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Two Problems in the Original Understanding of the Establishment Clause: Religious Exemptions, and the Claim that the Clause Was Really About Federalism

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The title of the symposium that will include this paper proclaims a "(re)turn to history" in religious liberty law. I doubt that we were ever away from history. Church-state relations were a much contested issue at the time of the American founding, and those debates left an unusually thick record. All sides in modern debates have mined that record, however selectively, for evidence of original understanding.

One side cites Madison and Jefferson; the other side cites the defenders of the established church. One side cites the decision to end direct financial support of churches; the other side cites Congressional chaplains and religious rhetoric by politicians and government officials. At least in political and judicial debates, neither side makes much effort to take account of the evidence offered by the other side, or to craft a theory that explains why the founders accepted government support of religion in some contexts and not in others. The claims that nonpreferential aid is permitted, or that noncoercive aid is permitted, fit modern agendas much better than they fit eighteenth-century practice. Not all forms of government support for

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religion were controversial in the late eighteenth century, but once a form of aid became controversial, making it nonpreferential or even noncoercive did not end the controversy.¹ A better first approximation is that the founders prohibited forms of support that were controversial among Protestants; financial support was controversial in the eighteenth century but nonfinancial support did not become controversial until the nineteenth century, when Catholic immigration expanded the range of religious pluralism and thus the range of religious practices that were controversial.²

The use of history has been selective not just in the sense that each side prefers its own half of history, but also in the sense that some prominent history is invoked repeatedly and other history, less widely known, is largely ignored. Both sides in the Supreme Court give much attention to the late eighteenth century but very little to the nineteenth-century Protestant-Catholic battles over public schools, although those battles are the true origin of modern controversies over both financial aid to private schools and religious observance in public schools.³ The Court has long debated Establishment Clause issues in originalist terms, but it rewrote the law of free exercise without a glance at original understanding.⁴ When scholars began providing the evidence on free exercise,⁵ each side predictably adopted the evidence

¹ See Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 Val. L. Rev. 37 (1991); Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875 (1986).

² See Laycock, *"Nonpreferential" Aid*, *supra* note **Error! Bookmark not defined.**, at 913-19.

³ Laycock

⁴ See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

⁵ Compare Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of*

that supported the position it had already taken.⁶ The Court endlessly debates what the framers of the First Amendment thought about establishment, but it shows no interest in what the framers of the Fourteenth Amendment thought about establishment, although it is the Fourteenth Amendment that applies in most of its cases. The Court is reasonably familiar with late eighteenth century evidence on funding and religious speech by government officials, but often it addresses newly emerging issues with little awareness of historical evidence that might be relevant.

This article addresses two such under-examined issues. First, some opponents of regulatory exemptions for religious practice claim that exemptions prefer religion and thus violate the Establishment Clause. This claim is inconsistent with the original understanding. There is much originalist debate about whether the founding generation understood regulatory exemptions to be constitutionally *required*. But there is no evidence that anyone thought they were constitutionally *prohibited* or that they were part of an establishment of religion. The established church had no need for exemptions, because its teachings were in accord with government policy. Exemptions protect minority religions, and they emerged only in the wake of toleration of dissenting worship. Exemptions are subject to limits in specific cases; they cannot prefer particular faiths or particular religious practices, and

Religion, 103 Harv. L. Rev. 1409 (1990) (arguing that the original understanding is somewhat supportive of a free exercise right to regulatory exemptions); with Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992) (arguing that the original understanding offers no support for such a right).

⁶ Compare *City of Boerne v. Flores*, 521 U.S. 507, 544-65 (1997) (O'Connor, J., dissenting); with *id.* at 537-44 (Scalia, J., concurring); majority and dissenting opinions in *Employment Div. v. Smith*, 494 U.S. 872 (1990).

they cannot impose significant costs on persons not voluntarily engaged in the religious practice. But nothing in our constitutional tradition suggests that exemptions are facially invalid.

Second, some opponents of any substantive content for the Establishment Clause have claimed that the Clause is really a federalism provision -- that it affirmatively prevents Congress from interfering with state establishments of religion, and that it does little or nothing else. This argument is based mostly on the ambiguity of "respecting" in the phrase "no law respecting an establishment of religion."⁷ The federalist meaning is linguistically possible, but there is little evidence that anyone attended to that meaning in the founding era, and that meaning does not respond to the concerns that animated the demand for the Establishment Clause. The federalist interpretation relies on eighteenth-century disagreements about establishment at the state level, ignoring the far more relevant consensus about establishment at the federal level. It ignores the rapid move to consensus on disestablishment at all levels in the early nineteenth century, and it ignores Republican disapproval of southern establishment of pro-slavery versions of Christianity, culminating in incorporation of the individual-liberty understanding of the Establishment Clause in the Fourteenth Amendment.

These two claims -- that exemptions are an establishment and that the Establishment Clause is mostly or only about federalism -- have only a tenuous connection to each other. The most apparent connection is that the federalism theory of the Clause would generally negate the theory that

⁷ U.S. Const., amend. I.

regulatory exemptions (or anything else a state might do) violate the Clause. The two theories are sufficiently separate that this is really two papers in one.

The two theories came together in arguments over *Cutter v. Wilkinson*,⁸ in which the Court unanimously rejected Establishment Clause challenges to the prison provisions of the Religious Land Use and Institutionalized Persons Act.⁹ RLUIPA provides that state prisons that accept federal funds may not substantially burden the religious exercise of an inmate, unless application of that burden to the inmate is the least restrictive means to serve a compelling government interest. Legislative history says that this standard is to be applied in light of prison conditions.¹⁰ States have vigorously resisted enforcement of the Act.¹¹

In *Cutter*, Ohio argued¹² (and the Sixth Circuit held¹³) that protecting religious practice from burdensome regulations establishes religion. Ohio also argued,¹⁴ and Virginia argued in an amicus brief,¹⁵ that the Establishment Clause is a federalism provision that protects states from federal legislation regulating their treatment of religion, even pursuant to the

⁸ 125 S.Ct. ---- (2005).

⁹ 42 U.S.C. §2000cc (2000).

¹⁰ Sen. Comm. Report.

¹¹ See *Cutter* on the way up and on remand; *Madison v. Riter* (4th Cir.), *Mayweather* (9th Cir.), 11th Circuit case, 7th Circuit case; check for others.

¹² Ohio Brief.

¹³ 6th Cir. opinion

¹⁴ Ohio Brief

¹⁵ Virginia brief. See also cert petition in *Madison v. Riter*.

Spending Clause. The Court rejected the challenge to regulatory exemptions, and except for Justice Thomas, it simply ignored the federalism argument, which had not been raised below. Thomas had proffered the federalism argument a year earlier, in a concurring opinion in the Pledge of Allegiance case.¹⁶ It was that opinion that inspired Ohio and Virginia to belatedly make the federalism argument in *Cutter*. But Thomas explained that while he remained inclined to accept the federalism interpretation of the Establishment Clause, it had no application to regulatory exemptions, because they have little or nothing to do with an establishment of religion.¹⁷

The details of the arguments in *Cutter* are of little moment here. Each of these arguments comes in multiple variations, and my intent is to address them generally. *Cutter* is merely the most recent occasion for my interest in these arguments, and the occasion for addressing them together.

I. Regulatory Exemptions for Religious Conduct

Establishment Clause attacks on religious exemptions come in many variations.¹⁸ But the core idea at the heart of all those arguments is that government can establish a religion by failing to regulate it, at least if the religion does some act that is regulated in secular contexts. Exemptions from government regulation are said to establish the unregulated religion.

¹⁶ See *Elk Grove Unified School Dist. v. Newdow*, --- U.S. ---, --- (2004) (Thomas, J., concurring).

¹⁷ *Id.* at ---.

¹⁸ Collect briefs, Rubenfeld, Gey, Sherry, others?

The argument proceeds from the premise that the Establishment Clause, or the Establishment Clause and Free Exercise Clause together, require government neutrality toward religion, including neutrality between religion and nonreligion. That premise has been controversial, but I share it; nothing in this article depends on rejecting the premise of government neutrality toward religion.

The second step in the modern argument that exemptions violate the Establishment Clause is to assume that neutrality means what I have called "formal neutrality" -- the absence of rules that formally distinguish on the basis of religion.¹⁹ A rule that children may consume wine at communion services and Seder dinners, but not at secular events -- or any other rule permitting a thing to be done for religious purposes but not for secular purposes -- violates formal neutrality. Regulatory exemptions are not formally neutral, but they are often consistent with what I have called "substantive neutrality" -- government regulation that seeks to provide religiously neutral incentives, minimizing the extent to which government either encourages or discourages religious practice.²⁰ Criminalizing communion wine for children is a powerful discouragement of a religious exercise; permitting children to take both the bread and wine at communion is unlikely to encourage nonbelievers to attend worship services, or to encourage believers to shift from a denomination that uses grape juice to a denomination that uses wine.

¹⁹ See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990).

²⁰ See *id.* at 1001-06; see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 527, 561-63 (1993) (Souter, J., concurring) (elaborating substantive neutrality).

This choice between formal and substantive neutrality is the modern conceptual argument in a nutshell, but it is relevant here only to the task of integrating original understanding with modern interpretation. My principal purpose here is to test the conclusion of the formal neutrality argument -- that religious exemptions violate the Establishment Clause -- against the original understanding of the Establishment Clause.

There is no significant originalist support for the core idea that exempting religion from regulation establishes religion. Exemptions from regulation were no part of the establishment of religion known to the founding generation. Exemptions emerged as an outgrowth of the state-by-state process of expanding free exercise. Some of these exemptions provoked substantial debate, and their opponents made many arguments, but no one attacked them as an establishment of religion or denied that legislatures had power to enact them.

A. The Features of Establishment

The essence of establishment was government sponsorship and control of a single church or, in later years, of a group of churches, such as all Protestant denominations, or all Christian denominations. In Judge McConnell's comprehensive survey of establishment in England and the colonies, he identifies six historic "Elements of the Establishment:"²¹

1) governmental control over the doctrines, structure, and personnel of the state church;

²¹ Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003).

- 2) mandatory attendance at religious worship services in the state church;
- 3) public financial support [of the state church];
- 4) prohibition of religious worship in other denominations;
- 5) use of the state church for civil functions; and
- 6) limitation of political participation to members of the state church.²²

This careful listing of six distinct elements is organizationally helpful, but of course each of these elements is familiar from other descriptions of the established churches.²³

Each element should also be familiar from modern constitutional doctrine. Each of these historic elements of the establishment is prohibited by current law, sometimes with controversy about the limits of the principle and its application to analogous cases. Government controlled the doctrine, structure, and personnel of the established church; today, government is not permitted to control the doctrine, structure, or personnel of religious organizations.²⁴ Government mandated attendance at worship services of the established church; today, mandatory attendance at worship services is unconstitutional, even when judicial deference is at its maximum, as in judicial review of military regulations.²⁵ The contested modern counterpart to

²² *Id.* at 2131-81.

²³ See, e.g., Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment 1-77* (Oxford Univ. Press 1986).

²⁴ See, e.g., *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929).

²⁵ See *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972) (invalidating compulsory worship at military academies).

mandatory worship is prayer and other religious observances at government-sponsored events that people attend for secular reasons.²⁶ The established church received tax support for its core religious functions; today, tax support for those functions is clearly unconstitutional, and the debated question is whether tax support of religiously sponsored schools or social services is sufficiently analogous to be an establishment.²⁷

Government suppressed religious competition with the established church; today, restrictions on minority faiths is rarely part of any effort to establish some other religion, and such restrictions are now treated as a free exercise issue.²⁸ Government used the established church for civil functions; today, government cannot delegate government functions to religious organizations,²⁹ and the point of modern controversy is whether it can contract for performance of specific services with religious and secular organizations alike.³⁰ Government restricted political participation to members of the established church; today, the state cannot restrict political participation on the basis of religious convictions or religious participation.³¹ Even the modern controversy over government endorsement of religious

²⁶ See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992).

²⁷ See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

²⁸ See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Div. v. Smith*, 472 U.S. 874 (1990).

²⁹ See, e.g., *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

³⁰ See, e.g., *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Bradfield v. Roberts*, 175 U.S. 291 (1899).

³¹ See, e.g., *McDaniel v. Paty*, 435 U.S. 618 (1978).

beliefs may be analogized to government designating the church or group of churches to be established.³²

Exemptions from regulation do not appear on Judge McConnell's list or in any other description of the established church. The established church had no need of regulatory exemptions, because government rarely made laws that prevented members of the established church from practicing their religion. Laws regulating conduct were generally consistent with the moral commitments of the established church, both because the established church and its members had substantial political influence, and because government's control over the established church, generally including the power to appoint clergy,³³ tended to prevent the emergence of religious teachings that challenged government policy.

Even a nonestablished church has no need for exemptions where its members have political control. Thus in Pennsylvania, there was no exemption from military service or oath taking so long as the Quakers were politically dominant. Instead, the laws did not require military service or oath taking of anyone. Pennsylvania had no organized militia until 1755, and then participation was voluntary.³⁴ Exemptions were enacted only after pacifists lost control and the new majority enacted conscription.³⁵ Then the Quakers,

³² See Laycock, "Noncoercive" Support, *supra* **Error! Bookmark not defined.**, at 41-48.

³³ Clearly so in England. Check on the colonies.

³⁴ See McConnell, *supra* note **Error! Bookmark not defined.**, at 1468; R.R. Russell, *Development of Conscientious Objector Recognition in the United States*, 20 Geo. Wash. L. Rev. 409, 413 (1952); Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & Religion 367, 385-86 (1994).

³⁵ See West, *supra* note **Error! Bookmark not defined.**, at 388-89.

as a minority faith even in Pennsylvania, needed exemptions. And within the limits described in the next section, these exemptions were enacted.

B. The Origin of Regulatory Exemptions.

Regulatory exemptions emerged when the majority became willing to provide for the religious liberty of minority faiths. Exemptions were never part of the establishment; they grew out of a political commitment to free exercise. The emergence of free exercise was an early step in the long process of *disestablishment*, but regulatory exemptions could and did coexist with formally established churches. Americans reached relative consensus on free exercise long before they reached anything like consensus on disestablishment.³⁶

Disestablishment did not happen all at once; it unfolded first in certain colonies and later state-by-state in the early republic. The formal designation of an established and tax-supported church was abandoned over a period of about sixty years, beginning in the 1770s and ending in 1833.³⁷ But this was just one stage in a longer process; the multiple elements of the classic establishment were abandoned one-by-one over a period of centuries, and the gradual abandonment of informal government support for popular religion continues, with debate and resistance, to this day.

³⁶ Illustrate with dates of clauses, and with John Locke. Text?

³⁷ See Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 *BYU L. Rev.* 1385, 1432-48, 1457-1540 (reviewing disestablishment state by state).

As early as 1675, Connecticut exempted Quakers from attending the established worship -- provided they did not assemble for religious purposes themselves.³⁸ In 1689, the Act of Toleration permitted dissenting Protestants to worship in England,³⁹ and this reform spread slowly and unevenly through the colonies.⁴⁰

Once a state decided that minority faiths should be permitted to freely worship, the logic of toleration suggested that they should also be exempted from other laws that made their lives unnecessarily difficult. Dissenters could not live in a state where their worship was penalized, but neither could they live in a state where any of their important religious practices were penalized.

Some legislators may have viewed these religious exemptions as a right and others as a matter of legislative grace, but either way, regulatory exemptions emerged in the wake of toleration for dissenting worship. The first exemption for conscientious objectors to military conscription was enacted in 1673, in famously tolerant Rhode Island, which never had an established church.⁴¹ The first exemption from oath taking appeared early in the Carolina colony, chartered in 1663, which from the beginning recruited settlers by advertising "full and free Liberty of Conscience."⁴² As toleration spread through the eighteenth century, the exemption from oath taking became nearly

³⁸ Curry, *supra* note **Error! Bookmark not defined.**, at 25.

³⁹ Esbeck, *supra* note **Error! Bookmark not defined.**, at 1413-14,

⁴⁰ See *id.* at 1475-76, 1485-87, 1537; McConnell, *supra* note **Error! Bookmark not defined.**, at 2161-69.

⁴¹ See Russell, *supra* note **Error! Bookmark not defined.**, at 412-13.

⁴² Curry, *supra* note **Error! Bookmark not defined.**, at 56.

universal.⁴³ Some state legislatures enacted exemptions from the requirement of removing hats in court.⁴⁴ Rhode Island exempted Jews from incest laws with respect to marriages "within the degrees of affinity or consanguinity allowed by their religion."⁴⁵

Exemption from military service was of course the most controversial claim to exemption.⁴⁶ This exemption is necessary to relieve an egregious burden on one of the most deeply held obligations of conscience, but it also confers a large secular benefit, relieving those exempted from important duties that can be dangerous, unpleasant, and difficult. Most colonies, and later most states, responded to this difficulty with a compromise: Quakers and similar conscientious objectors were exempt from military service in person, but were required to serve as noncombatants, provide a substitute, or pay a commutation fee.⁴⁷

Another common set of exemptions, more closely connected to the process of disestablishment, was exemption from paying taxes to support the established church. Beginning early in the eighteenth century, exemptions from church taxes spread through the colonies that collected such taxes.⁴⁸

⁴³ See Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1630-32 (1989) (collecting provisions from state and federal constitutions). There were also statutory provisions, as in the North Carolina provision described in text.

⁴⁴ McConnell, *supra* note **Error! Bookmark not defined.**, at 1471-72.

⁴⁵ *Id.* at 1471 & n.315.

⁴⁶ See generally West, *supra* note **Error! Bookmark not defined.**

⁴⁷ See *id.* at 1632-33; McConnell, *supra* note **Error! Bookmark not defined.**, at 1468-69; Russell, *supra* note **Error! Bookmark not defined.**, at 414; West, *supra* note **Error! Bookmark not defined.**, at 389.

⁴⁸ See Esbeck, *supra* note **Error! Bookmark not defined.**, at 1434-36, 1440-47, 1476-77, 1479, 1489-91, 1498, 1508 n.431, 1512; McConnell, *supra* note **Error! Bookmark not defined.**, at 1469.

The famous general assessment proposal in Virginia, in 1785, was a last attempt to preserve financial support for churches by including all Christian denominations in the benefits and by universalizing the exemption -- any taxpayer could support either the church of his choice or a fund for schools.⁴⁹

But on this issue, exemptions and multiple establishments were only a stopgap. By 1833, the last state system of tax support for churches was repealed in Massachusetts,⁵⁰ and exemptions from the church tax were no longer an issue.

C. The Founding-Era Debates.

1. Legislative Debates

Legislatively enacted exemptions for religious practice were thus common by the time of the First Amendment. There is of course a large originalist debate about whether this practice of exemptions was embedded in the Free Exercise Clause.⁵¹ But there is no originalist debate about whether such exemptions violated the Establishment Clause or any state establishment clause. The founding generation was familiar with legislatively enacted exemptions for religious practice, and the states were busily engaged in disestablishing churches, but I have found no record of anyone arguing that legislatively enacted exemptions were an establishment.

⁴⁹ The Virginia bill is reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 72-74 (1947) (Supp. App. to Rutledge, J., dissenting). For analysis, see Thomas E. Buckley, *Church and State in Revolutionary Virginia, 1776-1787*, at 108-09 (Univ. Press of Virginia 1977).

⁵⁰ See Esbeck *supra* note **Error! Bookmark not defined.**, at 1448, 1524; 1 Anson Phelps Stokes, *Church and State in the United States* 426-27 (Harper 1950).

⁵¹ Compare *City of Boerne v. Flores*, 521 U.S. 507, 544-65 (1997) (O'Connor, J., dissenting); *with id.* at 537-44 (Scalia, J., concurring).

Opponents of exemption from military service argued that exemption was bad policy, but not that exemptions were unconstitutional or that they implicated any concern about establishment of religion. In the First Congress, the Select Committee proposed to include, in what became our Second Amendment, a clause providing that "no person religiously scrupulous shall be compelled to bear arms."⁵² The opponents made a variety of arguments in the Committee of the Whole. Elbridge Gerry feared that government would "declare who are those religiously scrupulous, and prevent them from bearing arms."⁵³ In this way, government might "destroy the militia, in order to raise an army upon their ruins."⁵⁴ This objection seems so implausible -- it requires that "compelled" be interpreted as "permitted" -- as to suggest a willingness to argue just about anything in support of a reflexive opposition. But he did not argue that the proposed exemption would establish religion; that argument was apparently too implausible and unfamiliar to occur to him. The argument would not have been unfamiliar if he had heard anyone else make it. This at least suggests that no such argument was circulating in the First Congress, or in Philadelphia, or back home in Massachusetts.

Mr. Jackson thought the amendment to exempt conscientious objectors "unjust," unless those exempted were required to pay an equivalent.⁵⁵ Mr.

⁵² 1 *Annals of Cong.* 778 (Gales & Seaton, Aug. 17, 1789).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 779.

Smith thought those exempted should find a substitute.⁵⁶ Mr. Sherman and Mr. Vining supported the amendment as proposed.⁵⁷ Mr. Stone thought the text should clarify "what the words `religiously scrupulous' had reference to."⁵⁸ Mr. Benson moved to strike the whole clause and leave the issue to the legislature.⁵⁹ "I have no reason to believe but the Legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of; but they ought to be left to their discretion."⁶⁰ His motion was defeated, 24-22.⁶¹

Three days later, on the floor of the House, Mr. Scott also argued that this exemption should be left to the legislature. "I conceive it, said he, to be a legislative right altogether. There are many sects I know, who are religiously scrupulous in this respect; I do not mean to deprive them of any indulgence the law affords."⁶² Mr. Boudinot supported the amendment.⁶³ The proposal was amended to read that "no person religiously scrupulous shall be compelled to bear arms *in person*", and as amended, passed by the requisite

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 780.

⁶¹ *Id.*

⁶² *Id.* at 796 (Aug. 20, 1789).

⁶³ *Id.*

two-thirds vote.⁶⁴ The clause was later removed in the Senate,⁶⁵ where debate was not recorded.

This debate reveals opponents who wanted a more limited exemption, requiring payment of a fee or provision of a substitute. These opponents prevailed in the House, by the addition of the words "in person." The debate reveals other opponents who wanted the whole issue left to legislatures, and these opponents appear to have prevailed in the Senate. But the recorded debate contains no suggestion that legislative exemptions were in any way suspect. There is no hint in this debate of any issue concerning establishment of religion.

There was similar debate in Pennsylvania, where the legislature offered exemptions conditioned on noncombatant service or a fine of twenty shillings, and Quakers demanded an unconditional exemption. This dispute provoked a long political battle, which the Quakers eventually lost. Opponents of an unconditional exemption submitted petitions making a variety of arguments: that pacifism was a false religion, that "justice and equity" required service from all, that refusal to serve in time of war struck at "the very Existence of Civil Government," that the religious liberty guarantee in Pennsylvania's charter did not include exemption from military service, that Quakers had paid taxes for military measures elsewhere in the British Empire. I am still trying to track down the full text of these petitions, but in extensive summaries and quotations by a vigorous opponent of regulatory exemptions, there is no

⁶⁴ *Id.* (emphasis added).

⁶⁵ See 1 *Documentary History of the First Federal Congress of the United States of America* 136, 154 (Linda Grant de Pauw, ed., Johns Hopkins Univ. Press 1972).

mention of a claim that unconditional exemption for Quakers would establish their religion.⁶⁶ And of course, Pennsylvania did exempt Quakers from serving in person.

States enacted other exemptions without leaving a record of similar debate. Exemptions from oath taking were not controversial,⁶⁷ although they should have been controversial if any substantial body of opinion believed that exemptions were an establishment of religion. The absence of recorded controversy is also evidence that no such body of opinion existed. With respect to the exemptions from paying taxes for the established church, the focus of debate was on whether the tax should be continued at all, whether members of minority faiths should have to pay taxes to their own church, and whether the exemptions were fairly administered.⁶⁸ No one appears to have thought that exemptions made things worse, or that exemptions established a religion. The question was whether exemptions were enough.

2. Judicial Debates

There was also litigation in the early national period over constitutional claims to exemptions not enacted by the legislature. Here too I have found no evidence of anyone arguing that exemptions established religion. Some lawyers argued against exemptions, and some judges ruled against

⁶⁶ See West, *supra* note **Error! Bookmark not defined.**, at 390-91.

⁶⁷ Curry, *supra* note **Error! Bookmark not defined.**, at 81.

⁶⁸ See *id.* at 162-92; Esbeck, *supra* note **Error! Bookmark not defined.**, at 1434-36, 1440-47.

exemptions, but no lawyer or judge appears to have argued that exemptions might violate a state or federal establishment clause.

John Gibson, Chief Justice of Pennsylvania, whose opinions are commonly cited as early rejections of any claim to a constitutional right to regulatory exemptions, said clearly that such exemptions could be allowed by legislators, or even by judges in cases properly within judicial discretion. In *Philips v. Gratz*,⁶⁹ a Jewish plaintiff sought a continuance when his case was called for trial on Saturday. The motion was denied, the case was tried, and plaintiff appealed. Chief Justice Gibson wrote:

The religious scruples of persons concerned with the administration of justice will receive all the indulgence that is compatible with the business of government; and had circumstances permitted it, this cause would not have been ordered for trial on the Jewish Sabbath. But when a continuance for conscience' sake is claimed as a right, and at the expense of a term's delay, the matter assumes a different aspect.⁷⁰

Similarly, in criticizing a decision protecting the confidentiality of a Catholic confession, Judge Gibson said he supported "the policy of protecting the secrets of auricular confession. But considerations of policy address themselves with propriety to the legislature, and not to a magistrate . . ."⁷¹ He thus held that the state constitution did not *require* exemption, but he was equally clear in his view that it did not *prohibit* exemption.

⁶⁹ 2 Pen. & W. 412 (Pa. 1831).

⁷⁰ *Id.* at 416.

⁷¹ *Id.* at 417.

Counsel for the defendant, arguing against the exemption, did not claim otherwise. They urged that an exemption would be unworkable, and that the constitutional guarantee of religious liberty was confined to "faith and religious worship" and did not affect "performance of a civil duty."⁷² But they did not suggest that an exemption would establish anyone's religion. Similarly in other cases, to the extent we have either an opinion of the court or argument of counsel opposing a claimed exemption, we find a variety of arguments but no suggestion that the legislature could not provide exemptions or that such legislative exemptions would establish a religion.⁷³

Similarly in other cases, to the extent we have either an opinion of the court or argument of counsel opposing a claimed exemption, there is no suggestion that the legislature could not provide exemptions or that such legislative exemptions would establish a religion. In *Commonwealth v. Wolf*,⁷⁴ the Pennsylvania court affirmed the conviction of a Jew for working on Sunday. The court rejected his claim that the conviction violated his religious liberty, but it did not suggest that a contrary judgment would have established a religion. In *Commonwealth v. Drake*,⁷⁵ a criminal defendant sought a new trial on the ground that the state had introduced evidence of his penitential confession to members of his church. The state successfully argued that the confession was voluntary and reliable, that it had not been required by

⁷² *Id.* at 415.

⁷³ See *Commonwealth v. Drake*, 15 Mass. 161 (1818); *Commonwealth v. Wolf*, 3 Serg. & Rawle 48 (Pa. 1815).

⁷⁴ 3 Serg. & Rawle 48 (Pa. 1815).

⁷⁵ 15 Mass. 161 (1818).

ecclesiastical rule, and that its admission in evidence violated "no legal or constitutional principle."⁷⁶ The state did not argue that a rule excluding the evidence would establish a religion.

3. Other Scholarly Treatments of Founding-Era Debates

In the modern debate over whether regulatory exemptions are constitutionally *required*, historically minded opponents of exemptions have argued that they were not required by the original understanding. But none of those scholars has argued that regulatory exemptions were forbidden by the original understanding, and none has cited a single instance of anyone in the founding generation arguing that regulatory exemptions were unconstitutional. Rather, their position is that exemptions were commonly granted but were thought to be a matter of legislative grace.

Ellis West acknowledges that "exemptions from conscription laws were often granted to religious conscientious objectors before, during, and after the Revolution;" he attributes this to legislative "sympathy."⁷⁷ Philip Hamburger argues: "[T]hat various state statutes (or even constitutions) expressly granted religious exemptions from military service or other specified civil obligations hardly suggests that such exemptions were rights under the United States Constitution."⁷⁸ Gerard Bradley makes an

⁷⁶ *Id.* at 161-62.

⁷⁷ West, *supra* note **Error! Bookmark not defined.**, at 375.

⁷⁸ Hamburger, *supra* note **Error! Bookmark not defined.**, at 948.

impassioned conceptual and originalist case against regulatory exemptions under the Free Exercise Clause, but insists that "Nothing in this idea (and nothing in the Constitution) prohibits relief from neutral, generally applicable laws for conscientious objectors *by legislative accommodation*."⁷⁹

The only historically minded scholar who has in any way attempted to link regulatory exemptions to establishment is Philip Hamburger. He notes that religious dissenters attacking the privileges of the established church often argued for equal rights for all faiths.⁸⁰ Then he claims that this equal-rights argument "had implications for exemption," because exemptions "could create unequal rights."⁸¹ But this is Hamburger talking, not anyone from the eighteenth century. He has few examples of anyone attacking exemptions on these grounds -- none that do so unambiguously and none that connect such an attack to an establishment of religion. Just as legislators could grant exemptions and support them on policy grounds without believing they were constitutionally required -- Hamburger's principal point -- so critics could oppose exemptions on policy grounds without believing they were constitutionally prohibited. Hamburger himself acknowledges elsewhere that proponents of religious liberty often clarified

⁷⁹ Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L. Rev. 245, 262 (1991).

⁸⁰ Hamburger, *supra* note **Error! Bookmark not defined.**, at 946.

⁸¹ *Id.* at 946-47.

broad rhetoric about equal rights and opposition to laws "taking cognizance of religion," insisting that government must also protect free exercise.⁸²

Hamburger's effort to link exemptions with establishment gets no support from the few examples of eighteenth-century views in his footnotes to this section. He quotes a 1777 Memorial of Virginia Presbyterians stating that "the concerns of religion, are beyond the limits of civil control," and that accordingly, the church should not "receive any emoluments from any human establishments for the support of the gospel."⁸³ This quotation is out of context; the Memorial was opposing the proposed general assessment, a tax for the support of Christian clergy of all denominations.⁸⁴ "Emoluments" thus has its customary meaning of "profit or gain arising from station, office, or employment; dues, reward, remuneration, salary."⁸⁵ The quotation has nothing to do with regulatory exemptions.

⁸² Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 Sup. Ct. Rev. 295, 344-45.

⁸³ *Id.* at 946 n.117.

⁸⁴ The entire Memorial is devoted to the "the propriety of a general assessment, or whether every religious society shall be left to voluntary contributions for the maintenance of the ministers of the gospel who are of different persuasions." Memorial of Presbytery of Hanover (June 3, 1777), reprinted in Charles F. James, *Documentary History of the Struggle for Religious Liberty in Virginia* 225, 225 (DeCapo Press Reprint 1971). The Memorial says that this issue is the only reason the Memorial was prepared. *Id.* The specific context of Hamburger's quotation is as follows:

Neither does the church of Christ stand in need of a general assessment for its support; and most certain we are that it would be of no advantage, but an injury to the society to which we belong; and as every good Christian believes that Christ has ordained a complete system of laws for the government of his kingdom, so we are persuaded that by his providence, he will support it to its final consummation. In the fixed belief of this principle, that the kingdom of Christ and the concerns of religion are beyond the limits of civil control, we should act a dishonest, inconsistent part, were we to receive any emoluments from human establishments for the support of the gospel.

Id. at 226.

⁸⁵ 5 Oxford English Dictionary 182 (2d ed. 1989) (collecting examples from 1480 to 1881). The OED also lists an "obsolete" meaning of "advantage, benefit, comfort," with examples from 1633 to 1756. *Id.* The

Hamburger also quotes the Baptist leader John Leland as the only pastor of the time to criticize the exemption of the *clergy* from taxation and military service.⁸⁶ But clergy exemptions were based on religious status, not on any religious belief that prevented compliance with the law. Few clergy conscientiously objected to taxes other than the tax for the established church, and few clergy outside the historic peace churches conscientiously objected to military service, yet all got the exemptions, simply because of their occupation. As Justice O'Connor has explained, this fundamental distinction helps reconcile regulatory exemptions with a strong principle of religious equality:

What makes accommodation permissible, even praiseworthy, is not that the government is making life easier for some religious group as such. Rather, it is that the government is accommodating a deeply held belief. Accommodations may thus justify treating those who share this belief differently from those who do not; but they do not justify discrimination based on sect.⁸⁷

This distinction was not explicitly developed in the eighteenth century, but it may have been implicit, reconciling the common rhetoric of equal rights with the common practice of exemptions for conscientious objectors. This implicit distinction could explain why the religious minorities that demanded equal rights for all faiths did not oppose regulatory exemptions

examples offered go to physical comforts, and none suggests any form of legal privilege. Whatever the dictionary possibilities, the Presbyterians' use of the word is, in context, unambiguously financial.

⁸⁶ Hamburger, *supra* note **Error! Bookmark not defined.**, at 947 n.119.

⁸⁷ Board of Education v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring).

on that ground, and why John Leland attacked privileges for the clergy as such but did not attack exemptions for conscientious objectors.

The very sermon Hamburger quotes (Leland's most famous sermon on religious liberty), illustrates the distinction. Leland attacked the Connecticut tax for the support of the clergy as an establishment. He attacked the exemption for Protestant dissenters not as an establishment, but as not going far enough -- it presumed the power to tax, it treated the exemption as an indulgence rather than a right, and it required the dissenters claiming the exemption to submit certificates to examination by the Justice of the Peace, thus submitting a religious matter to civil authority. He attacked the failure to exempt Jews, Catholics, Turks, and "heathens." And he proposed that the consciences of both sides could be satisfied by reversing the burden of registering one's belief -- by taxing all those who submitted their names as believing in the tax, and exempting all those who expressed their conscientious objection by doing nothing.⁸⁸ This is unambiguously a proposal for a tax with an exemption based on

⁸⁸

It is likely that one part of the people in Connecticut believe in conscience that gospel preachers should be supported by the force of law; and the other part believe that it is not in the province of civil law to interfere or any ways meddle with religious matters. How are both parties to be protected by law in their conscientious belief? Very easily. Let all those whose consciences dictate that they ought to be taxed by law to maintain their preachers bring in their names to the society-clerk by a certain day, and then assess them all, according to their estates, to raise the sum stipulated in the contract [between each church and its pastor]; and all others go free. Both parties by this method would enjoy the full liberty of conscience without oppressing one another, the law uses no force in matters of conscience, the evil of Rhode-Island [where contracts to pay the clergy were widely believed to be unenforceable] law be escaped, and no persons could find fault with it (in a political point of view) but those who fear the consciences of too many would lie dormant, and therefore wish to force them to pay.

John Leland, *The Rights of Conscience Inalienable*, available at <http://classicaliberal.tripod.com/misc/conscience.html>. CHECK page cite for his collected writings.

conscientious belief, although implemented in a way that maximizes both the liberty of the religious dissenters and the opportunity for false claims.

Of course one might distinguish a law that was religious in purpose and effect, from the perspective of majority and dissenters alike, from a law that -- at least from the perspective of the majority -- was wholly secular and religiously neutral. Leland *might* have drawn such a distinction, but there is no evidence that he did.

There is some evidence to the contrary, evidence that Leland supported a broader right to exemptions for religiously motivated conduct. But in the end, there is not enough evidence to comfortably support a conclusion either way. Leland said that "every man must give an account of himself to God, and therefore every man ought to be at liberty to serve God in that way that he can best reconcile it to his conscience."⁸⁹ There is no belief/action distinction here; if I believe that God will hold me to account for my actions, or that I must serve God by my actions, then both Leland's premise and conclusion extend to religiously motivated actions as well as to religious belief. But neither does he explicitly negate a belief/action distinction, and if I believe that God will hold me to account only for a personal decision to accept Jesus Christ, or only for not adhering to the proper creed and forms of worship, then Leland's statement could be read as only about worship and belief. Of course, even worship falls on the action side of the belief/action distinction; the three most recent free

⁸⁹ *Id.*

exercise cases in the Supreme Court all involve prohibited acts of worship.⁹⁰

But Leland's statement about freedom of conscience, like many similar statements from the same era, is ultimately ambiguous on the difference between protecting only belief and worship, or protecting other religiously motivated conduct as well. Baptists had no need of exemptions beyond exemption from the tax for the established church and exemption from laws licensing the clergy.⁹¹ So I do not claim that Leland clearly supported a right to religious exemptions from laws regulating conduct. That question was not near the center of his concerns, and he never addressed it unambiguously. I do claim that there is not the slightest evidence that he opposed such exemptions as unconstitutional, and his opposition to exemptions based on one's status as a clergyman is no evidence of such opposition. Hamburger's quotations simply do not support his claim.

There were nearly four million Americans alive in the 1780s. Somewhere, sometime, someone might have said something connecting regulatory exemptions with establishment. Such a quote might surface. But it is clear that such views were no significant part of the founding-era debate on religious liberty.

D.From Original Understanding to the Present

⁹⁰ *Gonzales v. O Centro*; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Div. v. Smith*, 494 U.S. 872 (1990).

⁹¹ See Madison on Virginia laws pre Revolution.

This original understanding helps explain and confirm both American practice and Supreme Court precedent. From the late seventeenth century to the present, there is an unbroken tradition of legislatively enacted regulatory exemptions. A scholar using a Lexis search and sampling techniques estimated that there were 2000 religious exemptions on state and federal statute books in 1992.⁹² The suggestion that these exemptions may violate the Establishment Clause is of modern origin, perhaps first suggested by Philip Kurland in 1961.⁹³

The Supreme Court is deeply divided on the question whether regulatory exemptions are sometimes constitutionally required.⁹⁴ But it has repeatedly been unanimous in support of the general view that regulatory exemptions are constitutionally permitted.⁹⁵ Of course there are limits to this rule. Regulatory exemptions are invalid if they are "absolute" and "take[] no account" of burdens on others in particular applications,⁹⁶ or if

⁹² James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1445 & n.215 (1992). His search method appears to have included tax exemptions as well as regulatory exemptions.

⁹³ Philip B. Kurland, *Of Church and State and the Supreme Court* (Univ of Chicago Press 1961).

⁹⁴ Compare *City of Boerne v. Flores*, 521 U.S. 507, 544-65 (1997) (O'Connor, J., dissenting); *with id.* at 537-44 (Scalia, J., concurring). concurring and dissenting opinions in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁹⁵ See *Cutter v. Wilkinson*, 125 S.Ct. ---- (2005); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 705-06 (1994); *id.* at 711-12 (Stevens, J., concurring); *id.* at 715-16 (O'Connor, J., concurring); *id.* at 722-27 (Kennedy, J., concurring); *id.* at 743-45 (Scalia, J., dissenting); *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990); *id.* at 892-903 (O'Connor, J., concurring); *Tex. Monthly v. Bullock*, 489 U.S. 1, 18-19 n.8 (plurality opinion) (1989); *id.* at 28 (Blackmun, J., concurring); *id.* at 38-40 (Scalia, J., dissenting); *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-39 (1987); *id.* at 341-46 (Brennan, J., concurring); *id.* at 346 (Blackmun, J., concurring); *id.* at 348-49 (O'Connor, J., concurring). SOME OF THIS IN TEXT?

⁹⁶ *Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985).

they are confined to a single sect or a single religious practice.⁹⁷ The Court invalidated a tax exemption because in the plurality's view there was no burden on religious practice to be relieved and the cost of the exemption burdened other taxpayers,⁹⁸ or because, in the more convincing view of a concurring opinion, the exemption created a content-discriminatory tax on the press.⁹⁹ But nothing in these cases supports any version of the claim that regulatory exemptions are facially invalid.

The argument that regulatory exemptions implicate the Establishment Clause is relatively new. It grows from misapplication of attempts to summarize the principles of disestablishment and free exercise in the broad language of neutrality. But if ripped from context and historical roots, such broad language can suggest results inconsistent with those principles.

As understood by those in the founding generation who labored in the states on behalf of disestablishment, there was a material difference between support for organized religion (establishment, and a threat to religious liberty) and exemption for religious practice (liberty enhancing, whether or not required by free exercise). Exemptions are not a way of expanding the power of the dominant religion; they are a way of protecting religions that lack the political power to prevent legislation imposing substantial burdens on their religious practice. Government support makes a religion better off than it would have been if government had done

⁹⁷ See *Grumet*, 512 U.S. at 702-05; *Thornton*, 472 U.S. at 712 (O'Connor, J., concurring).

⁹⁸ *Tex. Monthly*, 489 U.S. at 19 n.8 (plurality opinion).

⁹⁹ *Id.* at 25-26 (White, J., concurring); *id.* at 28 (Blackmun, J., concurring).

nothing; regulatory exemptions relieve burdens imposed by government and leave the religion's adherents no better off than if government had not imposed the burden in the first place. Government does not establish a religion by leaving it alone.

II. Federalism Interpretations of the Establishment Clause.

The attack on exemptions is a thoroughly modern claim that has been argued in doctrinal terms and with no attention to original understanding. The second claim I wish to consider is rather different; it relies on original understanding as a basis to attack modern doctrine. The claim appears in various forms and support by a great variety of arguments, but the common core is that the Establishment Clause was, in whole or in part, a provision to protect the surviving state establishments against federal interference.

The idea first appears in a passing reference by William Crosskey in 1953.¹⁰⁰ It was first fully elaborated a year later by Joseph Snee,¹⁰¹ then professor of law at Georgetown University, responding to then- recent decisions incorporating the Establishment Clause into the Fourteenth Amendment.¹⁰² The Court rejected the incorporation applications of the

¹⁰⁰ 2 William Winslow Crosskey, *Politics and the Constitution in the History of the United States* 1068 (Univ. of Chicago Press 1953).

¹⁰¹ Joseph M. Snee, S.J., *Religious Disestablishment and the Fourteenth Amendment*, 1954 Wash. U.L.Q. 371.

¹⁰² See *Zorach v. Clausen* (1952); *McCullum v. Bd. of Educ.* (1948); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

argument as "of merely academic interest,"¹⁰³ but the argument lingered on in academic discussion and in political arguments of those who wished to wipe out the Court's Establishment Clause cases at a stroke. Michael Malbin briefly made the argument in a scholarly political pamphlet that was influential in conservative circles;¹⁰⁴ Daniel Conkle¹⁰⁵ and Gerard Bradley¹⁰⁶ made the argument as part of broader projects. Akhil Amar¹⁰⁷ and Kurt Lash¹⁰⁸ adopted and elaborated the argument as of 1791, but rejected its alleged implications for incorporation, concluding instead that developments leading up to and including incorporation had changed the meaning of the Establishment Clause from a federalism provision to a religious liberty provision, leaving the federalism argument principally of historical interest.¹⁰⁹

Steven Smith elaborated the argument and made it the centerpiece of his 1995 book, claiming that the Establishment Clause was and is merely a federalism provision.¹¹⁰ Justice Thomas took the argument from

¹⁰³ *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, --- (1963).

¹⁰⁴ Michael J. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 15 (1978).

¹⁰⁵ Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 Nw. U.L. Rev. 1113, 1133-34 (1988).

¹⁰⁶ Gerard V. Bradley, *Church-State Relationships in America* 92 (1987).

¹⁰⁷ Akhil Amar, *The Bill of Rights* (Yale Univ. Press 1998).

¹⁰⁸ Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 Ariz. St. L.J. 1085 (1995).

¹⁰⁹ Amar, *supra* note **Error! Bookmark not defined.**, at ---; Kurt Lash, *supra* note **Error! Bookmark not defined.**, at 1100-18.

¹¹⁰ See Steven D. Smith, *Foreordained Failure* 17-54 (Oxford Univ. Press 1995).

these scholars and gave it renewed prominence in his concurring opinion in *Elk Grove Unified School District v. Newdow*.¹¹¹ Ohio and Virginia took his cue and put versions of the argument in their briefs in *Cutter v. Wilkinson*.¹¹² So the federalism interpretation of the Establishment Clause is much more fully developed than any originalist version of the attack on exemptions.

Yet there is remarkably little to it. Noah Feldman¹¹³ and the historian Thomas Curry¹¹⁴ squarely rejected the federalism interpretation, with Curry concluding that the argument "belongs entirely to the world of logical distinctions and has no connection with the world of history."¹¹⁵ Steven Green rejected the federalism interpretation in an article published shortly after my project got under way.¹¹⁶

One might fairly ask if after all this scholarship, there is anything left to be said. I think there is, in part because I now have the advantage of comparing and contrasting the quite different arguments made by different supporters of the federalism interpretation, and in part because I think some of the most important reasons for rejecting that interpretation got insufficient emphasis from the interpretation's critics.

¹¹¹ --- U.S. --- (2004).

¹¹² 125 S.Ct. ---- (2005).

¹¹³ Feldman, *supra* note **Error! Bookmark not defined.**, at 405-12.

¹¹⁴ Curry, *supra* note **Error! Bookmark not defined.**, at 41-44, 128-30 & nn.24-33.

¹¹⁵ *Id.* at 129 n.28.

¹¹⁶ Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 Creighton L. Rev. 761 (2005).

The Establishment Clause did not originally apply to the states, and choices concerning the establishment of religion at the state level were therefore left to each state. This is the important federalism point, but this much was true of all provisions in the Bill of Rights. States could establish a church, but they could also prohibit the free exercise of religion or take property without just compensation.¹¹⁷

The new federalism interpretations of the Establishment Clause make a much more ambitious and dubious claim. They assert not just that the Establishment Clause did not prohibit state establishments, but also that the Clause affirmatively protected state establishments, forbidding Congress to interfere with any surviving state establishment. The pure version of this argument suggests that the Establishment Clause *only* prohibits federal interference with state establishments, and that it creates no individual rights.¹¹⁸ That interpretation would require that every Establishment Clause decision in the Supreme Court be overruled or rewritten on a new theory. It would leave both states and the federal government free to establish churches, and it would leave individuals with no remedy. Other versions of the argument try to avoid some or all of these implications, suggesting that the Clause does at least two things -- that it prohibits a federal establishment and protects state decisions concerning establishment.¹¹⁹ In its brief to the Supreme Court, Virginia

¹¹⁷ See *Permoli v. Municipality No. 1*, 44 U.S. (3 How.) 589 (1845); *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

¹¹⁸ See *Elk Grove Unified Sch. Dist. v. Newdow*, --- U.S. --- (2004) (Thomas, J., concurring); Smith, *supra* note **Error! Bookmark not defined.**, at 17-54.

¹¹⁹ Snee, *supra* note 101, at ---.

took the remarkable position that the Establishment Clause protects individuals against both federal and state establishments *and* that it prohibits federal interference with state establishments.¹²⁰ No version of the argument has much basis in the original understanding.

A. Constitutional Text

The Establishment Clause provides that Congress shall make "no law *respecting* an establishment of religion" (emphasis added). "Respecting" means relating to or concerning. In 1789, there was no federal establishment, so at the federal level, the only imaginable laws relating to or concerning an establishment of religion would have been laws creating an establishment, or beginning to create one. The Supreme Court has therefore said that "a given law might not *establish* a state religion but nevertheless be one `respecting' that end in the sense of being a step that could lead to such establishment" ¹²¹

But another meaning is also possible. A federal law interfering with a state establishment of religion would relate to that state establishment, and thus literally be "a law respecting an [the state's] establishment of religion." This is the textual basis for the argument that the Establishment Clause prohibits federal interference with state establishments.

This meaning is linguistically possible, but there is no direct evidence that anyone intended it or even noticed the possibility. "[R]especting" was

¹²⁰ Pet. for Writ of Certiorari, *Bass v. Madison* 12 (No. 03-1404).

¹²¹ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

inserted by the conference committee without recorded explanation.¹²² No one whose remarks have survived mentioned any possible federalism meaning of "respecting." The brief recorded debate in the House reflected popular fear that the federal government might establish one or more national religions,¹²³ but no fear that Congress might interfere with what remained of the state establishments.

Massachusetts, Connecticut, and New Hampshire (and Vermont, which would become a state in 1791), maintained tax supported churches, with each town choosing which church to support, and with exemptions -- at least in theory, and sometimes in practice -- permitting dissenters to pay their tax to their own church instead.¹²⁴ In the House debate on the Establishment Clause, Mr. Huntington of Connecticut feared that the Clause might lead federal *courts* to dismiss suits to collect Connecticut's mandatory "contributions" to churches.¹²⁵ But this line of thought did not lead him or anyone else to worry that *Congress* might interfere with the New England establishments. No one else mentioned the New England systems, and no one argued for or against any federalism implications of the proposed amendment. The debate concerned the substance of what should be prohibited to the federal government.¹²⁶

¹²² 3 *Documentary History*, *supra* note **Error! Bookmark not defined.**, at 228.

¹²³ 1 *Annals of Cong.* 758 (Aug. 15, 1789).

¹²⁴ See Curry, *supra* note **Error! Bookmark not defined.**, at 134-92.

¹²⁵ 1 *Annals of Cong.* 758 (Aug. 15, 1789).

¹²⁶ 1 *Annals of Cong.* at 757-59. For analysis, see Laycock, "Nonpreferential" Aid, *supra* note 1, at 908 (1986). Incorporate some of that explanation here.

None of the state proposals for amendments had raised any concern about federal interference with state establishments. The surviving state ratification debates show fear of a federal establishment, but no fear of federal interference with a state establishment. Massachusetts and Connecticut refused to ratify the First Amendment.¹²⁷ Yet we are supposed to believe that the Establishment Clause was drafted principally for their benefit and at the request of New England representatives, to protect their surviving establishments.

Many supporters of the New England systems denied that they maintained an establishment at all.¹²⁸ It was mostly Baptists who charged New England with establishment, but there were no Baptists in Congress.¹²⁹ The Congregationalists who represented New England would at least have found it embarrassing to refer to their systems as "an establishment," and they might well have viewed it as ineffectual to try to protect those systems by forbidding federal interference with "an establishment." This is the central point for Thomas Curry; I find it helpful but not the clincher that he find it to be.

A principal reason for the lack of alarm about federal interference with state establishments is that it was hard to imagine how Congress could have done such a thing.¹³⁰ Congress had no delegated power to enforce

¹²⁷ See Thomas J. Curry, *Farewell to Christendom* 42, 129 n.27 (Oxford Univ. Press 2001).

¹²⁸ Curry, *supra* note **Error! Bookmark not defined.**, at 172, 174-75, 189.

¹²⁹ *Id.* at 205.

¹³⁰ See Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 NYU L. Rev. 346, 408 (2002).

constitutional rights or individual liberties in the states; that would require a Civil War and the Reconstruction Amendments. The transportation and communication revolutions still lay in the future; any connection between locally assessed church taxes and interstate commerce would have been highly attenuated. The Spending Clause was available in theory, but the Sixteenth Amendment was 125 years in the future; Congress had little money to spend and thus little reason to think about the possibility of conditional spending programs. Surely no one contemplated taxing people in all the states to pay New England to abandon what was left of its establishment. Anti-Federalists sometimes imagined the new federal government exceeding its powers and doing quite implausible things. But the delegations from the three states with tax supported churches were mostly Federalist supporters of the Constitution,¹³¹ not disposed to such imaginings.

In sum, a ban on federal interference with state establishments is a possible meaning of the text. But there is no reason to believe it was an intended meaning of the text, and much reason to believe it was not intended or even considered. In the context of the formation of a new government with no hint of an established religion, the more straightforward meaning of "respecting" is the one adopted by the Supreme Court -- the federal government was not to take any step towards an establishment.

¹³¹ For biographies of these delegations, see 14 *Documentary History*, *supra* note **Error! Bookmark not defined.**, at 489-525, 604-69.

Madison on the Virginia Resolution here -- he treated "respecting," "abridging," and "prohibiting" as elegant variation, with no difference in meaning.

The Livermore draft -- "no laws touching religion" -- is the strongest evidence for the federalist interpretation, but very weak. The argument is that "no laws touching" was intended to protect the state establishments, and that although this was rejected, "respecting" carries the same meaning as "touching." Maybe so, but all of this is entirely speculative. There is no record of anyone saying anything like this, either about "touching" or about "respecting," and no record of the political concern that would have led to a proposal with such a meaning.

These two arguments go in this section when developed.

B.Original Understanding.

Some who claim that the Establishment Clause was only about federalism make an original understanding not at all tied to the text. They claim that the First Congress could not have agreed on either the desirability or the meaning of disestablishment.¹³² Hence the Establishment Clause could not create any substantive right to be free of establishments. It could only leave the question to the states.

But of course, the Founders did not have to agree on disestablishment. They had to agree only on what powers they were denying to the federal government -- and they had to agree on that only at

¹³² Smith, *supra* note **Error! Bookmark not defined.**, at 21.

a high level of generality. Opponents of all establishments could obviously support a ban on federal establishments. Those who supported state establishments might be less enthused about the sweep of the federal clause,¹³³ but no reason to oppose it.

Despite room for argument at the margins of the Clause, supporters of state establishments had ample reason to oppose a federal establishment. No one in New England could plausibly want a federally established church competing with, or layered on top of, their state establishments. Nor could anyone in New England plausibly want an established church designated by Congress, where Congregationalists were not likely to predominate. The three states with tax supported Congregationalist churches in 1789 had only 16 of the 65 seats in the First Congress.¹³⁴ Members did not have to resolve their disagreements about *state* establishments, and there was no significant disagreement about a *federal* establishment.

The political demand for the Establishment Clause did not come from supporters of the surviving establishments in New England, but rather from the dissenting churches who were successfully pursuing disestablishment in the states.¹³⁵ These dissenters had no interest in protecting the remains of New England's establishment. Their interest in the Establishment

¹³³ Huntington's comments about not "patroniz[ing] those who profess no religion at all" suggest this concern, 1 *Annals of Cong.* 758 (Aug. 15, 1789), as does the apparent effort in the Senate to expressly confine the Clause to denominational preferences. See *Lee v. Weisman*, 505 U.S. 577, 612-16 (1992) (Souter, J., concurring) (reviewing the drafting history). Move this to text.

¹³⁴ U.S. Const., art. I, §3.

¹³⁵ See Douglas Laycock, *Religious Liberty as Liberty*, 9 J. Contemp. Legal Issues 313, 343-46 (1996).

Clause was to be sure that establishment never got a foothold in the new federal government. The Court's interpretation of "respecting" is entirely consistent with their political goals.

C. The Fourteenth Amendment.

The campaign against establishments in the states continued after 1791. No new American state or territory formally established any religion, and all the New England states ended their tax support for churches by 1833.¹³⁶ State courts largely disentangled the law from religious explanations.¹³⁷ Protestants came to oppose financial aid to "sectarian" schools on grounds of separation of church and state.¹³⁸ Some of the new state and territorial constitutions borrowed the language of the federal Establishment Clause,¹³⁹ obviously taking that language to mean a prohibition of establishments and not something about federal interference with states. By the time of the Fourteenth Amendment, the consensus against establishment of religion was nearly universal, leaving only disagreements about the boundaries of that principal.

No southern state had a formal establishment of a *church* in the nineteenth century, but all southern states effectively established a

¹³⁶ See note **Error! Bookmark not defined.**, *supra*.

¹³⁷ Lash, *supra* note **Error! Bookmark not defined.**, at 1100-18.

¹³⁸ See *id.* at 1118-25; Douglas Laycock, *The Many Meanings of Separation*, 70 U. Chi. L. Rev. 1667, 1678-81 (2003).

¹³⁹ Amar, *supra* note **Error! Bookmark not defined.**, at 259.

particular religious *teaching*.¹⁴⁰ They supported a pro-slavery version of Christianity and vigorously suppressed any contrary teaching. They narrowly restricted and closely monitored religion among the slaves, especially emphasizing Paul's teaching that "slaves be subject to your masters."¹⁴¹ Republicans charged the South with violating both Religion Clauses, and listed both among the rights to be incorporated.¹⁴² The Republican objection was not to federal interference with state establishments, but rather to state support for a religious teaching and state suppression of competing religious teachings. Incorporation of a ban on state establishment of religion is thus entirely consistent with the goals of those who sponsored the Amendment. Congress was given express power to enforce this ban on state establishments by appropriate legislation.¹⁴³ If once there had been a proscription on federal interference with state establishments, that proscription is inconsistent with the Fourteenth Amendment, and necessarily repealed.

Two of the most prominent scholars who defend a federalism understanding of the Establishment Clause in 1789 come to essentially this conclusion, although they avoid the word "repealed." Kurt Lash says the Establishment Clause was gradually reinterpreted to protect "freedom of conscience," so that by 1868 it "was understood to be a liberty as fully

¹⁴⁰ Lash, *supra* note **Error! Bookmark not defined.**, at 1136-41.

¹⁴¹ *Id.* at 1138 n.235.

¹⁴² *Id.* at 1141-45.

¹⁴³ U.S. Const., amend. XIV, §5.

capable of incorporation as any other."¹⁴⁴ Akhil Amar says that modern nonestablishment principles are part of the Fourteenth Amendment either through direct incorporation or as part of the rights to free exercise, equal protection, and equal citizenship.¹⁴⁵

These scholars see the Establishment Clause transformed by the Fourteenth Amendment. For those who believe the Establishment Clause was an individual liberty provision from the beginning, no great transformation is required. Either way, the conclusion is the same. At least since the Fourteenth Amendment, the Establishment Clause has protected individual liberty against state laws respecting an establishment of religion. Whether or not it ever protected state establishments from Congress, it does not do so now.

D.No Action Affecting Religion.

Virginia tried to escape all these problems by offering a new version of the federalism argument. Virginia claimed that Congress is wholly forbidden to act on the subject of religion.¹⁴⁶ Congress cannot violate the Establishment Clause, it cannot violate the Free Exercise Clause, *and* it cannot enact any other legislation concerning religion, even if it violates neither Clause.

¹⁴⁴ Lash, *supra* note 108, at 1154.

¹⁴⁵ Amar, *supra* note **Error! Bookmark not defined.**, at 252-54.

¹⁴⁶ Cert. Pet. 12, in *Bass v. Madison* (No. 03-1404).

This remarkable argument abandoned any link to the constitutional text. Indeed, Virginia implied that Congress is most disabled precisely in the "play in the joints" where the Court says a law violates neither of the two Religion Clauses.¹⁴⁷ This argument was apparently designed to avoid two problems. It avoided the implication that all the Court's Establishment Clause cases must be overruled or reconceived, and it avoided the problem that regulatory exemptions have nothing to do with the establishment if religion.¹⁴⁸ Exemptions have something to do with religion, and thus Virginia said, Congress cannot enact them or require states to enact them.

For this argument to apply to *Cutter v. Wilkinson*,¹⁴⁹ the case in which Virginia made the argument, it had to apply even to legislation under the Spending Clause. Virginia necessarily claimed not merely that Congress cannot *mandate* religious exemptions in the states, but also that it cannot *encourage* religious exemptions by offering money to states that provide them.

The First Congress rejected the only draft amendment that might have given this interpretation some plausibility. Samuel Livermore of New Hampshire moved for the Clause to read: "Congress shall make no laws *touching religion*, or infringing the rights of conscience."¹⁵⁰ The Committee

¹⁴⁷ *Id.* at 14.

¹⁴⁸ See Part I, *supra*.

¹⁴⁹ 125 S.Ct. ---- (2005).

¹⁵⁰ 1 *Annals of Cong.* 759 (Aug. 15, 1789) (emphasis added).

of the Whole briefly adopted Livermore's proposal,¹⁵¹ but the House soon replaced it with a substitute.¹⁵² The Amendment ultimately adopted does not prohibit laws touching or respecting "*religion*," but only laws respecting "*an establishment of religion*." This textual difference is precisely what Virginia sought to elide. Justice Souter has noted that "Livermore's proposal would have forbidden laws having anything to do with religion and was thus not only far broader than Madison's version, but broader even than the scope of the Establishment Clause as we now understand it," citing regulatory exemptions as an example that would have violated Livermore's proposal but does not violate the Establishment Clause.¹⁵³ This appears to be an accurate literal reading of the Livermore draft.

Virginia relied not on constitutional text, nor on specific explanations of that text, but rather on broad statements in the founding era that the federal government had no power to meddle with religion. Most of these statements were made in 1787 and 1788, and they were mostly shorthand for the real issue in dispute -- that Congress had no power to burden or interfere with religious liberty. Beyond that, such rhetoric was partly the familiar Federalist argument that a Bill of Rights was not needed, and partly a reflection of the much narrower scope of federal powers at the time. These statements were interpretations of Article I, but they were not

¹⁵¹ *Id.*

¹⁵² *Id.* at 796 (Aug. 20, 1789).

¹⁵³ *Lee v. Weisman*, 505 U.S. 577, 612-13 (1992) (Souter, J., concurring).

interpretations of the First Amendment, and they are not a basis for interpreting the First Amendment.

Congress has never acted as though it were barred from any law touching religion -- not in the beginning and not now. Congress reenacted the Northwest Ordinance, with its provision guaranteeing religious liberty in the Northwest Territory.¹⁵⁴ Early Congresses paid churches to send teachers to Indian tribes.¹⁵⁵ Congress guaranteed "the free enjoyment of their . . . religion" to residents of the Louisiana Purchase.¹⁵⁶

Even if Virginia's argument were confined to federal legislation affecting the states, its consequences would be vast. Congress could not include church-affiliated schools in federal programs to aid education. Nor, presumably, could Congress exclude such schools. Nor could Congress provide that if such schools participated, they could not use the funds for purely religious purposes.¹⁵⁷ Congress could not prohibit religious discrimination in employment by state and local governments.¹⁵⁸ Congress could not protect religious speech in the Equal Access Act,¹⁵⁹ and perhaps it could not protect any speech in any Act, because there are also founding-era statements that Congress lacked all power over speech. For

¹⁵⁴ 1 Stat. 50 (1789). Within note (a) beginning at 51, see Article I at 52 for the religious liberty provision.

¹⁵⁵ See Robert L. Cord, *Separation of Church and State* 53-80, 261-70 (Lambeth Press 1982).

¹⁵⁶ Act of Oct. 31, 1803, ch. 1, §2, 2 Stat. 245.

¹⁵⁷ *But see* Mitchell v. Helms, 530 U.S. 793, 861 (2000) (O'Connor, J., concurring) (relying on such a requirement).

¹⁵⁸ See, e.g., 42 U.S.C. §2000e-2(a) (2000).

¹⁵⁹ *But see* Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (upholding the Act).

example, James Madison said that "the liberty of conscience and the freedom of the press were *equally* and *completely* exempted from all authority whatever of the United States."¹⁶⁰

But there is more. The core of Virginia's argument was not that the Establishment Clause especially protects the states, but that Congress lacks all power over religion. But if Congress lacks all power over religion, any legislation touching religion is invalid whether or not it also touches states. Congress could not prohibit religious discrimination in private employment, or even in federal employment. Congress could not exempt conscientious objectors from military service or from any other federal law. Congress could not enact tax exemptions for churches in the District of Columbia -- but neither, perhaps, could it tax them. At least in an era of pervasive regulation and massive government spending, the view that Congress simply cannot act with respect to religion is not even coherent.

¹⁶⁰ James Madison, *Report on the Virginia Resolutions* (Jan. 18, 1800), reprinted in 5 *The Founders' Constitution* 141, 146 (Philip Kurland & Ralph Lerner, eds., Univ. of Chicago Press, 2d ed. 2000).