 1868 understood the equal protection clause to prohibit racial segregation. As an originalist, did Bork believe that *Brown v. Board of Education* was wrongly decided?

Bork's response focused on the general understanding of the Equal Protection Clause to guarantee racial equality. As Ronald Dworkin put it, "Bork says that the *Brown* case was rightly decided because the original intention that judges should consult is not some set of very concrete opinions the framers might have had, about what would or would not fall within the scope of the general principle they meant to lay down, but the general principle itself. Once judges have identified the principle the framers enacted, then they must enforce it *as* a principle, according to their *own* judgment about what it requires in particular cases, even if that means applying it not only in circumstances the framers did not contemplate, but in ways they would not have approved had they been asked."[38]

I don't suggest that all originalists must accept Bork's approach to this problem. Many may disagree with it and adopt a different approach. But it is not easy to avoid choosing some level of generality to apply in implementing an originalist analysis. Further, it is difficult to justify why we should focus on one preferred level of generality across the board and even harder to explain why a particular level of generality applies in one case but a different level applies in other cases. It is unlikely that there will be evidence of the original understanding of how the problem of generality should be resolved in specific cases.

This issue is an important one because it relates to a significant dispute about the meaning of the Establishment Clause. A recurring and frequently litigated issue involves the government's sponsorship or display of religious messages and symbols. In resolving these disputes, at least some originalists appear to recognize as a general principle that the Establishment Clause prohibits religious preferentialism and the favoring of one faith over another. At the same time, they point to religious proclamations issued by United States officials throughout our early history that reflect a belief in G-d, although they typically refer to the Deity in generic rather than denominational terms. Based on these past

38 Ronald M. Dworkin, *The Bork Nomination*, 9 CARDOZO L. REV. 101, 105 (1987).

practices, it is argued that the Establishment Clause was neither intended nor understood to preclude government acknowledgements of G-d or an expressive preference for monotheistic religion. Only sectarian messages that focused on Jesus Christ, for example, would raise legitimate Establishment clause concerns.[39]

The problem with this analysis is self evident. We have a general principle of non-preferentialism, and we have the fact of religious proclamations that refer to G-d, but do not distinguish among monotheistic faiths. If we focus on the specific content of the proclamations as a limit on the scope of the general principle, one may argue, as Justice Scalia does in the *McCreary County* case, that the Establishment clause was understood to permit non-denominational acknowledgments of G-d and a preference for monotheistic beliefs.[40]

If we focus on the general principle of prohibiting religious favoritism, however, one may argue that the Establishment Clause was understood to require government to speak inclusively when it talked about religion. In 1790, non-denominational acknowledgments of G-d were extraordinarily inclusive. They included everyone who counted. Indeed, even the status of the extraordinarily small number of Jews in the United States was arguably respected by the lack of emphasis on exclusively Christian beliefs. Thus, in 1790, government practices expressing general religious acknowledgments of G-d, and the belief that such expressions were both valid and valuable, were consistent with a strong commitment to inclusivity. As the religious demographics of the country changed, however, and an increasingly large percentage of Americans are not included by these references to G-d,[41] constitutional jurists have to make a choice—between inclusion and the government's practice of expressing monotheistic, religious messages—that simply did not exist 200 years ago.

I do not suggest that history is irrelevant in making that choice. My point is that attempts to ground such a choice on the original understanding of the Establishment Clause are of limited persuasiveness when the conflict at issue between general principle and specific applications did not exist on the

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39 This appears to be the position Justice Scalia's endorsed in *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 896–97 (2005) (Scalia, J, dissenting).

40 "What is more probative of the meaning of the Establishment clause than the actions of the very Congress that proposed it, and of the first President charged with observing it?" *Id.*

41 *See supra* notes 33–36 and accompanying text.

same terms in the constitutional past. Further, any attempt to justify resort to a particular level of generality requires either consistency with conclusions about generality accepted in other constitutional contexts or some explanation as to why the level of generality adopted should differ depending on the guarantee that is at issue.[42]

VIII. CONSTITUTIONAL CHANGE THROUGH THE AMENDMENT PROCESS

Most of the historical debate about the original understanding of the Free Exercise Clause and the Establishment Clause is focused on the period surrounding the adoption of the United State Constitution and the Bill of Rights. More recently, several scholars have begun to address a related question: What did the drafters of the Fourteenth Amendment and the people of the United States during the Reconstruction period understand the religion clauses, and in particular, the Establishment Clause, to mean. If the meaning of the Establishment Clause had changed significantly during the interim 77 years between 1791 and 1868, then one may argue that the original understanding of the Fourteenth Amendment was to make the current (that is, 1868) understanding of the Establishment Clause applicable to the states.

This issue is particularly germane to the contention that the Establishment Clause was originally understood solely in jurisdictional or structural terms. Pursuant to this thesis, the Establishment Clause was intended to prevent federal interference with state autonomy in determining the relationship between church and state, not to protect the religious liberty or equality of individuals. Accordingly, the Establishment Clause cannot be incorporated into the Fourteenth Amendment and made applicable to the states because it was only intended to protect the states as states in the first place.[43]

Whatever the merits of this argument may be with regard

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42 If a higher level of generality is appropriate for equal protection analysis when originalist commentators ignore specific support for racial segregation at the time of the adoption of the Fourteenth Amendment, what justifies a lower level of generality when constitutional principles are interpreted in light of historically accepted practices in the adjudication of Establishment Clause cases.

43 *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J. concurring); AMAR, *supra* note 16.

to the original understanding of the Bill of Rights in 1791, there is significant scholarship suggesting that a very different understanding of the Establishment Clause existed after the Civil War. At this time, anti-establishment principles were widely understood to protect the religious freedom of individuals. Thus, Kurt Lash writes that "[b]y 1868, the (Non)Establishment Clause was understood to be a liberty as fully capable of incorporation as any other provision in the first eight amendments to the Constitution."[44] Similarly, Steven Calabresi and Sarah Agudo note that "[i]t is striking that so many states in 1868 had clauses in their state constitution prohibiting the establishment of religion and implying that freedom from an establishment was an individual fundamental right and not a collective-federalism state right against the national government."[45]

Again, I am not taking a position on the 1868 understanding, nor do I insist that the 1868 understanding controls the meaning of the Fourteenth Amendment as it applies to Establishment Clause claims. Also, I am not opining on how the 1868 understanding of the Establishment Clause would influence the application of the First Amendment to the federal government, if courts determined that this later understanding controlled the application of the Establishment clause to the states through the operation of the Fourteenth Amendment. My point is that jurists and commentators who claim to base their interpretation of the Establishment Clause on the original understand have to provide answers to these questions. They have to defend their conclusions as to which original understanding is controlling as well as what the substance of that understanding requires of government.

Legitimate disagreements on these issues, and the inability to answer these questions on the basis of an originalist analysis, further disrupts the mooring of an originalist interpretation of the religion clauses. The linkage between history and constitutional interpretation includes additional assumptions and analysis—all of which inject discretion and judgment into a court's conclusions.

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44 Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1154 (1996).

45 *See* Calabresi & Agudo, *supra* note 26, at 32.

IX. CONSTITUTIONAL CHANGE THROUGH DOCTRINAL DEVELOPMENT

One of the reasons that religion clause doctrine is so incoherent and religion clause disputes are so difficult to resolve is that the relationship between church and state implicates several different overlapping and conflicting constitutional values. This was true 200 years ago and it continues to be true today. As noted previously, this reality makes it difficult to unravel the original meaning of both clauses. But the multi-dimensional nature of constitutional guarantees relating to religion raises an additional, different, and in some ways, even more daunting problem.

Religion for constitutional purposes not only implicates several different constitutional values, it overlaps several distinct constitutional guarantees.

> "Religion . . . involves personal and institutional liberty and autonomy (in my view the right of the individual and congregations, rather than the state, to make self-defining decisions). It involves equality among groups; a form of equality that is analogous to, but in some ways distinct from, the equality mandated by the Equal Protection Clause that protects certain classes against discrimination. It also involves speech and belief. Government should avoid distorting the marketplace of ideas through state action that empowers or silences religious expression."[46]

In part, this means that demarcation lines have to be drawn to determine whether freedom of speech, equal protection doctrine or free exercise and establishment clause guarantees control the adjudication of particular disputes. More importantly, it raises the question of whether and how changes in the interpretation of other constitutional provisions need to be taken into account in interpreting the religion clauses. If the meaning of the religion clauses is unavoidably influenced by, and connected to, the way courts develop and apply free speech, privacy and autonomy, and equal protection doctrine, then it is difficult to insist that the interpretations of the religion clauses should remain static (because they are tied to the original understanding) while doctrine in these other areas has changed significantly over time.

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46 Alan E. Brownstein, *Evaluating School Voucher Programs Through a Liberty, Equality, and Free Speech Matrix*, 31 CONN. L. REV. 871, 886–87 (1999).

Let me offer some examples to clarify this point. One issue is whether the scope of liberty and equality mandates for other interests and groups necessarily influences constitutional norms directed toward protecting religious liberty and equality. For example, a limited understanding of the scope of religious liberty and freedom of conscience under a constitution that does not protect personal autonomy in any other aspect of life may be far more defensible and coherent than a limited understanding of free exercise rights in a constitution that protects a range of other autonomy interests including marriage, reproductive choice, family relationships and the right to control the education of one's children.[47] As constitutional protection of personal liberty expands generally, a truncated view of religious liberty becomes aberrant and inadequate.

A similar analysis might apply to religious equality under the Establishment Clause. A limited understanding of constitutional restrictions on religious favoritism may be defensible in a constitution that permits discrimination on the basis of race, gender and other characteristics. But a lack of constitutional attention to religious preferentialism is much more difficult to explain or justify in a constitution that prohibits discrimination on the basis of race, gender, national origin, citizenship, legitimacy, and arguably sexual orientation. Further, if status harms are recognized as constitutionally problematic with regard to government action based on race and gender,[48] strong analogies suggest that status harms related to religion also have constitutional significance. Indeed, since equality norms permeate constitutional law today and influence doctrine dealing with ostensible liberty interests such as freedom of speech and the right to travel,[49] the argument that the religion clauses must protect both religious liberty and religious equality has an

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47 *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (reproductive autonomy); Moore v. East Cleveland, 431 U.S. 494 (1977) (family relationships); Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925) (right of parents to control the education of their children).

48 *See, e.g.*, Brown v. Board of Ed., 347 U.S. 483 (1954) (referring to impact of racial segregation on the hearts and minds of Black children); United States v. Virginia, 518 U.S. 515 (1996) (rejecting gender classifications that denigrate members of either sex or "create or perpetuate the legal, social, and economic inferiority of women").

49 *See, e.g.*, Police Dept. v. Mosley, 408 U.S. 92 (1972) (applying equal protection guarantee to strike down content discriminatory speech regulation); Shapiro v. Thompson, 394 U.S. 618 (1969) (employing equal protection analysis to protect the right to interstate travel).

increasingly powerful foundation.

The need to interpret the religion clauses in light of overlapping and related constitutional guarantees is even stronger than the relational influences I described above. In some circumstances this is a logical and analytic imperative. Consider the religion clauses and freedom of speech. Many religious practices are speech: sermons, prayers, and proselytizing are obvious examples. Accordingly, free speech and religious clause doctrine have to be reconciled in some coherent way.

In the Eighteenth and Nineteenth centuries, this would not have been much of a problem. Free speech received relatively minimal protection. As the owner of public property, the state had the discretion to limit speech in the streets and parks at its discretion.[50] Content and viewpoint discrimination against "bad" speech was easily upheld against first amendment challenges.[51] Today, however, we have complex free speech requirements that prohibit viewpoint-discriminatory laws, limit content-discriminatory and content-neutral laws, and restrict the government's ability to regulate speech on public property depending on the use to which the property is being put. Under current law, fitting religion clause and free speech clause doctrine together requires careful analysis.

For example, the scope of Establishment Clause constraints on private religious speech expressed on public property has not evolved in a vacuum. It has clearly been influenced and limited by free speech standards that prohibit discrimination based on content and viewpoint.[52] More seriously, there may be a direct conflict between constitutionally mandated or statutorily required religious exemptions from general laws and free speech constraints prohibiting content and viewpoint discrimination. Exemptions for speech intensive religious activities 200 years ago would not have had to take these free speech clause requirements into account. Sermons, worship services, itinerant preaching could have received special protection against government interference and burdens without distorting other constitutional guarantees. Today, however, the privileging of religious expressive activities by statute may

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50 Commonwealth v. Davis, 39 N.E. 113 (Mass. 1895) *aff'd* 167 U.S. 43 (1897).

51 Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919).

52 *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Widmar v. Vincent, 454 U.S. 263 (1981).

no longer be tenable under current free speech doctrine.[53] Even constitutionally mandated free exercise exemptions will have to be reconciled with free speech requirements.[54]

I do not suggest that religion clause doctrine cannot develop in ways that are consistent with freedom of speech, equal protection and privacy and autonomy guarantees, although I do believe that working through this maze will require considerable care and effort. The critical point is that accommodating religion clause doctrine to developments in the rest of the constitution necessarily departs from the original understanding. Unless one insists that freedom of speech should have no different meaning than it was thought to have in 1791, and for the next 130 years or more, and that the equal protection clause must be interpreted according to the common understanding of equality in 1868, constitutional change in these and other areas necessarily influences what the religion clauses can be held to mean today. Moreover, the way those influences direct the development of religion clause doctrine will involve the exercise of judicial discretion. Here, again, additional discretionary decisions extend the linkage between the original understanding of the religion clauses and what the religion clauses can be held to mean under contemporary doctrine.

CONCLUSION

Basing the meaning of the religion clauses on the original understanding of the drafters, ratifiers, or the people as a whole requires a scholar or jurist to make a great many decisions along the way. First, they must decide whether the religion clauses are idiosyncratic provisions or whether their meaning is informed by other provisions (or lack of language) in the Constitution relating to religion. If the meaning of the Clauses is in some sense related to other provisions, the nature of those relationships must be determined. Second, they must wind their way through an extraordinary amount of contested commentary about what the drafters thought they were doing and what the polity understood the language of the Constitution to mean. Third, in doing this, they must assign weight to the various overlapping and conflicting values

53 *See* Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605 (1999).

54 *See* Alan E. Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 121–186 (2002).

underlying the relationship of church and state and work through how these interests were merged and reconciled. Fourth, they must account for the different language in the federal constitution and so many state constitutions and decide whether the federal text's departure from its state counterparts in some areas, such as the prohibition against religious tests, bears some relevance to the understanding of the religion clauses themselves.

Fifth, they must decide whether all governmental practices apparently accepted as legitimate during the period surrounding the Constitution's adoption must be recognized as constitutional today. If some practices, such as the subsidizing of particular faiths to engage in missionary work to convert Native Americans to Christianity, are rejected as no longer controlling the understanding of the religion clauses, then some criteria must be provided for distinguishing those practices from others that originalists continue to recognize as defining the scope and nature of free exercise and establishment clause doctrine.

Sixth, they must decide the extent, if any, to which changed conditions require a different understanding of constitutional principles, the characterization of government acts, and the application of principle to the facts of specific disputes than would have been the case 220 years ago. Do restrictions on the government providing financial support to religious institutions in today's welfare state constitute the denial of state subsidies promoting religion or the imposition of financial burdens penalizing religion? Do religious exemptions provide protection to religion against state interference or do they single out religion for special privileges that are unavailable to others? How should the dramatically increased religious diversity in the United States influence judicial decisions about what constitutes religious favoritism?

Seventh, there is the problem of generality. Here, the originalist must decide the extent to which general principles are to be tempered by specific practices that were commonly accepted during the founding period. Eighth, there are questions as to what the religion clauses were understood to mean in 1868 as well as 1791 and whether any new meaning assigned to the Free Exercise and Establishment Clause after the Civil War should influence or control the interpretation of the Fourteenth Amendment, the incorporation of these provisions, and their application to state and local governments. Ninth, there is the problem of reconciling religion clause doctrine with accepted changes in the meaning

of other parts of constitutional law that church-state doctrine subsumes and overlaps. Changes in privacy and autonomy rights, equal protection, and free speech doctrine all create tensions with the idea of a static interpretation of the religion clauses grounded on the original understanding.

Some of the issues described above are generic to an originalist analysis. Many of them, however, are particularly problematic for the religion clauses. Commentators and judges may offer answers to all of these concerns. But those answers necessarily will repeatedly require the exercise of discretion and judgment that cannot be justified by recourse to the original understanding alone.

As the number of issues that require decision makers to go beyond the confines of our early history increases, the contention that a judge's or scholar's conclusion is grounded on fact and devoid of ideological or value based influences decreases in credibility. In an area such as the relationship between church and state where there are so many links in the analysis that involve interpretative discretion, claims that a jurist or commentator is grounding his or her analysis on the original understanding are remarkably unpersuasive. This is particularly true when the decision makers fail to identify all of the steps in their analysis which are grounded on values and predisposition rather than an historical foundation.

Debate about the original understanding has a role in the constitutional project of interpreting the religion clauses of the First Amendment. But the claim that the many church-state disputes our society confronts today can be resolved dispositively by reading the clauses through an historical prism substantially exaggerates the weight and utility of an originalist approach in this area of constitutional law.

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