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THE DEVIL IS IN ALL THE DETAILS (NOT JUST IN GEORGIA)

MICHELLE KUNDMUELLER*

ABSTRACT

In this article I present a detailed examination of the task of understanding historical state law on freedom of religion and, with regard to the specific state of Georgia, demonstrate that the Supreme Court has gone astray in each of its attempts to use the state's legal history. The most resounding lesson to be learned from Georgia's history and the cases that rely upon it is that if the Court is to rely on state history at all in its interpretation of the Constitution, it must do so based on a more thorough understanding of that history. To do less is to risk multiplying the inaccuracies and unsupported assertions brought to light in this article. The obstacles to correctly marshaling state history in support of the Supreme Court's interpretation of the Religion Clauses of the United States Constitution are great, and the risks inherent in inadequate use of history are greater yet. Under the current circumstances, the Court should leave state legal history to the history books and pursue less onerous approaches to interpretation of the Religion Clauses. In this particular situation, a little history is indeed worse than none at all.

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INTRODUCTION

This article assesses the Supreme Court's use of Georgia's legal history in interpreting the Religion Clauses of the First Amendment to the United States Constitution. This evaluation has two primary purposes. First, this article demonstrates that the Supreme Court's attempts to use Georgia legal history have resulted in misleading and often incorrect applications of Georgia law. Second, using Georgia as an example, this paper will highlight the inherent obstacles, such as the size and complexity of the task relative to the Court's resources, to using state legal history as a tool in interpreting the Religion Clauses of the First Amendment.¹

1. In pointing to the obstacles inherent in such a quest, I mean not to declare it futile but rather to explore the complexity and consequent size of the task, and the resources necessary to make interpretation successful.

The relevance of this exploration of Georgia's legal history and the Court's misuse thereof is not limited to the Religion Clauses. Reliance on state law is a common interpretive tool for state constitutions with parallel or near parallel provisions, and it also occurs—albeit in less complex form—when a federal statute that is similar to state statutes proves difficult to interpret. Indeed, whenever federal courts consult state law and history as an aid to interpretation of national law, they are inevitably faced with obstacles similar to those which are analyzed here in the context of the First Amendment Religion Clauses and Georgia history.

Ultimately, I argue that the best method of correcting the Court's current approach is a deeper understanding of law, history, and politics. Because the Court has limited resources at its disposal, however, it cannot currently marshal a competent command of the legal histories of all the states relevant to the interpretation of the Religion Clauses. Therefore, the Court should abandon the use of state legal history as an interpretive tool unless and until better resources become available.

To uncover this flaw inherent in the Court's contemporary approach to the Religion Clauses, the Constitution, and national law more generally, I focus on a small but important portion of the total state legal history relevant to the interpretation of the Religion Clauses. Over the past 53 years, the Court has relied on the legal history of Georgia five times when interpreting the Religion Clauses.² The Court reached the incorrect result each time. These misapplications of Georgia law have often been in landmark cases, such as those deciding the constitutionality of Sunday closing law,³ public school prayer,⁴ religious holiday displays,⁵ and the Religious Freedom Restoration Act.⁶ In each of these five cases, the Court also examined the history of the other original states,⁷ and the history of Georgia was not disproportionately important

2. *McGowan v. Maryland*, 366 U.S. 420 (1961); *Engel v. Vitale*, 370 U.S. 421 (1962); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Locke v. Davey*, 540 U.S. 712 (2004).

3. *McGowan*, 366 U.S. at 420.

4. *Engel*, 370 U.S. at 421.

5. *Allegheny*, 492 U.S. at 573.

6. *Boerne*, 521 U.S. at 507.

7. *McGowan*, 366 U.S. at 487 (Frankfurter, J., concurring); *Engel*, 370 U.S. at 428–29 (1962); *Allegheny*, 492 U.S. at 646 (Stevens, J., concurring in part); *Boerne*,

to the Court's ultimate holding. Rather than arguing the particular importance of Georgia—or of the Court's mistakes with regard to Georgia—I use Georgia as a case study to illustrate how fundamental limitations of the Court interplay with the complexities of legal history to severely limit the Court's ability to correctly apply state legal history from the relevant era in any state. Georgia legal history and its use by the Supreme Court in cases interpreting the Religion Clauses constitute a small piece of evidence which points to a larger problem.

I focus on Georgia, one of the less-discussed states in relationship to interpretation of the Religion Clauses because, as much as the size of the research question is an obstacle to the Court's use of state history, it stands likewise as an obstacle to scholars who critique the Court's use of that history. Fortunately, as a scholar one may simplify the task for the sake of accuracy. Simplifying the task to a thirteenth of that faced by the Supreme Court, it becomes possible to flesh out the difficulties in one state that plague the analysis of all states. Indeed, a generalized or aggregate article on state legal history would necessarily make the same mistakes as those I highlight here. Therefore, I present what might plausibly be called “minutia” from one state for the purpose of shedding light upon the cumulative effect of such mistakes in all states. If, upon the close scrutiny offered herein, it appears that the Supreme Court has yet to apply Georgia legal history correctly even once, what reason is there to think that the histories of the other twelve original states have fared any better? How many states' histories must be thus mishandled before the Court's conclusions should be considered without sufficient historical support?

At the very least, analysis of Georgia's history and the Court's use thereof strongly indicate (1) that Georgia legal history has been inaccurately relied on and (2) that further research is needed to verify the legal history from the other twelve states that the Court has relied on in opinions applying the Religion Clauses. This, in turn, points to the need for further research on the accuracy of the state legal history relied upon by the Court in the many areas of constitutional and federal law interpretation to which it is currently being applied.

521 U.S. at 538–39 (Scalia, J., concurring in part); *Boerne*, 521 U.S. at 554 (O'Connor, J., dissenting); *Locke*, 540 U.S. at 723.

I. THE SUPREME COURT, THE RELIGION CLAUSES, AND STATE HISTORY

The Religion Clauses of the United States Constitution have proven notoriously difficult to interpret and apply.⁸ In the 132 years since the Supreme Court rendered its first Free Exercise opinion in *Reynolds v. United States*,⁹ the Court has struggled without success to establish a sound, workable, or lasting interpretation of either the Free Exercise Clause or the Establishment Clause.¹⁰ Moreover, the application of the Religion Clauses to state governments¹¹ has multiplied the opportunities for misapplication, intensifying the need for a better and more durable interpretation.

The first and most obvious cause of the difficulty of interpreting the Religion Clauses is the text of the amendment itself: “Congress shall make no law respecting an establishment of religion, or prohibiting the

8. See generally Frank S. Ravitch, *Rights and the Religion Clauses*, 3 DUKE J. CONST. L. & PUB. POL’Y 91, 93–94 (2008) (focusing on the “shifting conception of rights under the religion clauses between the early modern cases and the current jurisprudence.”); Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS J. 73, 76 (2005) (“Controversy can be stoked by the absence of clear rules, and one thing everyone agrees on is that much of the controversy over the Establishment Clause arises because the Supreme Court’s interpretation of the Clause has not been clear.”); Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL’Y 1083, 1083 (2008) (“Despite the vast quantity of research devoted to understanding religion and the American Founding, the original meaning of the First Amendment’s Free Exercise Clause remains a matter of significant dispute.”) [hereinafter Muñoz, *Free Exercise Clause*].

9. 98 U.S. 145 (1878).

10. See Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 586 (2006) (“Among contemporary scholars and jurists, in fact, less agreement exists now about the Establishment Clause’s original meaning than when the Supreme Court first attempted to decide the matter in *Everson v. Board of Education*.”) [hereinafter Muñoz, *Establishment Clause*]; Lee J. Strang, *The (Re)turn to History in Religion Clause Law and Scholarship*, 81 NOTRE DAME L. REV. 1697, 1698 (2006) (“In order for there to be a ‘(Re)turn’ to history, there must first be a ‘turn’ to history, and this occurred in *Everson v. Board of Education*, the Court’s first modern application of the Establishment Clause.”).

11. *Reynolds*, 98 U.S. at 162.

free exercise thereof.”¹² The meanings of “establishment,” “free exercise,” and even “religion” are not self-evident.¹³ Facing this language, the Supreme Court has looked to history for answers.¹⁴

In their historical analyses, the Court and scholars alike have focused heavily on the Constitution’s drafting notes and the writings of the founding generation.¹⁵ Yet the drafting notes from the First Amendment, a scant five pages of inconclusive notes, can lend only limited help.¹⁶ More troubling, even the evidence they contain does not seem to lead to any definitive conclusions about what was meant with the text employed.¹⁷ Analysis of the founding generation’s writings and speeches has proved no more dispositive. As a preliminary matter—before interpreting any contemporaneous texts—the Court must determine whose writings are relevant and which specific documents to

12. U.S. CONST. amend. I.

13. *City of Boerne v. Flores*, 521 U.S. 507, 550 (1997) (O’Connor, J., dissenting) (“As is the case for a number of the terms used in the Bill of Rights, it is not exactly clear what the Framers thought the phrase signified.”).

14. Scholars have noted the increased tendency of the Court to take a comparatively originalist (or at least highly historically and textually informed) approach to interpreting the Religion Clauses, particularly with regard to Establishment Clause analysis. See Muñoz, *Establishment Clause*, *supra* note 10, at 587 n.11 (“No aspect of constitutional law has been dominated more by ‘originalism’ than First Amendment Establishment Clause jurisprudence.”); Andy G. Olree, *James Madison and Legislative Chaplains*, 102 NW. U. L. REV. 145, 148 (2008) (“[T]here has been an increased interest in discovering what the Founding generation, including those who framed and ratified the First Amendment, understood the Establishment Clause to forbid. This concern with the original intent behind the Establishment Clause is not new, nor is it confined to those who would call themselves ‘originalists’ in matters of constitutional interpretation.”).

15. Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court’s Use of History in Religion Clause Cases*, 85 OR. L. REV. 563, 566 (2006) (offering a quantitative analysis of the use of history in Supreme Court Religion Clause cases, including an overview of its historical development and a count of the number of appeals to various public figures, and concluding that references to Thomas Jefferson and James Madison far outnumber references to other historical figures).

16. Their brevity (all told they fill about five typed pages) perhaps most forcefully conveys how little assistance they can render. JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., *RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT*, 196–200 (2d ed. 2001); Muñoz, *Free Exercise Clause*, *supra* note 8, at 1100–1109.

17. See generally, Muñoz, *Free Exercise Clause*, *supra* note 8.

use. This issue, which does not even begin to reach the substantive question of what any particular document indicates about the Religion Clauses, has led to significant controversy.¹⁸ For example, Thomas Jefferson, although not involved in the drafting process or the ratification debate, is nonetheless cited by many as an authority for the original meaning of the Religion Clauses—only to be denounced by others.¹⁹ Another layer of complexity is added by the difficulty of lifting a legal or political argument from one context, usually a state debate, and applying it to the national debate. A policy or legal position that a statesman advocated in one forum may have had little or nothing to do with the policy that he thought was actually enacted by the national government. For example, it is unclear whether the policy that James Madison preferred in his home state equated to his position on the meaning of the actual Religion Clauses as ratified by Congress.²⁰

18. In particular, there is contemporary critique of the Supreme Court's and scholarly tendency to rely disproportionately upon the views of Jefferson and Madison. See Stephen B. Presser, *Outsiders, Swing Justices, and Original Understanding: Can the Religion Clauses Be Saved? A Comment on Greenawalt*, 99 Nw. U. L. REV. 177, 179 (2004) (“[I]t is a misconception of history to suggest that Madison and Jefferson’s strict separationist views are those that we ought to use if we want to be faithful to the Framers’ conceptions. Curiously, Madison and Jefferson seem often to be the only authorities among the Framers on the meaning of the First Amendment who are cited even by some conservatives, but Madison and Jefferson, I suspect, were actually ‘outliers,’ if not ‘outsiders’ with regard to their strict separationist views . . .”).

19. See Patrick N. Leduc, *Christianity and the Framers: The True Intent of the Establishment Clause*, 5 LIBERTY U. L. REV. 201, 231–32 (2011) (pointing out that Jefferson did not attend the Constitutional Convention or take part in the Congressional debates on the drafting of the First Amendment and arguing that the “Framers’ general consensus that government should encourage religion, particularly Christianity, for the good of society, which they understood was accomplished best by getting government out of the way, conflicts with Jefferson’s ‘wall of separation’ analysis”).

20. Kyle Duncan, *Misunderstanding Freedom From Religion: Two Cents on Madison’s Three Pence*, 9 NEV. L.J. 32, 32 (2008) (claiming that the Court “lifted [Madison’s] political argument from one context and applied it uncritically in a different context and to a different issue”); Olree, *supra* note 14, at 152–56; Mark S. Scarberry, *John Leland and James Madison: Religious Influence on the Ratification of the Constitution and on the Proposal of the Bill of Right*, 113 PENN ST. L. REV. 733, 797–800 (2009).

Even if scholars and jurists could agree upon the evidence from which to determine the meaning of the Religion Clauses, they would not agree upon the conclusions to be drawn from the evidence. Indeed, given the complexity of these issues, combined with the difficulty of applying original intent in a modern context, at least one scholar has called for the minimization of a historical analysis in efforts to interpret the Religion Clauses.²¹ At least in part because the search for the original intent of the Religion Clauses—as based on the evidence from national politics and prominent figures in national debates—has proven inconclusive,²² the Supreme Court has looked beyond national politics to state law and politics from the period roughly contemporaneous with the drafting of the Religion Clauses for guidance. This approach is based upon the belief that the use of terminology in the Bill of Rights was very likely consistent with the use of the same terms in the states' constitutions and laws. As Justice O'Connor has articulated, "it is reasonable to think that the States that ratified the First Amendment assumed that the meaning of the federal free exercise provision corresponded to that of their existing state clauses."²³

The search for the original meaning of the Religion Clauses in state law and history also arises, at least in part, from the general trend towards interpreting constitutional provisions in light of their original public meaning.²⁴ As a result of this trend, the "public meaning" or

21. See Steven K. Green, "Bad History": *The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717, 1719 (2006) ("The historical record is too amorphous and too easily misread or manipulated to resolve modern controversies. In essence, the very attempt to use history to answer current constitutional questions is a misuse of the historical craft."); Ravitch, *supra* note 8, at 112 ("The irony is that, by relying on the dual illusions of historical truth and neutrality, the earlier Courts set the stage for later courts to undo substantive protections by simply challenging or altering the historical or neutrality-based analysis. By failing to rely directly on the rights principles with which it seemed concerned, the earlier Court set the stage for the destruction of those rights through the use of a very different conception of history and neutrality . . .").

22. See *supra* notes 8–10 and accompanying text.

23. *City of Boerne v. Flores*, 521 U.S. 507, 553 (1997) (O'Connor, J., concurring).

24. Numerous scholars have noted both an increase in judicial reliance upon originalism and a shift in the methods of this approach from original intent to focus upon the text and the public meaning contemporaneous with drafting and ratification. Laura A. Cisneros, *The Constitutional Interpretation/Construction*

“public understanding” of state constitutions and laws have taken on new importance as evidence of the meaning of similar language in the federal Constitution.²⁵ Even when language employed by state law is distinct from the language of the Religion Clauses, analysis of the state law illuminates the use of potential alternative language available to the framers of the Religion Clauses. Contemporaneous state laws, local laws, and government practices, presumably thought to be constitutional under their state constitutions, also become relevant as evidence of the meaning of the state constitutions. To be clear, no Justice has held that a state constitution, whether it precisely mirrors the language of the Religion Clauses or not, is conclusive evidence of the meaning of the Religion Clauses. Rather, evidence from state legal history serves as evidence of the public understanding of the terms at the time of the ratification of the First Amendment.

Given the number of constitutional issues to which the Court or at least a subset of the Justices applies a historical approach, the importance of historical accuracy cannot be overstated.²⁶ Within the last twenty years, the Court has consulted founding-era Georgia history for

Distinction: A Useful Fiction, 27 CONST. COMMENT. 71, 72–73 (2010) (“Generally speaking, however, New Originalism explains the theory of American constitutional interpretation as something of a dual process: First, one must look to the original public meaning (interpretation) and when that runs out, look to other sources that might reliably fill out the contours of that interpretation (e.g., history and tradition surrounding the text, the structure of the text, court precedent, etc.).”). See generally Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL’Y 5 (2011); James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523 (2011); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009).

25. See, e.g., Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 354 (2011) (“Even the most committed originalists and textualists use Framing-era state constitutions to interpret the federal document.”); Eric R. Nitz, Note, *Comparing Apples to Apples: A Federalism-Based Theory for the Use of Founding-Era State Constitutions to Interpret the Constitution*, 100 GEO. L.J. 295, 298 (2011) (“Originalists—who interpret the Constitution historically by referencing the founding era—have often looked toward founding-era state constitutional provisions for interpretive guidance. Because these state provisions contain similar wording to the text of the Constitution, the argument goes, the Constitution’s words must have a similar meaning.”).

26. Nitz, *supra* note 25 (listing the various constitutional provisions for which the Supreme Court has used founding-era state constitutions to aid in interpretation).

help in interpreting the First Amendment,²⁷ Second Amendment,²⁸ Fourteenth Amendment,²⁹ Dormant Commerce Clause,³⁰ and the constitutional prohibition of state term limits for national legislators.³¹

The Court has relied the most heavily on the historical approach in the context of the Second Amendment, particularly in *District of Columbia v. Heller*.³² In *Heller* the Court overturned a statute limiting individual firearms use within individual residences. Justice Scalia, writing for the Court, prefaced his exploration of state use of the term “bear arms” with this explanation: “In interpreting this text, we are guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.’”³³ Justice Scalia later focused upon state constitutions with phrases similar to those of the Second Amendment as the “most prominent examples” and the “most relevant to the Second Amendment.”³⁴ Thus, the Court’s holding relied, in part, upon the finding that its “interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment.”³⁵ Similarly, in *McDonald v. City of Chicago*,³⁶ in which the Court extended *Heller* beyond the District of Columbia and to state firearms laws, Justice Alito, writing for the Court, and Justice Scalia, in his concurrence, both relied

27. *City of Chi. v. Morales*, 527 U.S. 41, 103–05 (1999) (Thomas, J., dissenting).

28. *Dist. of Columbia v. Heller*, 554 U.S. 570, 586 (2008).

29. *McDonald v. City of Chi.*, 561 U.S. 742, 773 n.21, 816 n.3 (Thomas, J., concurring in part and dissenting in part), 817 n.4, 842, 844 (2010). This method has proved attractive to some scholars as well. Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909 (2013) (surveying historical data relevant to interpreting the Fourteenth Amendment in light of contemporaneous public meaning).

30. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 621–22 (1997) (Thomas, J., dissenting).

31. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 823–25 (1995); *see also id.* at 904–05 (Thomas, J., dissenting).

32. *Heller*, 554 U.S. at 576–87.

33. *Id.* at 576 (citing *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

34. *Id.* at 584.

35. *Id.* at 600–01.

36. 561 U.S. 742 (2010).

on state constitutions and state law, as well as state and federal military orders dating back to the Civil War.³⁷ Because of the incorporation issue present in *McDonald*, as opposed to *Heller*, both Justices relied upon state history that ranged from the period of the Second Amendment to that of the Fourteenth Amendment.³⁸

Reliance on state legal history as an aid to interpretation of the Constitution has not always been a winning argument. Yet the dissents in such cases are still useful from an analytical perspective. In their various dissents, Justice Thomas and Justice Scalia have defended reliance on state legal history and argued for the wide application of this approach. For example, in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*,³⁹ Justice Thomas relied upon Georgia state newspaper articles to parse the Constitution-era meaning of “import” to support his interpretation of the Dormant Commerce Clause.⁴⁰ Likewise, in *City of Chicago v. Morales*,⁴¹ Justice Thomas cited a string of state laws dating from the 1760s through the 1790s in support of his First Amendment and Copyright Clause interpretations.⁴²

At times, the dissenters have managed to draw a reluctant majority into a battle over the proper interpretation of state legal history. For example, in *U.S. Term Limits, Inc. v. Thornton*,⁴³ Justice Stevens’ majority opinion questioned the usefulness of historical state law as “a reliable indicator of the contours of restrictions that the Constitution imposed on States.”⁴⁴ Despite being unconvinced of the appropriateness of this method of interpretation, Justice Stevens proceeded to offer his own differing interpretation of the state constitutional history relied on in

37. *Id.* at 772–73; see also *id.* at 817–18, 841–44 (Thomas, J., concurring).

38. *Id.* at 772–73; *id.* at 817–18, 841–44 (Thomas, J., concurring); *Dist. of Columbia v. Heller*, 554 U.S. 570, 584, 600–01 (2008).

39. 520 U.S. 564 (1997).

40. *Id.* at 621–22.

41. 527 U.S. 41 (1999).

42. *Id.* at 103–05 (Thomas, J., dissenting) (“The American colonists enacted laws modeled upon the English vagrancy laws, and at the time of the founding, state and local governments customarily criminalized loitering and other forms of vagrancy.”). In the same opinion, Justice Scalia’s dissent discusses the differing approaches to history found in Justice Stevens’ opinion for the Court and Justice Thomas’ dissent. *Id.* at 84–86 (Scalia, J., dissenting).

43. 514 U.S. 779 (1995).

44. *Id.* at 823.

Justice Thomas' dissent.⁴⁵ A careful reading of *Thornton* illustrates an important facet of this debate. While the Justices are clearly in the midst of an ongoing difference of opinion over the correct interpretation and dispositive value of state legal history, they do not likewise voice any concern over their collective ability to assess this history. Given the enormity and complexity of the interpretative issues implicated should the Court determine to rely on state legal history, their silence on the feasibility of doing so accurately is troubling.

Certain areas of constitutional law appear unlikely to be affected by state legal historical analysis. Foremost amongst these is the Eighth Amendment's prohibition against "cruel and unusual punishment," the wording of which gives the most textual support to an evolving standards approach to interpretation.⁴⁶ Moreover, not every use of state legal history equates to an attempt to parse the meaning of a term used in the Constitution. For example, in *Golan v. Holder*,⁴⁷ Justice Breyer's dissent referenced the colonial copyright statutes of Georgia and other states, but he did so to demonstrate the "objective" of the early statutes, rather than to parse the meaning of terms used in the Copyright Clause and First Amendment.⁴⁸ Similarly, in *Deck v. Missouri*,⁴⁹ the Court's Due Process analysis required an inquiry into the constitutionality of shackling of prisoners during the sentencing phase of a criminal trial.⁵⁰ In order to determine whether "shackling" was a "deeply rooted tradition," Justice Breyer, writing for the Court, analyzed early state practices of "shackling."⁵¹ Although the Justice relied on state legal history to reach the Court's holding, this analysis, like the analysis in *Golan*, did not seek to prove the contemporaneous meaning of any terms employed in the Constitution.

45. *Id.* at 823–25; *see also id.* at 904–05 (Thomas, J., dissenting).

46. *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012) (explaining that the concept of proportionality central to the Eighth Amendment is viewed by the Court "less through a historical prism than according to 'the evolving standards of decency that mark the progress of a maturing society'"); Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 984 (2009).

47. 565 U.S. ___, ___, 132 S. Ct. 873, 901 (2012).

48. *Id.* at 901.

49. 544 U.S. 622 (2005).

50. *Id.* at 640–43.

51. *Id.*

In sum, because interpretation of the Religion Clauses has proven perennially problematic, the Court has sought to use evidence of founding-era state treatment of religion. This method of interpretation is linked to the search for an understanding of the original Constitution as relevant to, if not conclusive evidence of, the meaning of the Religion Clauses. Hence, the Court's competence in its efforts to apply state legal history to the Religion Clauses has bearing upon the merit of this resource to the broader project of originalism.

II. THE SUPREME COURT, THE RELIGION CLAUSES, AND GEORGIA

In practice, formidable obstacles stand in the way of using state legal history to interpret the Religion Clauses. In addition to the overwhelming size of the task are several complicating factors which are implicit in the analysis immediately below and which I will focus on in Part III: the complexity of state history, the condition and accessibility of historical records, and, in some states, the absence of outspoken statesmen prolific in the written word.

Despite these obstacles, the Supreme Court has turned to Georgia legal history for guidance in interpreting the Religion Clauses five times. In the first three such cases, *McGowan v. Maryland*,⁵² *Engel v. Vitale*,⁵³ and *County of Allegheny v. American Civil Liberties Union*,⁵⁴ the Court correctly cited some Georgia law but was misleading about the relevance of that law to the holding of the case before the Court. Lack of precision in analysis of the relevant state law, failure to take into account state law pointing contrary to the conclusions drawn, and lack of logical connection between the Georgia law cited and the conclusions drawn mark these cases as misleading uses of state law. In the Court's most

52. 366 U.S. 420 (1961) (holding that a Sunday closing law does not violate the Establishment Clause).

53. 370 U.S. 421 (1962) (holding that public school prayer violates the Establishment Clause).

54. 492 U.S. 573 (1989) (holding that a holiday display with decorations of just one religion does violate the Establishment Clause and finding that a holiday display including decorations of secular and multiple sectarian significance does not violate the Establishment Clause).

recent uses of Georgia history to interpret the Religion Clauses, *City of Boerne v. Flores*⁵⁵ and *Locke v. Davey*,⁵⁶ the Court went further astray. In *Boerne*, both Justice Scalia's and Justice O'Connor's opinions failed to take into account or even note major changes in Georgia's free exercise provision during the relevant period. In *Locke*, Justice Rehnquist ignored relevant changes in Georgia's constitution, omitted clear counter indications about the meaning of the state constitution in state law, and misread the plain meaning of the constitutional provision that he quoted.

Before discussing these uses of Georgia legal history or the underlying causes of the mistakes in these cases, an overview of the requisite history is necessary.

A. Georgia Legal History from 1732-1798: Colonial Rule and Four State Constitutions

The State of Georgia was established by an English royal charter in 1732 and was the youngest of the original thirteen colonies.⁵⁷ Despite its youth, Georgia's legal history is marked with complexity and enough major upheavals to fully occupy a legal historian, much less a Justice or a clerk. Since colonial times, Georgia has had a total of eleven constitutions, and her constitution was in a particularly remarkable state of flux during the first decades of independence.⁵⁸ Four of Georgia's constitutions fall within the period relevant to interpretation of the Religion Clauses: the state constitutions of 1776, 1777, 1789, and 1798, which was the first new Georgia constitution after the ratification of the Bill of Rights.⁵⁹

55. 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act violates the separation of powers).

56. 540 U.S. 712 (2004) (holding that a state statute which withheld public scholarships from students based on their choice to study devotional theology was not a violation of Free Exercise Clause).

57. KENNETH COLEMAN, *Frontier Haven: Georgia and the Bill of Rights, in THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES* 443 (Patrick T. Conley & John P. Kaminski eds., 1992).

58. See "Georgia Constitutions Introduction," GEORGIA INFO (An Online Georgia Almanac) available at <http://georgiainfo.galileo.usg.edu/gacontoc.htm>.

59. *Id.*

The first major transition in Georgia's governance occurred before the Revolutionary War. When the colony failed to prove lucrative, it was returned to the Crown, and a royal governor and the Church of England soon arrived.⁶⁰ Subsequently, in 1762, the colony enacted "Sunday" laws, "for preventing and punishing Vice, Profaneness, and Immorality, and for keeping holy the Lords day, commonly called SUNDAY."⁶¹ The law required that all persons observe the Sabbath, though—as would often be the case with Georgia establishment in the years to come—the law permitted individual selection of denomination.

[Every person] whatsoever, shall on every Lords day, apply themselves to the observation of the same, by exercising themselves thereon, in the duties of Piety and true Religion publickly [sic] or privately, or having no reasonable or lawful excuse, on every Lords day shall resort to their Parish Church, or some meeting or Assembly of Religious Worship, Tolerated and allowed by the Laws of England, and there shall abide, orderly and soberly during the time of prayer and preaching, on pain of forfeiture for every neglect....⁶²

In addition to requiring worship on Sunday, the law prohibited commerce, legal business, travel, public eating and drinking, and games on Sunday.⁶³ Violators were to be fined and, at the discretion of the Justice of the Peace, goods related to a violation could be seized and the violator set in the stocks for up to two hours.⁶⁴

60. ALBERT BERRY SAYE, *A CONSTITUTIONAL HISTORY OF GEORGIA: 1732–1945*, 45–48 (1948).

61. 18 *THE COLONIAL RECORDS OF THE STATE OF GEORGIA* 508–515 (Allen D. Chandler ed., 1910).

62. *Id.* at 508.

63. *Id.* at 511–12.

64. *Id.*

The next major transition took place fourteen years later when the British government was forced out of Georgia.⁶⁵ Georgia's interim governing body, the Provincial Congress, adopted a temporary constitution.⁶⁶ The temporary constitution, entitled "Rules and Regulations of 1776," went into effect in April of 1776 and was intended as only a temporary measure to bridge the gap between the desertion of Georgia by her colonial government and the opportunity to draft a more permanent governing document.⁶⁷ Called a "pre-constitution" by one historian,⁶⁸ this thirteen-paragraph constitution set forth only the bare essentials for the new government and provided that all prior laws "which do not interfere with the proceedings of the Continental or our Provincial Congresses . . . shall be in full force, validity, and effect until otherwise ordered."⁶⁹ No legislative history, drafting notes, or journals appear to have been kept or to have survived to aid in interpretation of this constitution.⁷⁰ Historians do not tell that any such records were ever drafted, and it appears doubtful that even archival research could uncover any useful records.⁷¹

The constitution of 1776 includes no religious provisions and no protections of individual liberties. Given the temporary nature of this constitution, it is possible that Georgia had yet to determine her position

65. KENNETH COLEMAN, *THE AMERICAN REVOLUTION IN GEORGIA 1763–1789*, 76 (1958).

66. *Id.*

67. *Id.*

68. *Id.*

69. GA. CONST. of 1776, § 4. This language could be interpreted to mean that all preexisting laws touching on religion were still in effect; indeed, this is doubtless the intent, with the exception of the establishment of the Anglican Church.

70. To the extent that the legal and general histories of Georgia reviewed discuss the Rules and Regulations of 1776, they do not indicate that any legislative or drafting notes or journals were kept or are still in existence. Though I did not find any historians affirmatively concluding that no such record exists, I think it is a reasonable conclusion that one of the many treatises I reviewed would have mentioned such a document were it in existence. Correspondence with the University of Georgia School of Law's reference librarians confirmed that they could find record of no journals, notes, or other materials, archival or otherwise, kept during the drafting of the Georgia Constitution of 1776. University of Georgia reference librarians are available for consultation and may be contacted via their website: www.lawsch.uga.edu/law-library.

71. *See supra* note 70.

on religion, let alone what precise language would best express that position. Thus, the omission of the entire topic of religion, given the omission of all individual rights in the document as a whole, should be attributed to the volatility of the era, not any specific religious viewpoint.

By 1777, this had changed. The new government drafted a comprehensive constitution that reflected the greater time and thought which its framers were able to supply. The impetus to the drafting and adoption of this constitution was the Declaration of Independence, and the new constitution was drafted intermittently because of the demands of the war between November of 1776 and February of 1777.⁷² As with the earlier “pre-constitution,” no journal or drafting notes, if they were ever kept, survive.⁷³ The only record at all, which is only available in state archives, merely notes who was present and that the convention modeled its work on the new federal constitution.⁷⁴ History thus provides little assistance to the interpretation of this constitution.

This new constitution, containing a four-paragraph preamble and sixty-three articles, describes the branches of the new government in greater detail and includes many provisions intended to protect individual liberties.⁷⁵ No less than ten provisions touch on religion, some promoting the establishment of religion and others protecting freedom of

72. COLEMAN, *supra* note 65, at 453; *see also* REBA CAROLYN STRICKLAND, *RELIGION AND THE STATE IN GEORGIA IN THE EIGHTEENTH CENTURY 161–86* (1939), for a discussion of questions concerning lands held by churches under British authority, a detailed analysis of the interrelationship of politics and religion during the Revolutionary War, and an excellent overview of the religious affiliations of the early Georgia colonists.

73. Ware’s *Constitutional History of Georgia* reports that a fragment of minutes from the meeting had been found in later years. ETHEL K. WARE, *A CONSTITUTIONAL HISTORY OF GEORGIA* 30 (1947). This fragment, however, is held by Pierpont Morgan Library, in New York, New York, which assists with research by appointment only and does not keep their holding available for online or electronic review. The Pierpont Morgan Library can be contacted via its website: www.themorgan.org. Further research, including correspondence with the University of Georgia School of Law’s reference librarians, revealed that this is the only known copy of this record (which apparently has not been duplicated or incorporated into any of the compilations of Georgia records). University of Georgia reference librarians are available for consultation and may be contacted via their website: www.lawsch.uga.edu/law-library.

74. WARE, *supra* note 73, at 30.

75. GA. CONST. of 1777.

conscience and worship.⁷⁶ Free exercise related provisions included an article providing for freedom of conscience for jury members⁷⁷ and a free exercise provision not unlike that of the First Amendment. The free exercise provision provided that “[a]ll persons whatever shall have the free exercise of their religion; *provided it be not repugnant to the peace and safety of the State.*”⁷⁸ With free exercise limited by the peace and security of the state, this phrasing implicitly indicated that free exercise at a minimum includes some external acts.

Far from rejecting religious establishment altogether, this first full-fledged Georgia constitution required that all members of the legislature and the state governor, by virtue of being required to be a member of the legislature, “shall be of the Protestant.”⁷⁹ This is the only clause of the constitution that designates a specific religion, but a number of clauses contribute to the establishment of nondenominational theism.⁸⁰ To this effect, an oath ending in “so help me God” was dictated for legislators and governors taking office, voters, and those about to hear secret information.⁸¹ Similarly, “Deus” (“God”) is referred to in the description of the state seal.⁸²

Perhaps the most revealing establishment provision is related to the payment of teachers. Article LVI provided that no person shall be

76. A provision which prohibited any clergyman from being “allowed a seat in the legislature” is difficult to categorize. GA. CONST. of 1777, art. LXII. While this could be perceived as an anti-religious provision, it seems more likely that it was intended to protect those of minority beliefs from the possibility of persecution from a legislature filled with majority-favored clergymen.

77. GA. CONST. of 1777, art. XLIII. This provision, setting forth the role of jury members, provided for freedom of conscience. Though jury members were required to bring in a verdict “according to law,” they were permitted an exception if such a verdict was “repugnant” to conscience. Thus, when faced with a conflict between conscience and the law, jury members were constitutionally authorized to follow their consciences. While this provision was facially neutral, it would be of significance to jury members whose religious beliefs made application of a law antithetical to their faith.

78. GA. CONST. of 1777, art. LVI (emphasis added).

79. GA. CONST. of 1777, art VI.

80. GA. CONST. of 1777, arts. VI, XIV, XV, XXIV, XXX, LVII.

81. GA. CONST. of 1777, arts. XIV, XV, XXIV, XXX. The required oath contained an alternative for voters (as opposed to members of the government) who were permitted to make an affirmation rather than an oath.

82. GA. CONST. of 1777, art. LVII.

required to “support any teacher or teachers except those of their own profession.”⁸³ By implication, this Article demonstrates that taxpayers could be required to support teachers of their own religion and that religion was an important aspect of a state-employed teacher’s job.⁸⁴ In other words, schools were at least implicitly understood to be in the service of religion. In 1783, Governor Lyman Hall appealed to the state legislatures to combine efforts to educate and increase piety, pleading for educational institutions that could “restrain vice and encourage virtue.”⁸⁵ Likewise, state legislator Abraham Baldwin worked for the passage of several acts that encouraged education and religion in tandem.⁸⁶ He argued that “[i]t should therefore be among the first objects of those who wish well to the National prosperity to encourage and support the principles of Religion and Morality.”⁸⁷ During this period, both proposed and enacted legislation related to education is notable for its professed goal of encouraging religion and its neutrality amongst Protestant religions.⁸⁸ In 1785, the Georgia legislature passed an act establishing a tax for the support of religion.⁸⁹ This act provided that when a designated number of residents subscribed to a given minister, the minister would then be paid from state funds.⁹⁰ The act also affirmed that the different sects and denominations of the Christian religion “were to ‘have free and equal liberty and toleration in the exercise of their religion.’”⁹¹ Thus, it seems that state support for and promotion of religion was the policy of the day. Yet establishment was limited, and the use of state funds to promote one religion over another was coupled

83. GA. CONST. of 1777, art. LVI.

84. *Id.*

85. LYMAN HALL, “Message from His Honor the Governor to the Honorable House of Assembly” (1783), in 2 COLONIAL RECORDS, *supra* note 61, at 512–513; Keith Whitescarver, *Creating Citizens for the Republic: Education in Georgia, 1776-1810*, 13 J. EARLY REPUBLIC 458 (1993).

86. Whitescarver, *supra* note 85, at 458–62 (chronicling the education-related religious legislation proposed and enacted during the period between the 1777 and 1789 constitutions).

87. *Id.* at 459.

88. *Id.* at 461.

89. COLEMAN, *supra* note 65, at 454.

90. *Id.*

91. *Id.* at 454–55.

with protections that permitted each taxpayer to limit the religion to which his taxes would be allocated.

The ratification of the United States Constitution spurred the next major event in Georgia constitutional history.⁹² The national Constitution arrived in Georgia on October 10, 1787.⁹³ By January 2, 1788, twenty-six Georgia delegates unanimously ratified the Constitution, making Georgia the fourth state to do so.⁹⁴ The Georgia legislature resolved that revisions of its own constitution should be made as soon as the necessary nine states had ratified the national Constitution.⁹⁵ The Georgia convention met for sixteen days in November of 1788.⁹⁶ As at the other state constitutional conventions of this era, no journal that is known to historians survived, and very little has ever been brought to light about which issues were most contentious.⁹⁷ The only record at all, which is only available in state archives, merely notes who was present and that the convention modeled its work on the new federal Constitution.⁹⁸ Indeed, the resulting document shows a marked tendency to harmonize with the new federal Constitution.⁹⁹ This is perhaps most notable in the structure of the new state constitution, which altogether abandoned its prior organization in favor of a branch-by-branch structure mimicking that of the United States Constitution. The new Georgia Constitution went into effect in May of 1789, before the first Congress met and drafting of the First Amendment commenced.¹⁰⁰

Substantive changes in Georgia's new constitution lessened some of the establishment elements. For example, religious tests for the legislature were removed, and "[s]o help me God" was deleted from oaths and affirmations.¹⁰¹ Similarly, the article specifying the state seal was removed and with it the provision specifying that the state seal

92. SAYE, *supra* note 60, at 132–37; WARE, *supra* note 73, at 60–61.

93. SAYE, *supra* note 60, at 132.

94. SAYE, *supra* note 60, at 133; WARE, *supra* note 73, at 60.

95. WARE, *supra* note 73, at 61.

96. SAYE, *supra* note 60, at 137; WARE, *supra* note 73, at 61.

97. SAYE, *supra* note 60, at 137; WARE, *supra* note 73, at 61.

98. SAYE, *supra* note 60, at 137; WARE, *supra* note 73, at 61.

99. SAYE, *supra* note 60, at 137; WARE, *supra* note 73, at 65.

100. WARE, *supra* note 73, at 63–64.

101. See generally GA. CONST. of 1789.

appeal to God.¹⁰² Moreover, with the deletion of the entire article on the role of juries, the right not to render a verdict contrary to conscience disappeared.¹⁰³ As in the Constitution of 1777, “[n]o clergyman of any denomination” was permitted to “be a member of the General Assembly.”¹⁰⁴

On the other hand, the free exercise clause underwent major revisions and read as follows: “All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own.”¹⁰⁵ All persons were still to have “free exercise of their religion,” but in the new version this protection was broadened through the removal of the language that limited the protection to actions not repugnant to the peace and safety of the state. The deletion of the language from the prior version can hardly be taken as accidental, and it seems that under the new provision exercise of religion was protected even if repugnant to the peace and safety of the state. The second revision of this article modified the clause prohibiting forced support of teachers so that no one should be “obliged to contribute to the support of any religious profession but their own,”¹⁰⁶ evidencing that at least one element of establishment—even if nondenominational or non-preferential—remained.

In sum, the changes in the 1789 constitution resulted in less establishment elements, with state support of religion permitted only with the consent of the individual to be taxed. But it also broadened the protections for exercise of religion, removing the requirement that protected activities not interfere with the peace and safety of the state. The implication from this change in language was that practicing one’s religion was constitutionally protected even when in violation of laws of general applicability.

Georgia’s next constitution was ratified in 1798 and is very similar to that of 1789: it has a similar organization, although the preamble from the 1789 version was completely omitted, and it continues along the same trajectory in many respects in its treatment of

102. *Id.*

103. *Id.*

104. GA. CONST. of 1789, art. I, § 18. The wording of this provision was unchanged from the prior version.

105. GA. CONST. of 1789, art. IV, § 5.

106. *Id.*

religion.¹⁰⁷ Like the 1789 Constitution, God remains absent from oath and affirmation, and there are no religious tests for office.¹⁰⁸ Again, the constitution is silent on the role of juries, and again the constitution does not set forth the contents or motto for a state seal.¹⁰⁹

The major changes in the treatment of religion in the 1789 Constitution are twofold. First, the prohibition against ministers serving as legislators was removed.¹¹⁰ Second, the only remaining article on religion was reworded so that it does not at all resemble the prior declaration that “[a]ll persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own.”¹¹¹ The resulting religious provision of the 1798 Constitution reads as follows:

No person within this State shall, upon any pretense, be deprived of the inestimable privilege of worshipping God in a manner agreeable to his own conscience, nor be compelled to attend any place of worship contrary to his own faith and judgment; nor shall he ever be obliged to pay tithes, taxes, or any other rate, for the building or repairing any place of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or hath voluntarily engaged to do. No one religious society shall ever be established in this State, in preference to another; nor shall any person be denied the enjoyment of any civil right merely on account of his religious principles.¹¹²

This new article in the Georgia Constitution welcomed a cluster of new rights and introduced subtle changes in pre-existing provisions.

107. *See generally* GA. CONST. of 1798.

108. *Id.*

109. *Id.*

110. *Id.*

111. GA. CONST. of 1789, art. IV, § 5.

112. GA. CONST. of 1798, art. IV, § 10.

Two phrases in the above paragraph have proven to be significant in subsequent Supreme Court opinions and require careful parsing. First, the establishment provision limiting the use of state funds in support of religion is significantly altered.¹¹³ On the one hand, taxation for religious spending was more explicitly limited to exclude all citizens except those who volunteered to pay the tax. The provision also clearly provides for state use of funds for the payment of ministers and the building and repair of “places of worship.”

Second, the 1798 free exercise provision also underwent changes that left it narrower in one regard and broader in another. The new clause specified that no one shall be deprived of “worship” “on any pretence whatsoever.”¹¹⁴ This change narrowed the provision by substituting “free exercise,” found in the 1777 and 1789 versions, with “worship.” At the same time, the protection of worship, which had already been strengthened in the 1789 version through the omission of the earlier limitation for peace and safety, was further bolstered by the emphatic language prohibiting interference “on any pretence whatsoever.”¹¹⁵

After the adoption of the 1798 Constitution, Georgia did not adopt a new constitution until 1861. Thus, the 1798 Constitution—the first constitution drafted after the adoption of the Bill of Rights and the last constitution drafted during the era of the founding generation—is the last Georgia Constitution relevant to interpreting the Bill of Rights in light of the understanding of the times in which it was written.

B. Three Cases of Insufficient History

Evidence contemporaneous with the drafting of the First Amendment indicates that Georgia law encompassed limited state action intended to further religion. In the three following cases, Justices Black, Stevens, and Frankfurter consistently omit or controvert the most relevant pieces of Georgia’s history relative to their arguments.

113. *Id.* (“[N]or shall [anyone] ever be obliged to pay tithes, taxes, or any other rate, for the building or repairing any place of worship, or for the maintenance of any minister or ministry, *contrary to what he believes to be right, or hath voluntarily engaged to do.*”) (emphasis added).

114. *Id.*

115. *Id.*

Although they each cite some facts of Georgia legal history accurately, they use this history torn from context and without reference to whether Georgia law as a whole supports their argument.

In *Engel v. Vitale*,¹¹⁶ in which the Court held that government-directed prayer in public schools violated the Establishment Clause,¹¹⁷ Justice Black referred to Georgia as one of the colonies in which, under British rule, the Church of England had been established.¹¹⁸ But Justice Black also claimed, without any citation to Georgia history, that “the successful Revolution against English political domination was *shortly* followed by intense opposition to the practice of establishing religion by law.”¹¹⁹ The Justice further supports his claim with a discussion of American history, in which he makes sweeping claims about the anti-religious developments in the new states but cites specifics only from Virginia.¹²⁰

Narrowly construed, Justice Black’s statement about rejection of establishment is correct: Georgia, once freed from the Anglican Church, did not establish one official state religion. But full establishment of an official state church was not at issue in *Engel*. At issue in *Engel* was the consistency of school prayer with the states’ historical treatment of religion. With the issue thus framed—and in light of a fuller grasp of Georgia history—it becomes evident that Justice Black omits much relevant Georgia history. Georgia’s constitution required all state legislators and the state governor to be Protestant for more than a decade during the post-war period.¹²¹ Likewise, throughout the period relevant to interpretation of the Religion Clauses, Georgia’s Constitution and laws provided taxpayer support for churches and religious instruction in schools.¹²² Indeed, state schools were viewed as important vehicles for

116. 370 U.S. 421 (1962).

117. *Id.* at 427–28.

118. *Id.* at 429.

119. *Id.* at 428 (emphasis added).

120. *Id.* at 428–29.

121. GA. CONST. of 1777, art. VI.

122. GA. CONST. of 1777, art. LVI; GA. CONST. of 1789, art. I, § 18; GA. CONST. of 1798, art. IV, § 10.

inculcating piety in young Georgian citizens.¹²³ Although these provisions do not amount to the official establishment of a state church, this history does demonstrate that elements of establishment were constitutionally mandated, particularly with regard to schools. Therefore, with regard to Georgia, Justice Black's claim that the Religion Clauses were welcomed by a nation of states hostile to establishment is either irrelevant, because state establishment was not before the Court, or misleading, insofar as Georgia did have significant elements of establishment—particularly in its use of schools—during the relevant period. At best, Justice Black's reliance on one accurate fact of Georgia history does little to advance his argument.

Justice Black's citation to Georgia's legal history is followed by a crucial but unsupported claim about development within the states.¹²⁴ This pivotal claim, that the First Amendment was ratified by a nation of states hostile to the establishment of religion, seems by implication to be supported by Georgia developments. But the careful reader observes that Georgia developments are no longer cited, and the informed reader knows Justice Black's claim can no longer be fairly understood as consistent with Georgia history. Not only is Justice Black misleading as to the content of Georgia history, but his historical analysis strays from the issue before the Court.

Similarly, in *McGowan v. Maryland*,¹²⁵ the Court used state history in an equally cursory and misleading fashion.¹²⁶ Chief Justice Warren, writing for the Court, upheld a Maryland Sunday closing law without relying on Georgia history.¹²⁷ Justice Frankfurter's lengthy concurrence, on the other hand, extensively explored the history of state Sunday closing laws and specifically cited Georgia's colonial Sunday

123. Whitescarver, *supra* note 85, at 458–62 (chronicling the education-related religious legislation proposed and enacted during the period between the 1777 and 1789 constitutions).

124. *Engel*, 370 U.S. at 428.

125. 366 U.S. 420 (1961).

126. For a fuller discussion of the Court's holding and its implications within the context of Sunday closing law jurisprudence, see Franklin E. Bondonno, *First Amendment Right and Sunday Closing Laws*, 31 LINCOLN L. REV. 51 (2003-04).

127. *McGowan*, 366 U.S. at 423.

closing law.¹²⁸ In his opinion, Justice Frankfurter argued that, while Sunday closing laws may initially have been largely religious, they developed into a non-religious practice in the states.¹²⁹

To support the historical narrative which preceded this conclusion, Justice Frankfurter discussed colonial Sunday closing laws and cited Georgia's 1762 colonial Sunday-closing law to support the proposition that the "earlier among the colonial Sunday statutes were unquestionably religious in purpose."¹³⁰ The paragraph supporting this claim included two brief quotes from the Georgia law in question and a citation to the statute.¹³¹ Besides this cursory treatment of Georgia history, Justice Frankfurter included similarly brief discussions of the Sunday closing laws of nine other colonies.¹³² Justice Frankfurter then argued that, after the Revolution, although complete separation of church and state had not been realized "[o]ther States were fast approaching that ideal, however, and everywhere the spirit of liberty in religion was in the ascendant."¹³³ Having admitted some degree of establishment in the early years of the nation, he asserts, "even the seventeenth century legislation does not show an exclusively religious preoccupation."¹³⁴ Here and indeed as he continues to illustrate his vision of the development of Sunday closing laws towards becoming secular in purpose, Justice Frankfurter altogether omits all citation or reference to Georgia. Although Justice Frankfurter draws generalized conclusions, there are no additional references to Georgia law, history, or politics dating after the Revolutionary War.

128. *Id.* at 459–551 (Frankfurter, J., concurring) (citing Georgia's colonial Sunday closing law at 488 n.49 & 489 n.56).

129. *Id.* at 507 ("For to many who do not regard it sacramentally, Sunday is nevertheless a day of special, long-established associations, whose particular temper makes it a haven that no other day could provide.").

130. *Id.* at 487, 488 n.49.

131. *Id.* at 487–88.

132. *Id.*

133. *Id.* at 486. Justice Frankfurter does qualify the relevance of this history to his ultimate interpretation, admitting that colonial and pre-First Amendment state law is "not in itself, of course, indicative of the purpose of those laws, or of their consistency with the guarantee of religious freedom which the First Amendment, restraining the power of the central Government, secured. Most of the States were only partially disestablished in 1789." *Id.*

134. *Id.* at 489.

Justice Frankfurter's concurrence omits any discussion of the development of Georgia law and thus does not support the claim about the non-sectarian development of Sunday closing laws on which his opinion rests. The one Georgia law that he cites, an uncontrovertibly sectarian law dating from the Colonial period, is accurate, but it cannot—as a matter of logic—demonstrate that the nation's Sunday closing laws *developed* into a non-sectarian phenomenon. Because Justice Frankfurter's opinion failed to reference any Georgia law supporting his argument that Sunday closing laws became non-sectarian in nature, he fails to show that Georgia history supports the conclusion. Nor does he either argue that Georgia was an outlier or admit his omission of additional Georgia evidence. Thus, his citation of Georgia law, while not wrong, misleads readers into thinking that Georgia history supports his overarching conclusion. Rather, Georgia history serves as a gloss, providing only the feel of historical support without genuinely adding the weight of history to Justice Frankfurter's conclusion.

The dissent in *County of Allegheny v. American Civil Liberties Union*¹³⁵ follows a similar pattern. In *Allegheny*, the Court considered the soundness of two “holiday” displays under the Establishment Clause.¹³⁶ Justice Blackmun, writing for the Court, upheld a menorah display, which included non-Jewish decorations, but found a nativity-focused scene impermissible.¹³⁷ Unlike Justice Blackmun, Justice Stevens' opinion relied on Georgia history.¹³⁸ In a partial dissent, Justice Stevens found both the nativity scene and the menorah unconstitutional because “[t]he overall display thus manifests governmental approval of the Jewish and Christian religions.”¹³⁹ To reach his conclusion, Justice Stevens consulted “[r]elations between church and state” at the time of the drafting and ratification of the First Amendment.¹⁴⁰ Justice Stevens prefaced his historical inquiry by explaining that it was “appropriate to reexamine the text and context of the Clause to determine its impact” on the case before the Court.¹⁴¹

135. 492 U.S. 573 (1989).

136. *Id.* at 578.

137. *Id.* at 579.

138. *Id.* at 646 (Stevens, J., dissenting in part).

139. *Id.* at 654.

140. *Id.* at 646–47.

141. *Id.*

Justice Stevens proceeded to argue that by the late 1780s, “some States had repealed establishment laws altogether, while others had replaced single establishments with laws providing for nondiscriminatory support of more than one religion.”¹⁴² In his only specific reference to Georgia law and history, Justice Stevens supported his claim with a footnote that included a reference to Georgia and five other states. In this footnote, he argued that the states mentioned therein had become “comprehensive or ‘multiple’ establishment” states where “aid was provided to all churches in each state on a nonpreferential basis, except that the establishment was limited to churches of the Protestant religion in three states and to those of the Christian religion in the other three states.”¹⁴³

Justice Stevens’ opinion next argued that “[i]t is against this historical backdrop” that the Establishment Clause was adopted for the purpose of rejecting multiple establishment.¹⁴⁴ Based on legislative history demonstrating that the proposed wording of the First Amendment Religion Clauses was altered from one prohibiting the establishment of an official national church to its eventual wording, Justice Stevens argued that this evolution of the proposed language indicates that multiple establishments, like that of Georgia, were considered and rejected by the First Congress.¹⁴⁵ Justice Stevens thus wrote that “even in those States and even among members of the established churches, there was widespread opposition to multiple establishments because of the social divisions they caused.”¹⁴⁶ No evidence regarding this widespread opposition is cited. Much less does Justice Stevens note or discuss the relevance of the many ways in which Georgia endorsed multiple establishment during the relevant period.

Justice Stevens used Georgia accurately for historical backdrop, but he omitted the causal link between the backdrop and his conclusion. His initial categorization of Georgia’s early support of religion was a logical treatment of the elements of establishment present in the state during the era in which the Religion Clauses were written and adopted.

142. *Id.*

143. *Id.* at 646 n.1.

144. *Id.* at 646–48.

145. *Id.*

146. *Id.*

Unfortunately, the conclusion that he drew from this evidence is not as sound as the history which he cited. After drawing a generalized conclusion about the rejection of multiple establishment at the national level, Justice Stevens then failed to support his claim that multiple establishment caused social division in states like Georgia.¹⁴⁷ Indeed, Justice Stevens' claim with regard to multiple establishment states is directly contrary to the evidence from Georgia, where the 1780s saw an increase in the use of public schools to promote religion and constitutional clarifications emphasizing the constitutionality of using state funds to pay the salaries of ministers and to build and repair churches.¹⁴⁸

In *Allegheny*, the pattern that emerged in *Engel* and *McGowan* continued. In each of these opinions, the narrowness of the Georgia history relied on belies the greater context of both the development of the law in Georgia and the use of this history within the Justices' opinions as a whole. Whether by failing to provide a fuller picture of that history or through failure to connect the history cited to the conclusions drawn, each of these opinions represents a misuse of state legal history. In order to genuinely ground these opinions in state legal history, both a richer reference to history and a stronger focus upon its implications to the question before the Court would have been necessary. Subsequent Justices have fared no better.

C. Justice Scalia, Justice O'Connor, and the Complexity of Georgia History

One might expect that when Justices have disagreed with one another about the meaning and implications of historical Georgia law at least one of them would have used it with a fair degree of accuracy. Unfortunately, *City of Boerne v. Flores*¹⁴⁹ demonstrates that this is not true. In *Boerne*, the Court reviewed the constitutionality of the Religious

147. *Id.* at 647–48.

148. Whitescarver, *supra* note 85, at 458–62 (chronicling the education-related religious legislation proposed and enacted during the period between the 1777 and 1789 constitutions); GA. CONST. of 1798, art. IV, § 10.

149. 521 U.S. 507 (1997).

Freedom Restoration Act (“RFRA”).¹⁵⁰ With RFRA, Congress attempted to redefine the parameters of religious freedom under the Free Exercise Clause in response to the Court’s opinion in *Employment Division, Department of Human Resources of Oregon v. Smith*.¹⁵¹ Despite Congress’s best effort to reinterpret the Free Exercise Clause, in *Boerne* the Court effectively returned the law to *Smith* and invalidated RFRA with respect to its applicability to the States.¹⁵² Justice Kennedy, writing for the Court, concluded that “RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.”¹⁵³ While Justice Kennedy’s opinion did not rely on Georgia history or law, Justice Scalia’s partial concurrence and Justice O’Connor’s dissent did.

Justice Scalia argued that RFRA’s protection of exceptions to general laws for religious practices was not constitutionally valid because such exemptions “depart[] from the understanding reflected in various statutory and constitutional protections of religion enacted by Colonies, States, and Territories.”¹⁵⁴ Justice Scalia then made two claims about early free exercise enactments, only one of which is well grounded in Georgia law.¹⁵⁵ First, he cited the “Georgia Constitution,” without specifying which of her four constitutions from that period, along with other state constitutions and acts, for the proposition that “the early ‘free exercise’ enactments . . . protect only against action that is taken ‘for’ or ‘in respect of’ religion.”¹⁵⁶ Based on this evidence, Justice Scalia concluded that it is “eminently arguable that application of neutral, generally applicable laws of the sort the dissent refers to—such as zoning laws . . . would not constitute action taken ‘for,’ ‘in respect of,’ or ‘on

150. For a more complete discussion of *Boerne*, RFRA, and the ramifications of this case, see Eugene Gressman, *RFRA: A Comedy of Necessary and Proper Errors*, 21 CARDOZO L. REV. 507 (1999).

151. *Boerne*, 521 U.S. at 512 (“Congress enacted RFRA in direct response to the Court’s decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*.”). See also *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990) (holding that there was no constitutionally required exemption from a drug law that would permit the use of peyote for religious purposes).

152. *Boerne*, 521 U.S. at 527.

153. *Id.* at 536.

154. *Id.* at 538 (Scalia, J., concurring in part).

155. *Id.* at 538–39.

156. *Id.*

account of one's religion."¹⁵⁷ As qualified by Justice Scalia, this claim is correct with regard to Georgia; nothing in her history or any of her early constitutions indicates that the free exercise provisions were intended to require an exemption from statutes of general applicability, such as zoning regulations, for religious bodies or practices.

Justice Scalia's second reference to Georgia is a different story. Again referencing the early state constitutions, Justice Scalia claimed that the "most plausible reading of the 'free exercise' enactments [of the states] . . . is . . . [that] [r]eligious exercise shall be permitted *so long as it does not violate general laws governing conduct.*"¹⁵⁸ In support of this claim, Justice Scalia quoted and cited the "Georgia Constitution."¹⁵⁹ By checking his quotation against the four possible Georgia constitutions of the era, it is possible to determine that it is the 1777 version to which he refers. This version indicates, as one would expect from his argument, that free exercise protection is limited to actions that were "not repugnant to the peace and safety of the State."¹⁶⁰

But Justice Scalia never notes that, just twelve years after the implementation of the constitution which he quotes and before the Bill of Rights was written, Georgia omitted the very language upon which he relies. Unlike the 1777 version which Justice Scalia quotes, the 1789 Georgia constitution provided for a simple protection of free exercise *without qualification related to keeping the peace*. "All persons shall have the free exercise of religion."¹⁶¹ Given his failure to note this 1789 development, it is not surprising that he also omitted reference to the yet more emphatic language of the 1798 Georgia constitution: "No person within this State shall, *upon any pretence*, be deprived of the inestimable privilege of worshipping God in a manner agreeable to his own conscience"¹⁶² If the 1789 omission and the 1798 addition to the Georgia free exercise clause are to be interpreted as having any meaning

157. *Id.* at 539.

158. *Id.* (emphasis in original).

159. *Id.*

160. GA. CONST. of 1777, art. LVI.

161. GA. CONST. of 1789, art. IV, § 5.

162. GA. CONST. of 1798, art. IV, § 10 (emphasis added). It should be noted that this version narrowed the scope of protected activity from "exercise" to "worship." The result of this change is a stronger protection for a smaller group of activities.

at all, as the norms of interpretation indicate they should, Justice Scalia's conclusion is undermined. Indeed, it is hard to imagine how changes in the state constitution could be more relevant or more directly undermine Justice Scalia's conclusion from the earlier, and therefore arguably less relevant, Georgia Constitution of 1777.

In the same opinion, Justice O'Connor's dissent overlooks the same development in Georgia law. Her dissent departs from Justice Scalia's view that the Free Exercise Clause does not apply to laws governing general conduct. Instead, Justice O'Connor concluded that the Court "[should] return to a rule that requires government to justify any substantial burden on religiously motivated conduct by a compelling state interest and to impose that burden only by means narrowly tailored to achieve that interest."¹⁶³ Her dissent introduced the early state constitutions to show that the "precise language of these state precursors to the Free Exercise Clause varied, but most guaranteed free exercise of religion or liberty of conscience, limited by particular, defined state interests."¹⁶⁴ Like Justice Scalia, she then cited the 1777 version of the Georgia constitution,¹⁶⁵ but unlike Justice Scalia she concluded that the "language used in these state constitutional provisions and the Northwest Ordinance strongly suggests that, around the time of the drafting of the Bill of Rights, it was generally accepted that the right to 'free exercise' required, where possible, accommodation of religious practice."¹⁶⁶

There are two Georgia constitutions—the one immediately before and the one immediately after the adoption of the First Amendment¹⁶⁷—that support Justice O'Connor's point more forcefully than the one on which she chose to rely. If used in conjunction with one another and the 1777 version, these constitutions would have supported her dissent by showing that Georgia's constitutional alterations repeatedly expanded this constitutional protection over the relevant

163. *Boerne*, 521 U.S. at 548 (O'Connor, J., dissenting).

164. *Id.* at 553.

165. *Id.* at 554. Although Justice O'Connor does not note that multiple versions exist, she does at least include the year of the Georgia constitution that she quotes. *Id.*

166. *Id.*

167. The 1789 version, which omitted the exclusion for acts repugnant to the peace and safety, and the 1798 version, which added "upon any pretence" to its prohibition against interference with worship.

period. Like Justice Scalia's concurrence, Justice O'Connor's dissent completely ignored the fact that the Georgia constitution changed dramatically on this point at the relevant time. For Justice Scalia, this oversight resulted in an overstatement about the probative value of Georgia law for his position. For Justice O'Connor, the mistake cost her a significant supporting argument.

Examining Justice Scalia's and Justice O'Connor's mistakes together, *Boerne* reinforces the point that the sound use of state law requires a solid grounding in state legal history. Justice Scalia's reliance on Georgia's constitution, while not without factual basis, undermined his conclusion because he overlooked the complex nature of the state's constitutional history and ignored changes to the constitution that removed the language on which he based his argument. Justice O'Connor's opinion suffers from the same failure to discover the complexity of state history and to cite the most relevant version of the Georgia constitution. In Justice O'Connor's dissent, this mistake results in an opinion weakened by an omission of strong evidence that could have supported her conclusion on the issue before the Court in *Boerne*. In both cases, the failures of the Justices to capture complex history result in a failure to accurately rely on Georgia law and history in support of their interpretation of the Religion Clauses.

D. Justice Rehnquist, Plain Text, and the Big Picture

Locke v. Davey,¹⁶⁸ the most recent case in which the Supreme Court relied on Georgia history to interpret the Religion Clauses, repeats the Court's earlier errors in its failure to take into account the complexity and legal context of Georgia constitutional history. In *Locke*, the Court upheld a Washington state law that withheld scholarships from students based on their choice to study devotional theology as opposed to any other field.¹⁶⁹ In his opinion for the Court, Chief Justice Rehnquist surveyed early state practices, including Georgia constitutional

168. 540 U.S. 712 (2004).

169. *Id.* at 715. For a more detailed analysis of this case and its ramifications on Establishment Clause law, see Richard F. Duncan, *Locked Out: Locke v. Davey and the Broken Promise of Equal Access*, 8 U. PA. J. CONST. L. 699 (2006).

provisions.¹⁷⁰ Chief Justice Rehnquist argued that “[m]ost States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry.”¹⁷¹ The string citation following this claim commences with a citation to the Georgia constitution of 1789 and a quotation of the constitutional language.¹⁷² On its face, this citation demonstrates the inaccuracy of the claim for which the Chief Justice had just cited it: “All persons shall have the free exercise of religion, *without being obliged to contribute to the support of any religious profession but their own.*”¹⁷³ Chief Justice Rehnquist concluded his set of state law constitutional citations with the clearly inconsistent claim that the “plain text of these constitutional provisions prohibited *any* tax dollars from supporting the clergy.”¹⁷⁴

On its face, the Georgia provision that Chief Justice Rehnquist’s cited provides for taxation in support of “religious profession.”¹⁷⁵ This is manifestly not a prohibition on the use of tax dollars in support of clergy because it only limits the tax dollars of one citizen from being used in support of the clergy of another.¹⁷⁶ Beyond the plain language of the constitution, a little knowledge of the historical context reinforces the point. In the 1780s, Georgia had enacted laws with the stated goal of using education to inculcate piety.¹⁷⁷ Both the 1777 and the 1798 Georgia constitutions clearly envision the use of tax money in support of religion, religious teachers, and ministers.¹⁷⁸ Georgia history and law, on their face and in light of the state’s historical practices, belie Chief

170. *Locke*, 540 U.S. at 723.

171. *Id.*

172. *Id.*

173. *Id.* (citing GA. CONST. of 1789 art. IV, § 5) (emphasis added).

174. *Id.*

175. GA. CONST. of 1789 art. IV, § 5.

176. *Id.*

177. Whitescarver, *supra* note 85, at 458–62.

178. GA. CONST. of 1777, art. LVI (“All persons . . . shall not, unless by consent, support any teacher or teachers except those of their own profession.”); GA. CONST. of 1798, art. IV, § 10 (“ . . . nor shall he ever be obliged to pay tithes, taxes, or any other rate, for the building or repairing any place of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or hath voluntarily engaged to do.”).

Justice Rehnquist's assertions about the meaning of the Georgia Constitution of 1789 and the use of taxes for the support of ministers.

In sum, no case discussed in this article misapplied Georgia law as clearly as *Locke*. Chief Justice Rehnquist's assertion about the meaning of the Georgia Constitution of 1789 was directly controverted by the text of the constitutional provision from which it was quoted. Moreover, the laws then in effect and the immediately preceding and subsequent Georgia constitutions, clearly contemplated the use of taxpayer funds to pay ministers and others who would teach religion.¹⁷⁹ While neither the language of the 1789 constitution or this additional evidence is conclusive proof that the Establishment Clause permits payment of ministers, some argument would be required to show how these laws could be consistent with the Chief Justice's position. More to the point, they are altogether irreconcilable with his assertion that no tax money could be used in Georgia to pay ministers under the 1789 constitution.

III. EXPLAINING THE COURT'S MISTAKES

Having chronicled the Court's misapplications of Georgia law, I return to the cause of the problem—the complex nature of legal history and the inherently time-consuming task of researching it. Researching the precise state of contemporary law on one point in thirteen states is, in itself, a time consuming task for an experienced, intelligent, and eager clerk. To say that the historical nature of the research question compounds the problem does not begin to capture the truth.

The major obstacles to using Georgia legal history when interpreting the Religion Clauses are (1) the complexity of legal history, (2) the nature of historical legal records, and (3) the complexity of the relationship of state history to the national constitution. Although the specific form that these obstacles take in the state (and colony) of Georgia are, in a sense, particular to Georgia, cursory consideration of their nature leads to the conclusion that the enormity of these challenges is unlikely to be any less even in states where the specifics differ. The particulars will differ by state, but this too increases the time necessary to

179. Whitescarver, *supra* note 85, at 458–62.

research a founding-era question of religion law because the researcher must learn the sources of information in each state.

Consulting the “Georgia Constitution” is no simple matter. Georgia executed four different constitutions during its infancy, and provisions with bearing on religion are scattered about the four constitutions.¹⁸⁰ To fully understand Georgia’s historical treatment of religion, all of the documents must be read in their entirety. Moreover, because only two of the four relevant constitutions bear any organizational resemblance to one another, the researching Justice and his clerk cannot simply read one version carefully and then check the relevant clauses and articles in the successive versions. Instead, a researcher must review the entirety of at least three of the four constitutions, checking to see, for example, if the provision about the allocation of taxation for the payment of ministers,¹⁸¹ the requirement that legislators be Protestant,¹⁸² or the clause granting freedom of conscience to jurors¹⁸³ has been altered, deleted, or simply moved. At an average length of a little less than that of the Constitution of the United States, skimming the four Georgia constitutions for religion related provisions—as anyone who has attempted to thoroughly skim that much contract can attest to—requires more than a negligible amount of time.

Another layer of complexity becomes apparent when one considers that it is not only the state constitutions that are relevant. The state and local laws in place under each constitution, presumably consistent with the state constitution, provide important evidence of the meaning of the constitutions themselves. In Georgia this is most powerfully illustrated by the laws for the support of religion and religious education that were enacted in the 1780s.¹⁸⁴ With this information, interpretation of the text of the Georgia constitutions becomes clearer; without it, as the opinions discussed have shown, interpretation of the Georgia constitutions threatens to become inaccurate historical flavor.

180. *See supra* note 58.

181. GA. CONST. of 1798, art. IV, § 10.

182. GA. CONST. of 1777, art. IV.

183. GA. CONST. of 1777, art. XLIII.

184. Whitescarver, *supra* note 85, at 458–62.

As it would in any contemporary research project, the state and local law aspect of the research more than doubles the amount of time that must be invested to retrieve a sound answer. This relates to the second hurdle to using state historical law to interpret the Religion Clauses, the nature of historical legal records. Unlike state constitutions, which are relatively short and of which we have comparatively complete records, historical state (and local) laws are far more difficult to research. In Georgia, state level laws are available in old, poorly-indexed volumes but not online or in any electronically searchable format. To the extent that local laws may survive, they are not available electronically, mentioned in the most thorough historical works, or known to the state's law librarians. Archival research may be able to unearth more, but clearly this is beyond the scope of what a Justice can have done in any one state, let alone all thirteen. To further grasp the volume of labor involved in researching such records, one must also note that the researcher is often in the time-consuming predicament of trying to prove a negative (for example, that *no* state or local ordinances permitted, required, or banned school prayers or Sunday closing laws). Of course, answering such questions conclusively is simply not possible, but even performing the due diligence necessary to rule out the possibility of a conclusive answer is in itself a difficult task.

The difficulty of researching and sometimes even locating relevant records applies even at the constitutional level. Keeping in mind that the record of the *national* Congressional debate on the wording and meaning of the Religion Clauses is a scant five pages,¹⁸⁵ it should come as no surprise that we have much less for many relevant state events. Knowledge of the law's relationship to religion in early Georgia is severely limited by the lack of official records from this period. While copies of most of the landmark legal documents, such as the colony Charter¹⁸⁶ and the act establishing the Church of England during the Colonial Period,¹⁸⁷ survive, more quotidian records with the potential to shed light on how these laws were or were not enforced are lacking. As

185. JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., *RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 196–200* (2001).

186. Coleman, *Frontier Haven*, *supra* note 57.

187. THE COLONIAL RECORDS OF THE STATE OF GEORGIA, *supra* note 61, at 508–15.

one can only discover by taking the time to search for them, there are virtually no surviving records from any of Georgia's state constitutional conventions and legislative debates from the founding era, and such fragments as may exist are in state archives.¹⁸⁸ Those official court and legislative records which were made and kept were almost entirely lost or destroyed during the Revolutionary War or the Civil War.¹⁸⁹

Even that trusted resource of the common lawyer's tool box, case law, proves nearly useless. Almost all court records made before 1779 have been lost or destroyed, and there was no systematic attempt to record or publish judicial decisions until about 1805.¹⁹⁰ Cases that survive on an ad hoc basis have not been gathered into a comprehensive resource, published, made available online, or included in legal databases.¹⁹¹

The final difficulty in using Georgia legal history as an aid to interpreting the Religion Clauses is the complexity of the relationship between the state and national laws, politics, and circumstances. As with the law in many of the original states, none of the Georgia constitutions served as a model for the First Amendment; nor does it appear that Georgia modeled her religious freedom clauses after those of the First Amendment. Therefore, while some of the phrasing bears a resemblance to that of federal Constitution, it is not obvious that comparing the meaning of the Georgia constitution to the national Constitution is a matter of comparing apples to apples. In some states this obstacle may be overcome by consulting the public writings of leaders who addressed the question of how their own state's constitution compared to the Religion Clauses or what phrasing or provisions should be employed.¹⁹² But in Georgia none of the statesmen active in the passage and debate

188. Such official records as have survived and published can, for the most part, be found in either Chandler's *Colonial Records* or *The Revolutionary Records of the State of Georgia*. Chandler, comp., *REVOLUTIONARY RECORDS* (1908); *THE COLONIAL RECORDS OF THE STATE OF GEORGIA*, *supra* note 61, at 3–4.

189. *THE COLONIAL RECORDS OF THE STATE OF GEORGIA*, *supra* note 61, at 3–4.

190. WARE, *supra* note 73, at 53, 91–92.

191. Westlaw's case history of Georgia, for example, dates only to 1846 for state supreme court cases and 1906 for the state's appeals courts.

192. Virginia, which enjoys the illumination cast by prolific writers James Madison and Thomas Jefferson, is the best example.

over the First Amendment were likewise active in Georgia. Unlike Virginia and to some extent Massachusetts and New York, Georgia history does not enjoy the illumination rendered by leading intellectuals and politicians whose statements and writings survive to explain their understandings of various policies.

It is true that in some states the writings of politicians prominent on both the national and the state level can bring to light interesting parallels and positions arguably helpful to interpreting the meaning of the Religion Clauses. Yet even this resource does not lead to a simple solution.¹⁹³ Barring identical language, the applicability of a state debate on a state provision to a national debate on a national issue is contentious and difficult. Even when sufficient care is taken to ensure appropriate use of evidence from state law and politics, a problem of disproportionate sources of evidence becomes apparent. The public meaning of the Religion Clauses in the state of Georgia is no less relevant than that of Virginia, but our ability to discover it is nonetheless comparatively limited.

To the extent that records in Georgia are missing, an understanding of how her history bears on the Religion Clauses remains admittedly incomplete. For example, the absence of drafting records from her many constitutional conventions leaves unanswerable questions about the meaning of Georgia's various free exercise clauses. Yet, insofar as the obstacles to a better understanding of the Religion Clauses include the labor that it takes to unearth the historical records and apply them to a case with the requisite precision and accuracy, application of state legal history to the Religion Clauses may actually be more difficult in states in which more complete records exist.

All these factors, the complexity of state law across time and levels of government, the founding-era legal records that are difficult to find and search, and the complexity of determining the relevance of state enactments to the Religion Clauses, contribute to the difficulty of accurately bringing state legal history to bear on Constitutional

193. For example, James Madison's opinion is not a matter of agreement. In *Arizona Christian School Tuition Org. v. Winn*, 563 U.S. ___, 131 S. Ct. 1436 (2011), Justice Kennedy and Justice Kagan agreed upon the *relevance* of Madison's Memorial and Remonstrance Against Religious Assessments but disagreed about its *meaning* relative to interpretation of the Establishment Clause. See *Winn*, 563 U.S. at ___, 131 S. Ct. at 1461.

interpretation. Most important and easiest to overlook is the immense investment in time that researching the issues requires because of the combination of these factors. Even if and when Georgia founding-era legal history can be determined with sufficient accuracy, it is not the work of a day to find and interpret it. And even a day's work—because it implicates twelve additional days' work—is more research time than the Court can allocate to such a question.

CONCLUSION

The most resounding lesson to be learned from this history and the cases that attempt to rely upon it is that, if the Court is to rely on state history at all in its interpretation of the Constitution, it must do so based on a more thorough understanding of that history. Citing a provision—whether correctly or not—in support of one's argument is not sound reasoning when Georgia law as a whole is contrary to a Justice's argument. The legal history of Georgia's treatment of religion is complex, shrouded in layers of obscurity, and without a prominent historical figure to serve as its spokesperson. To gain insight on the meaning of Georgia history in its own right requires a willingness to wade through the history and carefully analyze the information we have and the development that occurred over the relevant period. Even then, the answers to be found are not simple, but at least they have a basis in history and law and therefore may help in the search towards an understanding of the Religion Clauses of the First Amendment. To use Georgia history—or the history of any one state—in support of constitutional interpretation requires no less care.

Indeed, the Supreme Court's task requires a great deal more care because this process must be repeated thirteen times. To do less, however, is to risk multiplying the inaccuracies and unsupported assertions brought to light in this article. Unless the Court (and courts more generally) can find the resources, either in their own offices or through new scholarship provided by others, to research thoroughly, they should cease to rely upon the thin historical evidence that has been used to date. The obstacles to correctly marshaling history in support of the Supreme Court's analysis to the many specific questions of applying the Religion Clauses are great; yet the risks inherent in inadequate use of history are greater. Under the current circumstances, the Court should

leave state legal history to the history books and pursue less onerous approaches to interpretation of the Religion Clauses. In this particular situation, a little history is worse than none at all.

