

Power and the Subject of Religion

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Under the First Amendment, "Congress shall make no laws respecting an establishment of religion or prohibiting the free exercise thereof." Nevertheless, congressional actors have on occasion enacted laws that expressly make religion the subject of legislation. Many scholars justify these laws on the grounds that Congress at the time of the Founding had an implied power to legislate on religion if necessary and proper to an enumerated end.

Professor Lash argues that the "implied power" theory cannot withstand historical scrutiny. Whatever "implied power" arguments may have emanated from the original Constitution, those arguments were foreclosed by the adoption of the First Amendment. However, the enactment of section 5 of the Fourteenth Amendment does enable Congress to legislate—in a limited scope—on religious matters.

I. INTRODUCTION

What precisely is the source of power enabling Congress to enact a law on the subject of religion? I am not referring to Congress's power to make law that incidentally affects religion, but rather law that expressly makes religion the subject of legislation. An example of the former would be a law prohibiting the use of peyote that has the incidental effect of prohibiting religious use of that same drug.¹ An example of the latter would be a law requiring employers to accommodate the religious beliefs of employees.² Although laws having an

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¹ After *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), both federal and state governments have broad power to enact generally applicable laws that incidentally burden religious exercise.

² See Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-2(a), 2000e-2(j) (1994) (banning religious discrimination in employment and requiring employers to reasonably accommodate the religious practices of their employees if they can do so without undue hardship).

incidental effect on religious exercise raise constitutional problems of their own,³ the second type of law—law that makes religion itself the subject of legislation—raises unique and difficult questions of congressional authority.

Congress has long believed that it has some degree of power to regulate on the subject of religion: the United States Code is riddled with such laws. From the creation of the congressional chaplaincy in 1789,⁴ to the 1864 Civil War exemptions from military service for religious objectors,⁵ to the Prohibition-era exemptions for sacramental use of alcohol,⁶ each generation of legislators has enacted laws that expressly address—and regulate—some form of religious exercise.⁷

³ In the years since the Court's decision in *Smith*, a great deal of scholarly attention has focused on the issue of religious freedom from laws incidentally burdening religious exercise. See Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 94–96 (1990); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 1; Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 754 (1992) (describing the academic commentary on *Smith* as “mostly critical”); Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). I have also addressed this subject. See Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. L. REV. 1106 (1994).

⁴ Act of Sept. 22, 1789, ch. 17, 1 Stat. 70–71.

⁵ Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 6, 9.

⁶ Prohibition of Intoxicating Beverages, ch. 85 § 3, 41 Stat. 307, 308 (1919), *repealed by* Liquor Law Repeal and Enforcement Act, ch. 740, § 1, 49 Stat. 872, 872 (1935).

⁷ To cite but a few additional examples: the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 allows states to distribute their federal welfare block grants to charitable and other private groups, including religious organizations. See 42 U.S.C. § 604a (Supp. 1996). The Act further provides: “No funds provided directly to institutions or organizations to provide services and administer programs . . . shall be expended for sectarian worship, instruction, or proselytization.” *Id.* Laws regulating the armed forces permit members to wear religious apparel. See 10 U.S.C. § 774 (1994). Ministers are exempt from compulsory military training and service. See 50 U.S.C. § 456(g) (1994). The American Indian Religious Freedom Act provides an exemption from all state or federal laws for the use of peyote by Native Americans. See 42 U.S.C. § 1996a(b)(1) (1994). The Fair Housing Act, 42 U.S.C. § 3607 (1994), and the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 337, 363 (codified at 42 U.S.C. § 12187 (1994)), both contain exemptions for religious organizations. Federal law provides criminal sanctions against anyone who defaces or destroys religious real property because of the religious character of that property, or intentionally obstructs by force or threat of force someone's free exercise of his religious beliefs. See 18 U.S.C. § 247 (1994). The Equal Access Act requires equal access for religious expression in public secondary schools. See Equal Access Act of 1984, Pub. L. No. 98-377, 98 Stat. 1302, 1302–04 (codified as amended at 20 U.S.C. §§ 4071–4074 (1994)). Federal copyright law

Although the Supreme Court has limited congressional power to regulate religious matters,⁸ a majority of the Court has consistently indicated that both state and federal governments have *some* power to regulate this area.⁹ Indeed, the Court has characterized nonmandatory accommodation of religion¹⁰ as “follow[ing] the best of our traditions.”¹¹ In the recent case *City of Boerne v.*

provides exemptions for materials used for religious purposes. *See* 17 U.S.C. § 110(3)–(4) (1994). Federal food inspection laws contain exemptions for the ritual slaughter of animals and the preparation of food in accordance with religious practices. *See* 7 U.S.C. §§ 1902, 1906 (1994). There are many others examples. *See generally* James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445–47 & nn. 217–34 (detailing lower courts’ applications of the Free Exercise Clause and noting that the lower courts’ positions mirror that of the government).

⁸ *See* *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (striking down in part the Religious Freedom Restoration Act as beyond congressional power under § 5 of the Fourteenth Amendment); *Board of Educ. v. Grumet*, 512 U.S. 687 (1994) (striking down special school district for Hasidic village); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (invalidating on establishment grounds a state sales tax exemption for religious literature); *Estate of Thornton v. Caldore, Inc.*, 472 U.S. 703 (1985) (striking down a law requiring employers to accommodate Sabbath day beliefs of employees).

⁹ *See* *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (upholding the Equal Access Act); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding Title VII exemptions for employment by religious entities); *Walz v. Tax Comm’n*, 397 U.S. 664 (1970) (upholding tax exemptions to religious organizations); *United States v. Seeger*, 380 U.S. 163 (1965) (upholding, but broadly construing, the religious exemptions in the Universal Military Training and Service Act); *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding release time program); *see also* *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 144–45 (1987) (“This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.”); *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring) (stating that government is permitted “to take religion into account when necessary to further secular purposes unrelated to the advancement of religion, and to exempt, when possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed”) (footnote omitted). Justice Stevens appears to be the only Justice opposed to all free exercise accommodations. *See* *City of Boerne*, 117 S. Ct. at 2172 (Stevens, J., concurring) (arguing that discretionary religious accommodations violate the Establishment Clause).

¹⁰ By “nonmandatory,” I refer to legislation that is neither required nor forbidden by the Constitution.

¹¹ *See* *Zorach*, 343 U.S. at 313–14 (“We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.”); *see also* *Employment Div., Dep’t of Human Resources v. Smith*, 494 U.S. 872, 890 (1990) (stating that religious exemptions from generally applicable laws are most often a matter of legislative discretion, not constitutional mandate); *Amos*, 483 U.S. at 338 (“[Our cases teach] that there is ample room for accommodation of religion under

Flores,¹² although the Court struck down part of the Religious Freedom Restoration Act (RFRA) as beyond congressional power under section 5 of the Fourteenth Amendment,¹³ once again a majority of the Supreme Court indicated that Congress has some degree of power to regulate on behalf of religion. With the exception of Justice Stevens,¹⁴ all of the Justices in *Boerne* either wrote or

the Establishment Clause.”); *Gillette v. United States*, 401 U.S. 437, 453 (1971) (“[I]t is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with ‘our happy tradition’ of ‘avoiding unnecessary clashes with the dictates of conscience.’”) (citation omitted); *Walz*, 397 U.S. at 673 (“The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.”).

The Supreme Court has also permitted, if not encouraged, laws targeting religion that seek to separate church and state beyond the degree otherwise mandated by the federal Constitution. A number of state courts have interpreted their state constitutions to require stricter separation of church and state than that mandated by the federal Constitution. *See, e.g.*, *Witters v. Washington Dep’t of Servs. for the Blind*, 474 U.S. 481 (1986), *reaff’d sub nom. Witters v. State Comm’n for the Blind*, 771 P.2d 1119 (Wash. 1989) (holding that there was no violation of federal Establishment Clause in case of state financial assistance to visually disabled student attending Christian college for purpose of studying for the ministry, but, on remand, same assistance struck down by state supreme court on ground of state constitutional provision prohibiting use of public money for religious instruction); *see also California Teachers Ass’n v. Riles*, 632 P.2d 953 (Cal. 1981); *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983) (striking down loaning of textbooks by public school districts to parochial schools even though U.S. Supreme Court has upheld this practice under the federal Establishment Clause); *Opinion of the Justices (Choice in Education)*, 616 A.2d 478, 480 (N.H. 1992) (advising that a school choice program that includes religious schools would violate the New Hampshire state constitution).

¹² 117 S. Ct. 2157 (1997).

¹³ The decision focused on that part of the Religious Freedom Restoration Act (RFRA) that required the states to accommodate religious exercise. It was this aspect of RFRA that went beyond congressional power under § 5. The Court did not address that aspect of RFRA which applied against the federal government and, presumably, remains in effect. The Court, however, may be poised to strike down this aspect as well. *See In re Young*, 82 F.3d 1407 (8th Cir. 1996), *vacated and remanded in light of the Boerne decision*; *Christians v. Crystal Evangelical Free Church*, 117 S. Ct. 2502 (1997) (vacating lower court decision upholding claim under RFRA against application of federal bankruptcy law). Lower federal courts that have addressed the issue are split. *Compare Alamo v. Clay*, 137 F.3d 1366 (D.C. Cir. 1998) (assuming “without deciding, that the RFRA applies to the federal government notwithstanding the Supreme Court’s decision in *City of Boerne*”), *with Robinson v. District of Columbia Government*, No. Civ. A. 97-787 (GK), 1997 WL 607450, at *1 n.1 (D.D.C. July 17, 1997) (rejecting the plaintiff’s RFRA claims—in a challenge to the District of Columbia government’s actions as an employer—on the grounds that “the Supreme Court’s decision in *City of Boerne v. Flores*, declared that act unconstitutional”) (citation omitted).

¹⁴ Justice Stevens is the only member of the current Court who believes that all legislative attempts to expressly accommodate religion are unconstitutional. *See City of Boerne*, 117 S. Ct. at 2172 (Stevens, J., concurring).

joined opinions indicating that Congress does have power to make special provisions for religion, as long as it does so within certain limits.¹⁵ In the weeks following the *Boerne* decision, a number of scholars testified that RFRA could be reenacted in much the same form as long as Congress relied on some other power besides section 5.¹⁶ Indeed, among legal scholars, there is a remarkable

¹⁵ See *id.* at 2163 (Kennedy, J., plurality opinion) (stating that Congress “can enact legislation under § 5 enforcing the constitutional right to the free exercise of religion”); *id.* at 2174 (Scalia, J., concurring) (interpreting the historical intent behind the Free Exercise Clause as allowing, but not requiring, legislative accommodation of religion); *id.* at 2179 (O’Connor, J., dissenting) (arguing that the original framers of the First Amendment anticipated that legislatures would have an affirmative duty to protect religious exercise).

¹⁶ See, e.g., House Committee on the Judiciary, *Subcommittee Hearing on “Protecting Religious Freedom After Boerne v. Flores”* (visited Dec. 4, 1998) <<http://www.house.gov/judiciary/222308.htm>> (testimony of Douglas Laycock, Associate Dean for Research, University of Texas Law School given July 14, 1997) (citing, among other sources of congressional power to reenact religious freedom legislation, the Treaty Clause, the Commerce Clause, the Spending Clause, and limited use of § 5 of the Fourteenth Amendment); *Protecting Religious Freedom after Boerne v. Flores: Testimony to the Subcomm. on the Constitution of the House Comm. On the Judiciary* (July 14, 1997) available in 1997 WL 11234759 (testimony of Thomas C. Berg, Associate Professor of Law, Cumberland Law School, Samford University) (citing the Treaty Clause, the Commerce Clause, the Spending Clause, and limited use of § 5 of the Fourteenth Amendment); *id.* at 1997 WL 11234761 (testimony of Mark E. Chopko, General Counsel, U.S. Catholic Conference) (citing the Spending Clause, Commerce Clause, and the Necessary and Proper Clause).

Even those scholars who argued that RFRA was unconstitutional as applied against the states generally conceded that Congress has some degree of power to regulate religion. See Jay Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1625 n.401 (1995) (rejecting the idea that Congress has power to require states to accommodate religion, but noting that “Congress has a much stronger claim under the Necessary and Proper Clause” to provide “religious exemption[s] for activities legitimately regulated under its enumerated powers”); Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 76 (1995) (“Although the Court’s Establishment Clause doctrine forbids the government to promote religion, for example, it has been construed to permit religion-based exemptions from governmentally imposed burdens.”); Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357, 363 (1994) (“The First Amendment does not empower Congress to regulate federal law in order to achieve religious liberty unless it does so pursuant to an enumerated power.”); Ira C. Lupu, *Of Time and the RFRA: A Lawyer’s Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 213 (1995) (arguing that constitutional difficulties raised by the enactment of RFRA have to do with its application to the states, not the general power of Congress to accommodate religion under a separately enumerated power); Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2357 (1997) (“There may be distinctively federal domains—say, in the issuance of money, in regulating the armed forces, in making rules for its own legislative sessions, in

degree of consensus that the government (both state and federal) has some degree of discretion to regulate on the subject of religion, whether by direct regulation (like Title VII's anti-religious discrimination provisions), or by exempting religiously motivated conduct from otherwise generally applicable law.¹⁷

governing territories, and so on—in which Congress can constitutionally make laws intermeddling with religion.”).

¹⁷ See, e.g., JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY 123 (1995) (“Restorative or equalizing accommodations for religion that do *not* meaningfully interfere with religious freedom should be permissible . . .”); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 238 (1st ed. 1986) (stating that accommodation is allowed if its purpose is to protect religious freedom); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 126 (1995) (arguing that religious liberty issues generally, and accommodation in particular, should be left to the political process); see also Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 62 n.274 (1994) (“Congress has power under the Necessary and Proper Clause . . . to take steps to ensure that free exercise values are respected in any federal program.”); Bybee, *supra* note 16, at 1625 n.401 (rejecting the idea that Congress has power to require states to accommodate religion, but noting that “Congress has a much stronger claim under the Necessary and Proper Clause” to provide “religious exemption[s] for activities legitimately regulated under its enumerated powers”); Conkle, *supra* note 16, at 76 (“Although the Court’s Establishment Clause doctrine forbids the government to promote religion, for example, it has been construed to permit religion-based exemptions from governmentally imposed burdens.”); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1267 (1994) (“To observe that the burden or nobility of religious belief offers no grounds for constitutionally privileging religion is not to deny the capacity of legislative bodies to accommodate religious beliefs or even help religious institutions to prosper, where good reasons exist for so doing.”); Hamilton, *supra* note 16, at 363 (“The First Amendment does not empower Congress to regulate federal law in order to achieve religious liberty unless it does so pursuant to an enumerated power.”); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996) (explaining that permissive religious exemptions are consistent with “substantive neutrality”); Lupu, *supra* note 16, at 213 (“Congress presumably has affirmative power to protect religious freedom; whatever power authorizes the underlying legislation will support an accommodation of religious liberty as part of the legislative scheme.”); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 323 (1991) (“A conclusion that the Free Exercise Clause does not require a particular result does not mean that the Establishment Clause necessarily prohibits that result. . . . [T]here should be some space for permissible legislative action between the two constitutional commands.”); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 140 (1992) (approving of the Court’s interpretation of the Establishment Clause that allows the government to “exempt religious organizations from a regulatory burden, even when not required to do so under the Free Exercise Clause.”); Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589, 677 n.358 (1996) (“The relevant enumerated power authorizing Congress to apply [RFRA] . . . is that which authorizes each federal law, regulation

Despite this remarkable degree of consensus,¹⁸ however, it is not at all clear where Congress gets its power over religious matters.¹⁹ No text in the Constitution expressly grants the federal government power over the subject. The religion clauses of the First Amendment, although they address the subject of religious freedom, do so in terms of limiting, not granting, power.²⁰ Twentieth century constitutional lawyers, of course, are not deterred by the lack of an enumerated power; the common presumption is that Congress has power to address the subject of religion as long as doing so is “necessary and proper” to advance an enumerated responsibility.²¹ Although this reasoning has justified broad federal power under the Commerce Clause since the New Deal,²² it is not

or policy from which a free exercise exemption is sought. . . . Congress needs no *independent* enumerated power to pass laws protecting the free exercise of religion against federal interference.”).

¹⁸ Even those who argued that RFRA was unconstitutional as applied against the states, generally conceded that Congress had some degree of power to regulate religion. *See* Bybee, *supra* note 16, at 1625 n.401 (rejecting the idea that Congress has power to require states to accommodate religion, but noting that “Congress has a much stronger claim under the Necessary and Proper Clause” to provide “religious exemption[s] for activities legitimately regulated under its enumerated powers”); Conkle, *supra* note 16, at 76 (“Although the Court’s Establishment Clause doctrine forbids the government to promote religion, for example, it has been construed to permit religion-based exemptions from governmentally imposed burdens.”); Hamilton, *supra* note 16, at 363 (“The First Amendment does not empower Congress to regulate federal law in order to achieve religious liberty unless it does so pursuant to an enumerated power.”); Lupu, *supra* note 16, at 213 (arguing that constitutional difficulties raised by the enactment of RFRA have to do with its application to the states, not the general power of Congress to accommodate religion under a separately enumerated power); Rubinfeld, *supra* note 16, at 2357 (“There may be distinctively federal domains—say, in the issuance of money, in regulating the armed forces, in making rules for its own legislative sessions, in governing territories, and so on—in which Congress can constitutionally make laws intermeddling with religion.”).

¹⁹ The Supreme Court, although often referring to such power, has never directly identified the enumerated source of federal power to regulate on the subject of religion. *See supra* note 16. Generally, the Court avoids any discussion of precisely where the power comes from, and instead simply asserts that the religion clauses are not so restrictive as to prevent exercises of benevolent neutrality. *See, e.g.,* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 334 (1987). *But see* Welsh v. United States, 398 U.S. 333, 371 (1970) (White, J., dissenting) (proposing the Necessary and Proper Clause as a source of congressional power to accommodate religion).

²⁰ *See* U.S. CONST. amend. I. (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”); *see also infra* note 75 and accompanying text.

²¹ *See* sources cited *supra* note 16.

²² *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).

immediately clear why the same approach works when it comes to religion. Whatever else the New Deal accomplished in terms of federal power, it has never been understood to have granted or expanded federal power to regulate First Amendment subjects.²³ Thus, explaining federal power to regulate religion seems to warrant either a rethinking (and expansion) of the New Deal's impact on federal power²⁴ or a serious investigation into congressional powers that pre-existed the New Deal. Unfortunately, the issue has received little attention—most scholars assumed that Congress's "necessary and proper" power reaches religion just as easily as it reaches private racial discrimination and home grown wheat.²⁵

Perhaps one reason for the lack of scholarly treatment of this issue is that, until recently, the vast majority of legislation on the subject of religion arguably was required by the Constitution. For example, from 1973 to 1990, the Supreme Court occasionally interpreted the Free Exercise Clause to require exemptions from otherwise generally applicable laws.²⁶ Both state and federal governments were obligated to provide a religious exemption from a generally applicable law in any case in which there was no compelling reason to bind the religious objector. Under this interpretation of the Free Exercise Clause, Congress had good reason to write express free exercise exemptions into the law, if only as a preemptive strike against later constitutional litigation.²⁷ Similarly, during this

²³ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

²⁴ This is something the current Court may be willing to undertake, but not in the direction of adding to federal power under the Necessary and Proper Clause. See *Printz v. United States*, 117 S. Ct. 2365 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

²⁵ Scholars asserting that Congress has such power under separately enumerated powers by way of the Necessary and Proper Clause invariably make the assertion with no more than one or two sentences of explanation. See sources cited *supra* notes 17 & 19. One issue that has received sustained attention is whether the Establishment Clause permits Congress to promote or advance the cause of religion. Compare CHESTER JAMES ANTIEAU ET AL., *FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES* (1964), and GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* (1987), with LEVY, *supra* note 17, and Douglas Laycock, "Non-Preferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1987). The general discussion in these works, however, has to do with the limits of the Establishment Clause, and not whether Congress has power to promote the free exercise of religion.

²⁶ See *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); see also *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) ("In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.").

²⁷ See *Welsh v. United States*, 398 U.S. 333, 369–71 (1970) (White, J., dissenting) (noting that even if the Free Exercise Clause does not require exempting devout believers from

same general period, the Supreme Court interpreted the Establishment Clause to prevent (in many cases) participation by religious groups in general government benefits programs.²⁸ Under this interpretation of the Establishment Clause, Congress might wish to expressly exclude religious groups from government benefits programs in order to comply with the restrictions of the Establishment Clause.²⁹

Most recently, however, the Supreme Court has pared back the scope of both religion clauses and replaced constitutional mandates with political discretion. In *Employment Division v. Smith*,³⁰ the Court held that, in all but the narrowest of circumstances, religious exemptions are a matter of legislative choice, not constitutional right.³¹ As a result of *Smith*, exemptions previously thought to be required by the Free Exercise Clause now exist purely as a matter of legislative grace.³² Or, put another way, after *Smith* accommodation of religion is mainly a question of discretionary legislative power.³³

the military, it was "necessary and proper" in exercising its military powers for Congress "to take account of the First Amendment and to avoid possible violations of the Free Exercise Clause"); see also Robin-Vergeer, *supra* note 17, at n.621; Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992). For a general discussion regarding statutes enacted to track the requirements of the Constitution, see Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1 (1993).

²⁸ See, e.g., *School Dist. v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

²⁹ For example, a public school might wish to limit the use of its facilities by community religious organizations in order to avoid advancing the cause of religion in violation of the Establishment Clause. See, e.g., *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

³⁰ 494 U.S. 872 (1990).

³¹ See *id.* at 890.

³² Following the *Smith* decision, a number of state courts began to decide free exercise claims under their own constitutions. See, e.g., *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 236 (Mass. 1994); *State v. French*, 460 N.W.2d 2, 8 (Minn. 1990). See generally Stuart G. Parsell, Note, *Revitalization of the Free Exercise of Religion Under State Constitutions: A Response to Employment Division v. Smith*, 68 NOTRE DAME L. REV. 747 (1993) (arguing that state courts have increasingly relied on state Free Exercise Clauses to avoid the Court's narrow reading of the federal Free Exercise Clause). Not all changes, however, were favorable towards religion. Following *Smith*, some administrative accommodations were withdrawn. See, e.g., 62 Fed. Reg. 3,534, 3,535 (Jan. 23, 1997) (regarding post-*Smith* revocation of exemption for Amish and Sikhs from requirement of wearing hard hats on construction sites).

³³ According to Professor Ira Lupu:

By writing courts out of, and all other branches into, the accommodation process, *Smith* eliminates constitutional compulsion from the field and replaces it with political discretion

Similarly, recent Supreme Court decisions appear to allow legislative discretion to regulate religion in an effort to maintain the separation of church and state. In earlier “*Lemon*-period”³⁴ cases like *Aguilar v. Felton*³⁵ and *School District of the City of Grand Rapids v. Ball*,³⁶ the Court interpreted the Establishment Clause to forbid participation by religious groups in generally funded government programs due to the threat of excessive government entanglement with religion. However, since the late 1980s, the Court has moved away from the *Lemon* test³⁷ and increasingly interprets the Establishment Clause to require no more than government “neutrality” in the disbursement of government benefits.³⁸ For example, the Court recently reversed the holding in

to respond to the special claims of religion. The zone of accommodation has thus grown wider and perhaps more permissive than at any time in the past thirty years. The scope of such accommodation is crucial to religious persons and institutions seeking to advance claims of religious exemption, because they are now directed to turn exclusively to nonjudicial bodies for redress.

Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PENN. L. REV. 555, 574 (1991) (footnotes omitted); see also *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990) (holding that religious-based tax exemptions are not required under the Free Exercise Clause); *Walz v. Tax Comm’n*, 397 U.S. 664 (1970) (holding that religious-based tax exemptions are permissible under the Establishment Clause).

³⁴ See *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (striking down Pennsylvania statutes which provided for the use of public school funding to supplement teachers’ salaries and other educational resources at parochial schools).

³⁵ 473 U.S. 402 (1985) (striking down the use of federal funds to pay for the salaries of public school teachers who teach in parochial schools).

³⁶ 473 U.S. 373 (1985) (striking down use of public school funds for a “shared time” program in which public school teachers “leased” classrooms from religious schools for the purposes of remedial education).

³⁷ In *Lemon*, the Court established a three-pronged test for the constitutionality of statutes “respecting” religion. See 403 U.S. at 612. “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” *Id.* at 612–13 (citation omitted).

³⁸ For example, in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), *reaff’d on state constitutional grounds sub nom.* *Witters v. State Comm’n for the Blind*, 771 P.2d 1119 (Wash. 1989), the Court held that the federal Establishment Clause does not prevent a theology student from using neutrally distributed educational funds to subsidize his religious vocational education. Similarly, in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Court held that the Establishment Clause does not prevent a federally funded sign language interpreter from accompanying a deaf student into a religious school, when the presence of the interpreter is due to the choices of the student and not the state. Most recently, the Court has held that in cases involving religious expression, the Establishment

Aguilar and held that the Establishment Clause allows religious schools to receive the same Title I educational assistance provided to secular public and private schools.³⁹ However, even as the Court has reduced the restrictions of the Establishment Clause, it has left open the possibility that Congress or the states may require stricter separation of church and state than that mandated by the Establishment Clause. For example, in *Witters v. Washington Department of Services for the Blind*,⁴⁰ the Court held that the Establishment Clause did not forbid a student from using state vocational assistance monies for tuition at a religious college.⁴¹ The Court then remanded the case to state court—which promptly denied the aid under the “stricter” provisions of the Washington Constitution.⁴² The ultimate result in *Witters*, then, was to allow states the discretion to impose non-establishment norms not otherwise required by the federal Establishment Clause.⁴³ Presumably, the federal government has no less discretion than the states on this matter. In fact, the Supreme Court has held that the restrictions placed on the federal government by way of the First Amendment are coextensive with the restrictions placed on the states by way of the Fourteenth.⁴⁴ Thus, if states have some degree of discretion to pursue their

Clause does not require—and the Free Speech Clause forbids—discrimination against a religious viewpoint. *See* *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Rosenberger v. Rector of Va.*, 515 U.S. 819 (1995); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). Although these cases limit the degree of government discretion to avoid entanglements between church and state (real or perceived), the Court has not indicated whether this rule will apply in cases not involving expressive activity. Indeed, it would be remarkable if it did, for it would amount to moving from “constitutionally forbidden” to “constitutionally required” in the space of about 11 years. To the extent that *Rosenberger* represents the Court’s narrowing of the requirements of the Establishment Clause, its ultimate effect will be an increase, not a decrease of government discretion to include or exclude religious organizations in generally funded government benefits programs.

³⁹ *See* *Agostini v. Felton*, 117 S. Ct. 1997, 2003 (1997).

⁴⁰ 474 U.S. at 481–90, *reaff’d on state constitutional grounds sub nom.* *Witters v. State Comm’n for the Blind* [hereinafter *Witters II*], 771 P.2d 1119 (Wash. 1989).

⁴¹ *See id.*

⁴² *See* *Witters II*, 771 P.2d at 1119, *cert. denied*, 493 U.S. 850 (1989).

⁴³ *See generally* Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625 (1985) (describing “the more restrictive stance taken by many state courts interpreting state establishment clauses”).

⁴⁴ *See* *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231–32 (1995) (“[T]he Constitution imposes upon federal, state, and local governmental actors the same obligation to respect the personal right to equal protection of the laws.”); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (“[I]t would be unthinkable that the same Constitution would impose a lesser duty [than that on the states] on the federal government.”).

“affirmative obligation” to avoid the establishing of religion,⁴⁵ so does the federal government.

This gradual shift in the Court’s interpretation of both religion clauses has resulted in a jurisprudential gap: laws once arguably required by the Constitution now appear to be a matter of political choice. When it comes to the federal government, however, exercising such a choice requires an enumerated power. The existence and scope of such power has never been—has never before had to be—adequately explained. This article is an attempt to do just that. I should say from the outset that I believe there is such a source of power. Locating it, and tracing its contours, however, is more difficult than one might suppose and deserving of far deeper analysis than the subject has previously received.

Part II of this article explores the possibility that the original Constitution contained an implied power over the subject of religion. Although the most plausible reading of the historical evidence suggests that no such power was granted, the evidence could support the position that the original Constitution granted Congress some degree of power to regulate on the subject of religion when necessary and proper to the advancement of an enumerated end.

Part III then considers the impact of the adoption of the First Amendment. The text of the First Amendment and the historical context in which it was enacted suggest that the two religion clauses added nothing to Congress’s power under Article I and instead were meant to foreclose the possibility that Congress’s necessary and proper powers might reach the subject of religion.

Part IV tests the conclusions of Parts II and III by taking a close look at the actions of the federal government in the period following the adoption of the First Amendment. Although there are some examples of Congress exercising power over the subject of religion, there are fewer unambiguous examples than often claimed and not enough to outweigh the remarkably consistent public interpretations of the religion clauses by those most closely involved with their enactment.

Finally, Part V (appropriately enough) discusses section 5 of the Fourteenth Amendment, and the possibility that this provision grants Congress a degree of power to regulate on the subject of religion. I conclude that section 5 is such a plausible source of congressional power, and that, to this extent, the Fourteenth Amendment altered the substantive content of the original First Amendment. This part concludes by comparing and contrasting federal power created under section 5 with the more commonly asserted power under the Necessary and Proper Clause. Because section 5’s grant of power is limited to measures

⁴⁵ See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O’Connor, J., concurring) (“[The Establishment Clause] imposes affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message.”).

protecting constitutionally defined religious liberty, Congress may not exercise power over the subject of religion even if necessary and proper to some other enumerated end.

II. THE CASE FOR AN UNENUMERATED POWER OVER THE SUBJECT OF RELIGION IN THE ORIGINAL CONSTITUTION

Had Congress undertaken to guaranty religious freedom, or any particular species of it, they would then have had a pretense to interfere in a subject they have nothing to do with. Each state, so far as the clause in question does not interfere, must be left to the operation of its own principles.

—James Iredell⁴⁶

The original Constitution contains no provision directly granting Congress power over the subject of religion. Although Article VI bans religious tests for federal office,⁴⁷ this provision was not understood to increase congressional power beyond the list of enumerated responsibilities in Article I.⁴⁸ Thus, if the original Constitution contained any degree of power over the subject of religion, such power existed only by implication; either as “necessary and proper” to advance an enumerated end,⁴⁹ or as an aspect of Congress’s plenary powers to

⁴⁶ Debate in North Carolina Ratifying Convention (July 30, 1788) [hereinafter Debate in North Carolina], *reprinted in* 5 THE FOUNDERS’ CONSTITUTION 89, 90 (Philip B. Kurland & Ralph Lerner eds., 1987).

⁴⁷ See U.S. CONST. art. VI, cl. 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”). See generally Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674 (1987) (discussing the Article VI ban on religious test and arguing that “all we need to know about the appropriate constitutional philosophy of religion: there is none”).

⁴⁸ See Debate in North Carolina, *supra* note 46 (statements of James Iredell). Some Antifederalists feared that the Test Clause implied the existence of power over religion not otherwise prohibited by the Constitution. See *Essay by Cincinnatus*, N.Y.J., Nov. 15, 1787, *reprinted in* 6 THE COMPLETE ANTI-FEDERALIST 13, 14 (Herbert J. Storing ed., 1981) (“This exception implies, and necessarily implies, that in all other cases whatever liberty of conscience may be regulated. For, though no such power is expressly given, yet it is plainly meant to be included in the general powers, or else this exception would have been totally unnecessary . . .”). The Federalists, of course, denied the existence of such implied power.

⁴⁹ U.S. CONST. art. I, § 8, cl. 18 (“The Congress shall have power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .”). Whether viewed as an aspect of the necessary and proper clause itself, or as an inherent aspect of the express grant of power, the result would be the same. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

tax and spend for the public welfare.⁵⁰

A. *The Possibilities of the Text*

To begin with, nothing in the original Constitution prohibits including laws on the subject of religion among the implied powers of Congress. In other words, it does no violence to the text of the original Constitution (prior to the First and Tenth Amendments) for Congress to regulate religion when doing so was “necessary and proper” to the achievement of an enumerated end. For example, under its original Commerce Clause power, it is textually plausible that Congress had power to prohibit state religious establishments if those establishments interfered with the free flow of commerce.⁵¹ Or, pursuant to a duly ratified treaty, Congress might have prohibited state laws interfering with the religious exercise of foreign dignitaries.⁵² Similarly, Congress might have established the First Church of the United States if it thought doing so would facilitate interstate commerce or enhance troop morale (providing a place of worship for soldiers far from their home state).⁵³ In fact, under a broad reading of the Tax and Spending

⁵⁰ U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .”).

⁵¹ Such laws might include state laws prohibiting the sale or distribution of religious materials critical of the official state religion (interfering with movement of goods), or laws prohibiting the practice of certain religions (interfering with the movement of persons). *See* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 204 (1824) (indicating that Congress may regulate purely local activity “incidental to the power expressly granted to congress”). In fact, prior to the adoption of the First and Tenth Amendments, Congress might have acted to prohibit local churches from discriminating on the basis of race, due to the impact on the interstate movement of persons. *See* *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding congressional regulation of private discrimination in hotels due to indirect impact on interstate commerce); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding congressional regulation of private discrimination in restaurants due to indirect impact on interstate commerce).

⁵² *See* U.S. CONST. art. II, § 2 (“[The Executive] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . .”); *id.* art. I, § 8 (“Congress shall have Power to . . . make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”); *id.* art. VI, cl. 2 (“This Constitution . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); *see also* *Missouri v. Holland*, 252 U.S. 416 (1920).

⁵³ *See* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). I am grateful to Robert Destro for raising the analogy between the establishment of a bank and the establishment of a

Clause, Congress could create and fund a national church if it felt that doing so promoted the general welfare of the Country—regardless of any nexus to an enumerated power.⁵⁴ Nothing in the text of Article I, of course, mandates such a broad reading of congressional power to regulate on the subject of religion.⁵⁵ Nevertheless, prior to the adoption of the First and Tenth Amendments, these kinds of religious regulations were textually plausible and arguably conformed with early interpretations of Congress's express and implied powers.⁵⁶

The fact that a reading is possible, however, does not necessarily make it the most plausible interpretation of the original implied powers of Congress. For example, those who proposed and ratified the original Constitution may have considered the issue and expressly disavowed any intent to bring the subject of religion within the reach of Congress. The text itself being ambiguous, the next logical step would be to inquire into whether those who proposed and ratified the original Constitution meant to include regulation of religion as one of various means available for the pursuit of enumerated ends.

B. *The Ratification Debates*

In fact, the subject of religion came up in a variety of ways in the debates over the proposed Constitution. For example, a number of Antifederalists criticized the document for its lack of any religious test and its failure to officially recognize the Deity.⁵⁷ The criticism was not aimed, however, at adding

church. See Robert A. Destro, *The Structure of the Religious Liberty Guarantee*, 11 J.L. & RELIGION 355, 358 (1995). In fact, a federal chaplaincy was established to serve the troops. See *infra* note 235 and accompanying text. There is a possibility that the Religious Test Clause, U.S. CONST. art. VI, cl. 3 (“[N]o religious test shall ever be required as a Qualification to any Office or public Trust under the United States.”), would have prevented the establishment of a national church. Even here, however, Congress could have subsidized independent religious contractors (local churches) and avoided the restrictions of the Clause (as was regularly done at the time to provide educational instruction to the Native Americans, see *infra* notes 188–89 and accompanying text). For a general discussion of the Test Clause, see Bradley, *supra* note 47.

⁵⁴ In *United States v. Butler*, the Supreme Court adopted the Hamiltonian view that the tax and spending power was not limited to those subjects enumerated in Article I, § 8, at least in regard to non-coercive exercise of the tax and spending power. See 297 U.S. 1 (1936).

⁵⁵ In fact, there is evidence that some of the founders objected to Marshall's broad reading of the Necessary and Proper Clause. See Raoul Berger, *The Founders' Views—According to Jefferson Powell*, 67 TEX. L. REV. 1033, 1067 (1989) (discussing Madison's criticism of Marshall's opinion in *McCulloch v. Maryland*).

⁵⁶ See *United States v. Butler*, 297 U.S. 1 (1936); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

⁵⁷ See, e.g., Debate in Massachusetts Ratifying Convention (Jan. 30, 1788) (statement of Col. Jones), reprinted in 4 THE FOUNDERS' CONSTITUTION, *supra* note 46, at 642, 643 (“[R]ulers ought to believe in God or Christ . . . one of his principle objections was, the

to the powers of Congress.⁵⁸ Instead, the writers argued that, absent the moral constraint of religious belief, federal officials would be free to follow their own selfish ambitions.⁵⁹ Similarly, without a provision protecting the rights of conscience, those religiously scrupulous of bearing arms might be forced to serve in the national military.⁶⁰ The purpose, then, of calls to add a constitutional acknowledgement of God and the rights of believers was to limit, not expand, the potential reach of the federal government.⁶¹ Indeed, the most common objection

omission of a religious test.”); see also *Essay By Samuel*, BOSTON INDEP. CHRON. & UNIVERSAL ADVERTISER, Jan. 10, 1788, reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 48, at 191, 193 (lamenting the fact that, in the new Congress “a Pagan, a Mahometan, a Bankrupt, may fill the highest seat, and any and every seat”); Debate in North Carolina, *supra* note 46, at 89.

⁵⁸ The author of the *Essay by Samuel*, *supra* note 57, at 195, criticizes the No Religious Test Clause and asks whether a state can subsist without adopting some system of religion. Although this could be read to imply that the author wanted Congress to have power over the subject, “Samuel” himself criticizes only the lack of provisions *acknowledging* God. *Id.* at 196. The *Letter by David* contains the clearest expression of Antifederalist support of government regulation of religion. See *Letter By David*, MASS. GAZETTE, Mar. 7, 1788, reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 48, at 246, 248 (“[I]t is not more difficult to build an elegant house without tools to work with, than it is to establish a durable government without the publick protection of religion.”). The letter, however, does not address the failures of the federal Constitution. Instead, it is a reply to a previous letter published in defense of the Constitution that called into question the general propriety of any government (state or federal) support for religion. See *id.* In addressing the specific idea of religious tests for public office, “David” repeats the common argument that religious tests act as a check on legislative activity. See *id.* at 248 & 249 n.3 (citing the example of no-establishment, religiously tolerant Rhode Island, where the legislators “have no principles of restraint”). Some pro-religion Antifederalists exhorted the new Congress to “recommend” that the states pursue education. See, e.g., Charles Turner, Speeches in the Massachusetts Ratifying Convention (Jan. 17 and Feb. 6, 1788), reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 48, at 217; see also The Northwest Ordinance, 1 Stat. 50 (1789).

⁵⁹ For example, Aristocrotis argued that, by failing to provide a religious test for public office “the grand convention hath dexterously provided for the removal of every thing that hath ever operated [sic] as a restraint upon government in any place or age of the world.” Aristocrotis, *The Government of Nature Delineated or An Exact Picture of the New Federal Constitution* (1788), reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 48, at 196, 207.

⁶⁰ See *Essays of Philadelphiensis*, PHILADELPHIA INDEP. GAZETTEER, Nov. 1787–Apr. 1788, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 48, at 107 (arguing that without a provision explicitly protecting the rights of conscience, Congress might force the religiously scrupulous to bear arms).

⁶¹ Adding a religious test for office would not increase the powers of Congress any more than the age requirements of Article I, § 2 implicates congressional power to control the appropriate age for serving as a Representative. See U.S. CONST. art. I, § 2 (“No person shall be a Representative who shall not have attained to the Age of twenty-five Years . . .”); see also

in regard to congressional power and the subject of religion was that Congress might attempt to regulate that subject as one of its express or implied responsibilities. Some Antifederalists claimed that Congress might enforce “religious orthodoxy” by way of its broad powers to tax and regulate the military.⁶² These writers singled out the Necessary and Proper Clause as a potential source of power to interfere with the rights of conscience—a right expressly protected in state charters.⁶³ According to the pseudonymous writer “An Old Whig”:

[I]f a majority of the continental legislature should at any time think fit to establish a form of religion, for the good people of this continent, with all the pains and penalties which in other countries are annexed to the establishment of a national church, what is there in the proposed constitution to hinder their doing so? Nothing; for we have no bill of rights, and every thing therefore is in their power and at their discretion.⁶⁴

The Federalists responded by arguing that the proposed Constitution granted no power to Congress regarding the subject of religion—express or implied. In the Virginia Ratifying Convention, James Madison declared that “[t]here is not the shadow of right in the general government to intermeddle with religion. Its

Powell v. McCormack, 395 U.S. 486 (1969).

⁶² See *Essays of An Old Whig*, PHILADELPHIA INDEP. GAZETTER, Oct. 1787–Feb. 1788 [hereinafter *Essays of An Old Whig*], reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 48, at 17, 36.

⁶³ See *Letters From A Countryman*, N.Y.J., Jan. 17, 1788, reprinted in 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 48, at 69, 86–87 (arguing that the Necessary and Proper Clause, when read along side explicit prohibitions like the Ex Post Facto Clause, might be read to grant power over all things not explicitly excepted, including the rights of conscience); see also 1 ANNALS OF CONG. 455–57 (Joseph Gales ed., 1789) (statement of James Madison); *id.* at 757 (statement of James Madison) (introducing religious liberty amendment on the grounds that some people feared the Necessary and Proper Clause would provide an excuse to establish religion).

⁶⁴ See *Essay of An Old Whig*, *supra* note 62, at 37; see also *Essay by Deliberator*, PHILADELPHIA FREEMAN’S J., Feb. 20, 1788, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 48, at 176, 179 (discussing Congress’s ability under the General Welfare Clause to establish a uniform national religion). Specifically, “Deliberator” noted:

Congress may, if they shall think it for “the general welfare,” establish an uniformity in religion throughout the United States. Such establishments have been thought necessary, and have accordingly taken place in almost all the other countries in the world, and will, no doubt, be thought equally necessary in this.

Id.

least interference with it, would be a most flagrant usurpation.”⁶⁵ In the North Carolina Ratifying Convention, James Iredell went even further:

Had Congress undertaken to guarantee religious freedom, or any particular species of it, they would then have had a pretence to interfere in a subject they have nothing to do with. Each state, so far as the clause in question does not interfere, must be left to the operation of its own principles.⁶⁶

C. *The Implications of “Losing”*

Eventually, of course, Madison and the Federalists gave in to the calls for an amendment expressly limiting federal power over free exercise and religious establishments. This could be interpreted as a Federalist concession that the original Constitution had, in fact, placed religion within the potential reach of Congress’s enumerated powers. For example, in his speech introducing the Bill of Rights, Madison noted that “[i]t is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if Government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent”⁶⁷ Madison, however, makes clear that he believes the amendments will help prevent an abuse of power, not restrict the undesirable exercise of powers legitimately granted.⁶⁸ In fact, Madison never was convinced that the First

⁶⁵ Virginia Ratifying Convention (June 12, 1788) (statement of James Madison) [hereinafter Madison, Virginia Ratifying Convention], reprinted in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 46, at 88.

⁶⁶ Debates in North Carolina, *supra* note 46, at 90 (statement of James Iredell). In this section of Iredell’s speech, he is explaining why the proposed constitution guarantees a republican form of government, but does not guarantee religious liberty. *See id.* at 89–90. Professor Akhil Amar has argued that this “Guarantee Clause” may imply a source of congressional power to protect free speech within the states, even if there is no power directly under the First Amendment. *See* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994); Akhil Reed Amar, *Some Notes on the Establishment Clause*, 2 ROGER WILLIAMS U. L. REV. 1, 11 (1996) [hereinafter Amar, *Notes on the Establishment Clause*]. Even if true, this still distinguishes the Free Speech Clause (which may be necessary to a republican form of government) from the religion clauses as a legitimate subject of congressional regulation.

⁶⁷ 1 ANNALS OF CONG. 456 (Joseph Gales ed., 1789) (statement of James Madison).

⁶⁸ *See id.* at 24. Madison commented:

But I will candidly acknowledge, that, over and above all these considerations, I do conceive that the Constitution may be amended; that is to say, if all power is subject to abuse, that then it is possible the abuse of the powers of the general Government may be

Amendment was absolutely necessary.⁶⁹ According to Madison, the original Constitution had not granted the federal government any legitimate power—express or implied—over subjects like speech and religion, and that the First Amendment was added to make the Constitution “more explicit, and more safe to the rights not meant to be delegated by it.”⁷⁰ According to Madison’s *1800 Report on the Virginia Resolutions*:

Without tracing farther the evidence on this subject, it would seem scarcely possible to doubt that no power whatever over the press was supposed to be delegated by the Constitution, as it originally stood, and that the amendment was intended as a positive and absolute reservation of it.

....

... Both of these rights, the liberty of conscience and of the press, rest equally on the original ground of not being delegated by the Constitution, and, consequently, withheld from the Government. Any construction, therefore, that would attack this original security for the one must have the like effect on the other.

... They are both equally secured by the supplement to the Constitution, being both included in the same amendment, made at the same time, and by the same authority.⁷¹

Madison, at least, did not consider the addition of the Bill of Rights to be a concession that the original document had in fact granted Congress any degree of power over First Amendment subjects.

guarded against in a more secure manner than is now done

Id.; see also Proposed Amendments and Ratification 1789 [hereinafter Proposed Amendments], reprinted in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 46, at 40–41. The Preamble to the Proposed Amendments contained the following language:

The conventions of a number of the states having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the government will best ensure the beneficent ends of its institution.

Id.

⁶⁹ See 1 ANNALS OF CONG. 757 (statement of James Madison) (“Whether the words [of the religion clauses] are necessary or not, he did not mean to say . . .”).

⁷⁰ James Madison, Report on the Virginia Resolutions (Jan. 1800) [hereinafter Madison, 1800 Report], reprinted in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 46, at 141, 143.

⁷¹ *Id.* at 143, 146.

D. Summary

It is possible to read the text of the original Constitution as granting Congress implied power to regulate religion when doing so is necessary and proper to advance an enumerated end.⁷² Certainly, the Antifederalists believed that this was a plausible reading of the proposed Constitution—and this was one reason they offered for rejecting it. Those defending the Constitution agreed that granting federal power over religion would be a bad idea, but disagreed that the Constitution contained even the “shadow of a right” to interfere on the subject and that any such law would constitute an abuse of power. It seems, then, that if implied power over religion was granted, it was granted by accident and despite the intentions of everyone involved. For this reason alone, one might reject the implied power theory on the ground that it is unreasonable to interpret the original Constitution to contain a power deplored by the Constitution’s enemies and denied by the Constitution’s friends.⁷³ Nevertheless, even if not the most plausible reading of the original text—as Madison himself conceded—it was possible to read the original Constitution to contain such power. The issue, then, is whether such power reasonably can be understood as having survived the adoption of the Bill of Rights.

III. THE CASE FOR POWER AFTER THE ADOPTION OF THE FIRST AMENDMENT

The first sentence of the First Amendment reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁷⁴ In terms of the religion clauses’ effect on congressional power, there are four possible interpretations: (1) the religion clauses grant Congress a degree of discretionary power over the subject of religion, (2) the clauses have no effect on power previously granted over the subject of religion, (3) the clauses limit, but do not completely preclude, the exercise of such power previously granted,

⁷² In fact, if one is convinced by Chief Justice Marshall’s opinion in *McCulloch v. Maryland*, this may be the most plausible reading of Congress’s implied powers, even *without* the Necessary and Proper Clause. See 17 U.S. (4 Wheat.) 316 (1819).

⁷³ During the period in which debates were raging over the adoption of the Bill of Rights, the Virginia Senate issued a report reflecting its belief that even under the First Amendment, Congress had power to “levy taxes” “for the support of religion or its preachers.” See BRADLEY, *supra* note 25, at 117. This report, however, was issued in an attempt to derail ratification of the Bill of Rights. In other words, this criticism reflected widespread consensus at the time of the Founding that, if such power existed, that was a reason to reject the Constitution or amend it.

⁷⁴ U.S. CONST. amend. I.

or (4) the clauses remove all congressional power over the subject of religion, or (similarly) the clauses declare that the Constitution shall not be construed to grant Congress any degree of power over the same.

The first possibility, that the First Amendment introduced power over the subject of religion, is the least plausible. This interpretation is totally at odds with the language of the amendment—"Congress shall make no law"—and would contradict the reasons for introducing the First Amendment in the first place.⁷⁵ The second possible interpretation, that the clauses had no effect on power over religion previously granted, seems equally unlikely. The adoption of the First Amendment was fueled by a concern at least to limit, if not remove altogether, Congress's potential reach over the subject of religion.

The third view—that the amendment limits, but does not totally remove, congressional power—is more reasonable. According to this view, the original Constitution granted Congress some degree of implied power over religion, but this power was somewhat circumscribed by the adoption of the First Amendment. Under this "residual implied power" theory, Congress retained some degree of implied power to regulate the subject of religion if (1) it was doing so incident to an enumerated end, and (2) the regulation did not exceed the (new) limitations of the First Amendment.

Some aspects of the religion clauses could be read as supporting the residual implied power theory. For example, although the Establishment Clause prohibits any law "respecting" an establishment, the Free Exercise Clause prohibits only those laws which "prohibit" religious exercise. This wording might imply that, although Congress has no power "respecting" religious establishments, Congress may pass laws "respecting" free exercise, so long as the law does not "prohibit" religious exercise. Under this view, the Free Exercise Clause would not itself stand as the source of such power, but it would permit certain laws passed on behalf of religious freedom. Thus, if the original Constitution granted Congress some degree of implied power over religion, and if one reads the term "prohibit" as indicating a lesser degree of restriction than the term "respecting," then it is possible to arrive at a theory of residual implied power over the free exercise of religion.

Additional evidence for the residual implied power view might also be inferred from rejected drafts of the religion clauses. For example, Congress

⁷⁵ According to James Madison in his speech introducing the Amendments to the House, "the great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode." 1 ANNALS OF CONG. 454 (Joseph Gales ed., 1789) (statement of James Madison). According to Leonard Levy, the conclusion that the First Amendment added to the powers of Congress "is not only an impossible conclusion; it is ridiculous. Not one state would have ratified such an enhancement of national authority." LEVY, *supra* note 17, at 141–42.

briefly considered a version proposed by New Hampshire's Samuel Livermore stating that "Congress shall make no laws touching religion, or infringing the rights of conscience."⁷⁶ Five days later, however, the House replaced this proposed amendment with "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience,"⁷⁷ which itself was rejected in favor of other proposals until Congress finally agreed on the ultimate wording of the clauses. Because the "no laws touching religion" language was rejected in favor of seemingly less restrictive language ("no law respecting an establishment of religion or prohibiting the free exercise thereof"), this could indicate an intent to only partially, not totally, disable Congress from making laws "touching religion."⁷⁸

There are, however, a number of problems with this approach. First of all, the language ultimately adopted is, arguably, more restrictive than Livermore's proposal. As a number of scholars have pointed out,⁷⁹ it is the "no law respecting" language that uniquely protects state, as well as prohibiting federal, religious establishments. This unique language is missing from Livermore's proposal. Nor is it at all clear that Livermore's version would have completely denied federal power to regulate free exercise in the states. If Congress was prohibited from making any law "touching religion," this could be read to allow a federal law also prohibiting state laws from "touching" religion.⁸⁰ Most of all, it is rather difficult to make an interpretative argument regarding the meaning of the First Amendment, based on the rejection of a draft, when there is no surviving record of why the draft was rejected.⁸¹ It seems that the best we can do

⁷⁶ 1 ANNALS OF CONG. 759 (statement of Samuel Livermore).

⁷⁷ *Id.* at 796 (statement of Rep. Ames).

⁷⁸ BRADLEY, *supra* note 25, at 92-96; *see also* SMITH, *supra* note 17, at 31-33.

⁷⁹ *See* SMITH, *supra* note 17, at 22; Akhil Reed Amar, *The Bill of Rights as a Constitution*, 101 YALE L.J. 1131, 1157 (1991); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1091 (1996); William K. Leitzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV 1191, 1199 (1990).

⁸⁰ Just as a provision preventing federal abridgment of free exercise, standing alone, might allow federal laws preventing the states from abridging free exercise. This construction was avoided by adding the (state protective) Establishment Clause and the Tenth Amendment. *See infra*.

⁸¹ Although there is no record of why Livermore's draft was rejected, proposing that its rejection was motivated by an effort to retain some degree of federal power over the subject of religion is rather startling, given the anti-federal power sentiment of the Antifederalists (who called for the amendment) and the separationist views of men like James Madison (who claimed no power had been granted in the first place). There is no evidence that the adoption or rejection of any draft was motivated by a desire to retain some degree of federal power, and the historical context in which the drafts were considered makes such a proposition extremely

is consider what was adopted, and investigate what the Founders' had to say about the text we ultimately received—which, after all, was the only text voted on by those who ratified the document.

In fact, there are other textual clues in the First Amendment that seem to point towards a complete denial of federal power.⁸² For example, of the original Ten Amendments, only the First begins with the declaration "*Congress shall make no law.*" No other provision in the original Bill of Rights uses this sweeping language of prohibition. Although amendments Two through Eight address subjects clearly within Congress's enumerated powers,⁸³ the First Amendment does not. In fact, Madison himself distinguished the Bill's protection of "positive rights," like "trial by jury,"⁸⁴ from "natural rights," like free speech.⁸⁵ Positive rights are limitations on the government's exercise of an otherwise legitimate power.⁸⁶ Natural rights like religion, speech, and the press,⁸⁷ on the other hand, are declarative and exist whether expressly enumerated or not—the protection of these rights in the Bill are added "merely for greater caution."⁸⁸ Their enumeration in the First Amendment was merely

unlikely.

⁸² Professor Akhil Amar has discussed this aspect of the First Amendment in relation with the rest of the Bill of Rights. See Amar, *Notes on the Establishment Clause*, *supra* note 66, at 9.

⁸³ For example, the Second Amendment, U.S. CONST. amend. II, limits powers legitimately granted to Congress to "suppress insurrections" and to "provide for the organizing, arming and disciplining the militia." *Id.* art. I, § 8, cl. 15–16. The Third Amendment, *id.* amend. III, limits the Executives power as commander in chief of the armed forces. See *id.* art. II, § 2. Amendments Four through Eight limit the Executive's power to "take care that the laws be faithfully executed" and the judiciary's power under Article III. See *id.* art. III, § 3; *id.* amend. IV–VIII. In particular, the search and seizure provisions of the Fourth Amendment, are limitations on the exercise of otherwise legitimate congressional power to impose criminal sanctions. See *id.*, e.g., art. I, § 8, cl. 6 (conferring power "to provide for the punishment of counterfeiting the securities and current coin of the United States"); *id.* art. I, § 8, cl. 10 (conferring "power to define and punish piracies and felonies committed on the high seas").

⁸⁴ James Madison, Notes for Amendment Speech (1789), reprinted in *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* 64 (Randy E. Barnett ed., 1989) ("[P]ositive rights result[]. As trial by jury.").

⁸⁵ *Id.* ("[N]atural rights retained as speach [sic]."). See generally Randy E. Barnette, *Necessary and Proper*, 44 *UCLA L. REV.* 745, 779–80 (1997) (discussing Madison's distinction between "positive" and "natural" rights).

⁸⁶ See *supra* note 84.

⁸⁷ See Madison, 1800 Report, *supra* note 70, at 143, 146 (arguing that liberty of conscience and freedom of the press were "declaratory rights" and were "equally and completely exempted from all authority whatever of the United States").

⁸⁸ 1 *ANNALS OF CONG.* 452 (Joseph Gales ed., 1789); see also Proposed Amendments, *supra* note 68, at 40. The Preamble clearly states:

“precautionary,” because there had been no intention to grant Congress power over these subjects in the first place.⁸⁹ In other words, to Madison, the First Amendment does more than merely—and only partially—restrict previously granted power; the language was a precautionary declaration that Congress has

The conventions of a number of the states having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the government will best ensure the beneficent ends of its institution.

Id.

⁸⁹ According to Madison:

When the Constitution was under the discussions which preceded its ratification, it is well known that great apprehensions were expressed by many, lest the omission of some positive exception, from the powers delegated, of certain rights, and of the freedom of the press particularly, might expose them to the danger of being drawn, by construction, within some of the powers vested in Congress, more especially of the power to make all laws necessary and proper for carrying their other powers into execution. In reply to this objection, it was invariably urged to be a fundamental and characteristic principle of the Constitution, that all powers not given by it were reserved; that no powers were given beyond those enumerated in the Constitution, and such as were fairly incident to them: that the power over the rights in question, and particularly over the press, was neither among the enumerated powers, nor incident to any of them; and consequently that an exercise of any such power would be manifest usurpation. . . .

From this posture of the subject resulted the interesting question, in so many of the Conventions, whether the doubts and dangers ascribed to the Constitution should be removed by any amendments previous to the ratification, or be postponed in confidence that, as far as they might be proper, they would be introduced in the form provided by the Constitution. The latter course was adopted; and in most of the States, ratifications were followed by propositions and instructions for rendering the Constitution more explicit, and more safe to the rights not meant to be delegated by it. . . .

. . . .
Without tracing farther the evidence on this subject, it would seem scarcely possible to doubt that no power whatever over the press was supposed to be delegated by the Constitution, as it originally stood, and that the amendment was intended as a positive and absolute reservation of it. . . .

. . . .
. . . Both of these rights, the liberty of conscience and of the press, rest equally on the original ground of not being delegated by the Constitution, and, consequently, withheld from the Government. Any construction, therefore, that would attack this original security for the one must have the like effect on the other.

. . . They are both equally secured by the supplement to the Constitution, being both included in the same amendment, made at the same time, and by the same authority.

Madison, 1800 Report, *supra* note 70, at 143, 146.

no power—express or implied—over these subjects in the first place.

When the First Amendment is read in conjunction with the Tenth, the textual presumption against any degree of federal power over the subject of religion becomes even stronger. The First Amendment declares that Congress “shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”⁹⁰ The Tenth Amendment then declares that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁹¹ Since power to establish religion and power to “prohibit free exercise” are denied to the federal government, and nowhere prohibited to the states,⁹² power to establish religion and prohibit its free exercise is, literally, reserved to the states. And, as we shall see in the next section, both Madison and Jefferson read the First Amendment in conjunction with the Tenth.

A. Summary

The text of the First Amendment could be read merely to limit federal power to prohibit free exercise, but not to prevent federal laws *protecting* free exercise. Other aspects of the text, however, and particularly the text of the Tenth Amendment, seem to point towards a complete denial of federal power over free exercise and religious establishments. The words of prohibition in the First Amendment are more restrictive than amendments Two through Eight, and Founders like James Madison and Thomas Jefferson read these words as declarative of preexisting constraints on federal power—as opposed to the “positive rights” contained in the rest of the Bill of Rights. As declarations of natural rights, the words expressed the idea that no power to make laws “respecting” religious establishments or prohibiting free exercise had been granted to Congress in the first place. Finally, the text of Tenth Amendment literally reserves to the states power “to prohibit free exercise” and make laws “respecting religious establishments.” Thus a good argument can be made from the text of the First and Tenth Amendments that all power over the subject of religion was denied to the federal government and reserved to the states—including the power to protect (indeed, power to *prohibit*) free exercise.

B. The Interpretation of the Founders

The text is not dispositive. As I pointed out at the beginning of the previous

⁹⁰ U.S. CONST. amend. I.

⁹¹ *Id.* amend. X.

⁹² See *Permoli v. First Municipality*, 44 U.S. (3 How.) 588 (1846).

section, one could focus on the word “prohibit” in the Free Exercise Clause and conclude that Congress could regulate the free exercise of religion as long as it did not *prohibit* it. Although there are other textual indications that power over the subject of free exercise was reserved to the states, either textual interpretation is possible—if not equally plausible. Once again, we must turn to the views of those involved in the framing, ratification, and early interpretation of the First Amendment. However limited a role one reserves for evidence of original intent, it surely would help to know the Founders’ expectations regarding the effect of the Bill of Rights on congressional power—to the extent those expectations can be ascertained.⁹³

In fact, there is a wealth of Founding-period commentary on the scope of federal power over the subject of religion following the enactment of the religion clauses. Thomas Jefferson, for example, read the First Amendment in conjunction with the Tenth and concluded that the restrictions of the religion clauses on the federal government were sweeping and comprehensive:

[I]t is true, as a general principle, and is also expressly declared by one of the amendments to the Constitution, that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people;” and that, no power over the freedom of religion, freedom of speech, or freedom of the press, being delegated to the United States by the Constitution, nor prohibited by it to the states, all lawful powers respecting the same did of right remain, and were reserved to the states, or to the people; . . . [The Tenth Amendment] thus also [] guarded against all abridgment, by the United States, of the freedom of religious principles and exercises, and retained to themselves the right of protecting the same⁹⁴

Jefferson thus believed that, not only was all power over the subject of religion denied the federal government, but also “all lawful powers respecting the same”—including power to protect free exercise—was reserved to the states. Similarly, in his Second Inaugural, Jefferson declared “[i]n matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of the general government.”⁹⁵

⁹³ Constitutional theorists as varied as Laurence Tribe, Ronald Dworkin, Antonin Scalia, and Robert Bork all agree that the original intentions of the framers are at least helpful in resolving the meaning of ambiguous constitutional texts. See generally *A MATTER OF INTERPRETATION* (1997) (containing essays by Scalia, Amy Gutmann, Gordon Wood, Laurence Tribe, Mary Ann Glendon, and Ronald Dworkin). See also ROBERT BORK, *THE TEMPTING OF AMERICA* 143 (1990).

⁹⁴ Thomas Jefferson, Kentucky Resolutions of 1798 and 1799 [hereinafter *Kentucky Resolutions*], reprinted in 5 *THE FOUNDERS’ CONSTITUTION*, *supra* note 46, at 131, 132.

⁹⁵ Thomas Jefferson, Second Inaugural Address (March 4, 1805) [hereinafter *Jefferson*,

Jefferson was so convinced that the entire subject of free exercise was removed from federal cognizance that he felt comfortable applying the uniquely restrictive “respecting” language to both the Establishment *and* Free Exercise Clauses. This not only appears in the above quote (“no power over the freedom of religion . . . all power respecting the same”), but also in his letters where he wrote that he:

consider[ed] the government of the US. as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment, or free exercise, of religion, but from that also which reserves to the states the powers not delegated to the U. S.⁹⁶

James Madison agreed with Jefferson’s comprehensive reading of the First Amendment. As we have seen, during the debates over the proposed Constitution, Madison argued “[t]here is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation.”⁹⁷ In his *1800 Report on the Virginia Resolutions*, Madison declared that “liberty of conscience and freedom of the press were *equally and completely* exempted from all authority whatever of the United States.”⁹⁸ Most significantly, Madison expressly rejected the idea that Congress could regulate free exercise so long as it avoided making laws prohibiting free exercise. During the Alien and Sedition Act debates, the Federalists compared the First Amendment restriction on laws respecting religious establishments with the seemingly lesser restriction on laws “abridging” freedom of speech and press. Madison responded:

For if Congress may regulate the freedom of the press, provided they do not

Second Inaugural], *reprinted in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897, at 382 (James D. Richardson ed., 1899); *see also* Letter of Thomas Jefferson to Reverend Samuel Miller (Jan. 23, 1808), *reprinted in* 5 THE FOUNDERS’ CONSTITUTION, *supra* note 46, at 99 [hereinafter Jefferson/Miller Letter] (“[C]ivil powers alone have been given to the President of the U.S. and no authority to direct the religious exercises of his constituents.”).

⁹⁶ Jefferson/Miller Letter, *supra* note 95, at 98.

⁹⁷ Madison, Virginia Ratifying Convention, *supra* note 65, at 88; *see also* James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785) [hereinafter Madison, Memorial and Remonstrance], *reprinted in* 5 THE FOUNDERS’ CONSTITUTION, *supra* note 46, at 82 (“[I]n matters of Religion, no man[’]s right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.”).

⁹⁸ Madison, 1800 Report, *supra* note 70, at 146; *see also id.* at 146–47; *supra* note 96 and accompanying text (discussing whether the Free Exercise Clause, as opposed to the Establishment Clause, grants some degree of congressional power).

abridge it, because it is said only “they shall not abridge it,” and is not said, “they shall make no law respecting it,” the analogy of reasoning is conclusive that Congress may *regulate* and even *abridge* the free exercise of religion, provided they do not *prohibit* it,” and is *not* said, “they shall make no law *respecting*, or no law *abridging* it.”⁹⁹

Madison believed there was no difference in degree regarding the First Amendment’s constraints on religious establishments, free exercise, speech and press: “the liberty of conscience and the freedom of the press were *equally* and *completely* exempted from all authority whatever of the United States.”¹⁰⁰ Thus, when Madison said Congress had no power over the freedom of religion, he meant: no power to “prohibit,” “abridge,” “regulate,” or do *anything* “respecting” the free exercise of religion.

As advocates of the separation of church and state, Jefferson and Madison might have been expected to take a narrow view of federal power over the subject of religion.¹⁰¹ However, even those favorably disposed towards state religious establishments interpreted the religion clauses to preclude federal power over the subject of religion. For example, Joseph Story, who otherwise believed that “Christianity ought to receive encouragement from the state,” nevertheless believed that, under the Constitution, “*the whole power over the subject of religion is left exclusively to the state governments*, to be acted upon according to their own sense of justice, and the state constitutions.”¹⁰²

⁹⁹ Madison, 1800 Report, *supra* note 70, at 146–47.

¹⁰⁰ *Id.* at 146.

¹⁰¹ See Thomas Jefferson, Letter to the Danbury Baptist Association (Jan.1, 1802) [hereinafter Jefferson/Danbury Baptist Letter], *reprinted in* 5 THE FOUNDERS’ CONSTITUTION, *supra* note 46, at 96; Thomas Jefferson, Notes on the State of Virginia [hereinafter Jefferson, Notes on Virginia], *reprinted in* 5 THE FOUNDERS’ CONSTITUTION, *supra* note 46, at 79; James Madison, Detached Memoranda [Madison, Detached Memoranda], *reprinted in* 5 THE FOUNDERS’ CONSTITUTION, *supra* note 46, at 103; Madison, Memorial and Remonstrance, *supra* note 97, at 82.

¹⁰² JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 988, 992 (Carolina Academic Press reprint 1987) (1833) (emphasis added). Story’s conclusion that the federal government was denied all power over the subject of religion may seem inconsistent with his arguments, made in the same section, in support of government regulation of religion. See *id.* Story, however, was in favor of *state* support of religion and disagreed with those seeking to disestablish religion in 1833 Massachusetts. See WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT (1971). Story thus rejected claims that the Founders meant to express a principle of church-state relationships that should operate at the state, as well as at the federal level. Thomas Cooley, in his 1868 treatise on state constitutions, adopts Story’s “no federal power” interpretation of the First Amendment religion clauses. See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 470 n.1 (1868); see also *Ex*

The statements by other notable legal theorists of the time, although not as clearly prohibitive of congressional power, follow the same pattern of denying (instead of granting or permitting) federal power to regulate on the subject of religion. In his treatise on Blackstone's Commentaries, St. George Tucker declared:

Let no such monster be known there, [in the United States] as human authority in matters of religion. . . . This inestimable and imprescriptable right is guaranteed to the citizens of the United States, as such, . . . by that amendment to the constitution of the United States, which prohibits congress from making any law respecting the establishment of religion, or prohibiting the free exercise thereof.¹⁰³

According to William Rawle in *A View of the Constitution of the United States*, "[t]he first amendment prohibits congress from passing any law respecting an establishment of religion, or preventing the free exercise of it. It would be difficult to conceive on what possible construction of the Constitution such a power could ever be claimed by congress."¹⁰⁴ These statements of Tucker and Rawle are not as clearly prohibitive of federal power as are the statements we considered above. On the other hand, nothing in their writing conflicts with the express statements by Jefferson, Madison, and Story that Congress had no legitimate power over the subject at all.¹⁰⁵ In this regard, the testimony of the

Parte Garland, 71 U.S. (4 Wall.) 333, 397–98 (1866) (Miller, J., dissenting) (adopting Story's view of the "whole power over the subject of religion . . .").

¹⁰³ ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES (1803), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* note 46, at 96, 98 (quoting Richard Price, *Of Liberty of Conscience and Civil Establishment of Religion*, 130 POLITICAL WRITINGS (1723–1791)). Price was a famous dissenting Protestant clergyman in his day.

¹⁰⁴ WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES (2d ed. 1829), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* note 46, at 106.

¹⁰⁵ The First Amendment names Congress as the branch precluded from establishing a religion or abridging the free exercise of religion. Although this might be interpreted as an indication that the other two branches were free to do so, such an interpretation would contradict the common understanding that the federal government as a whole was to have no power to regulate religion. Professor Jay Bybee recently has pointed out that the Representatives from the New England states had good reason to avoid a draft that might have an adverse effect on the ability of federal courts to enforce state law when called upon to do so. *See* Bybee, *supra* note 16, at 1560. For example, during the House debates over the drafting of the religion clauses, Representative Huntington noted:

The ministers of their congregations to the Eastward were maintained by the contributions of those who belonged to their society; the expense of building meeting-houses was contributed in the same manner. These things were regulated by by-laws. If an action was brought before a Federal Court on any of these cases, the person who had neglected to

Founders is consistent and uncontroverted by those who played a major role in the First Amendment's framing and ratification.¹⁰⁶

perform his engagements could not be compelled to do it; for a support of ministers or building of places of worship might be construed into a religious establishment.

1 ANNALS OF CONG. 758 (Joseph Gales ed., 1789); *see also* MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 22–23 (1967); Bybee, *supra* note 16, at 1561–62. Madison responded by pointing out that the clause was intended only to prohibit national religious establishments and proposed adding the “national” for that purpose. *See* 1 ANNALS OF CONG. 758 (statement of James Madison). He withdrew his motion when Antifederalist Representatives objected that the term “national” implied “consolidation of the states.” *Id.* at 759. No one argued that federal courts should be disabled from enforcing religious-based state law, and the final wording seems perfectly suited to meet both Huntington’s objections and Madison’s interpretation of the purpose of the clause: The First Amendment focuses attention on Congress and leaves the federal courts free to enforce state law respecting religion. Understanding the Federalist concerns that played a role in the drafting of the First Amendment also helps to explain later judicial pronouncements on the subject of religion. In *Vidal v. Girards’ Executors*, Justice Story remarked that Christianity was part of the common law in “this qualified sense, *that its divine origin and truth are admitted*, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public.” 43 U.S. (How.) 127, 198 (1844) (emphasis added). *Vidal* was a case involving state law. Under the Federalist reading of the First Amendment, it would be perfectly appropriate to refer to religion as an integral aspect of state common law. In fact, Story cites to a Pennsylvania case in support of his interpretation of the common law. *See id.* at 198.

Although the First Amendment also omits the Executive Branch, it is unlikely that this reflects an intention to leave the President free to abridge free exercise and enforce laws respecting an establishment of religion. More likely, Congress believed that including the Executive was unnecessary in light of the congressional restriction. If there were no religious-based laws to execute, there would be little opportunity for the President to exercise power over the subject of religion. *See* 1 ANNALS OF CONG. 448–59 (statement of James Madison). Here we must remember that the Executive in 1787 had far less power and was expected to play a far more limited role in daily government decisionmaking, than the Presidency of today. *See* JAMES W. CEASER, *PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT* 74 (1979). In fact, the subject of executive power did come up during the ratification debates, and the defenders of the Constitution rejected the idea that the President could establish a national religion by way of his power to make treaties with foreign nations. *See* Debate in North Carolina, *supra* note 46, at 89–91. The symbolic acts of the Executive will be addressed below. Finally, whatever the reasons for naming Congress and no other branch of the federal government, following its adoption, the First Amendment was consistently interpreted as a restraint on *federal* power, not just *congressional* power.

¹⁰⁶ I have found one example of an unsuccessful argument in favor of government power over the subject of religion in the immediate post-adoption period. In 1811, James Madison vetoed an Act of Congress to incorporate the Episcopal Church in what was then the District of Columbia. *See* 22 ANNALS OF CONG. 983–84 (1811). Madison vetoed the Bill on the grounds that it violated the Establishment Clause. *See id.* Objecting to member’s requests for time to

C. *Denying Federal Power to Promote the Free Exercise of Religion: Federalism and the Concept of Toleration*¹⁰⁷

Presuming that Founders like Madison and Jefferson meant what they said—that Congress has *no power* over the subject of religion—this seems to collapse the restrictions of the religion clauses into a single proposition: Congress has no power to address the subject of religion (either to prohibit or promote). That proposition may seem so counterintuitive to the modern mind as to render it presumptively erroneous. What possible reason would the Founders have had to deny the federal government power to promote religious liberty as an aspect of their enumerated powers?

The modern intuition that the federal government has some degree of power to promote religious freedom, I believe, is entirely accurate if we are talking about federal power post-1868.¹⁰⁸ In 1791, however, there was good reason to fear federal involvement even on behalf of the free exercise of religion. Consider, for example, the Establishment Clause. There is a general consensus among legal historians that at least one of the purposes of the Establishment

consider the matter, Mr. Wheaton declared that Madison's objections were "altogether futile." *Id.* at 984. According to Wheaton, "if a bill for regulating the funds of a religious society could be an infringement of the Constitution, the two Houses had so far infringed it by electing, paying or contracting with their Chaplains; for so far as it established two different denominations of religion." *Id.* The next day, the House voted against reconsidering the bill by a vote of 29 in favor of reconsideration to 74 against. *See id.* at 997–98. To the extent that Wheaton was arguing in favor of a general power over the subject of religion, he does not expressly address the source of that power in regard to the Act or the practice of employing chaplains. Moreover, his attempt to link the practice of congressional chaplains to a general power to address the subject of religion failed to move his colleagues to reconsider the veto.

¹⁰⁷ I have argued elsewhere that many of the Founders were in favor of government promotion and protection of majoritarian religion and religious culture. *See Lash, supra* note 3, at 1118–22. Many of these same Founders, of course, also were in favor of a Federalist First Amendment that denied federal power over the subject of religion. This highlights a deep ambiguity in the federal Establishment Clause—supporting the adoption of the Establishment Clause did not necessarily mean you were against government support of religion. As I point out below, one's reasons for voting in favor of the amendment probably affected one's interpretation of the *scope* of the amendment. If you were anti-federal government, but pro-religion, you might be open to mere "symbolic acknowledgment of religion," and would make sure that laws which were passed had minimal impact on the religious exercise of the majority. Nevertheless, to the extent that I once believed that Congress openly asserted the power to regulate religion as religion, I no longer believe that was the case. There were other ways to pursue pro-religion policies without asserting such power. *See infra* Part IV (discussing, among other things, religious education in territories, anti-polygamy legislation, thanksgiving proclamations, etc.).

¹⁰⁸ *See infra* Part V.

Clause was to protect state religious establishments from federal interference.¹⁰⁹ However, if protecting state religious establishments was a special concern, then there was just as much reason to deny federal power to “promote free exercise” as there was to deny power over “an establishment of religion.” Federal laws protecting the free exercise of religion *in the states*, after all, could just as easily interfere with state religious establishments as could a law “respecting an establishment of religion.”

In fact, at the time of the Founding, the very idea of “free exercise of religion” was inextricably linked to the idea of state power to establish religion. Consider, for example, James Iredell’s curious statement in the North Carolina Ratifying Convention that “[h]ad Congress undertaken to guaranty religious freedom, or any particular species of it, they would then have had a pretense to interfere in a subject they have nothing to do with.”¹¹⁰ This point had particular bite in 1788. Free exercise at this time was an explicitly religious concept—and a Protestant Christian one at that.¹¹¹ State constitutions of the late eighteenth

¹⁰⁹ See SMITH, *supra* note 17, at 22; Amar, *supra* note 79, at 1131 (1991); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) [hereinafter Amar, *Fourteenth Amendment*]; Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113 (1988); Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3, 12 (1949); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 389; see also Lash, *supra* note 3.

¹¹⁰ See Debate in North Carolina, *supra* note 46, at 90. Here Iredell echoes Alexander Hamilton in *Federalist* #84:

I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.

THE FEDERALIST No. 84 (Alexander Hamilton); see also James Wilson, Speech on the Federal Constitution, reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787–1788, at 156–57 (Paul Leicester Ford ed., B. Franklin reprint 1971) (1888) (“[A] formal declaration upon the subject [of freedom of the press] . . . might have been construed to imply that some degree of power was given, since we undertook to define its extent.”).

¹¹¹ See ROGER WILLIAMS, THE BLOODY TENENT, OF PERSECUTION FOR CAUSE OF CONSCIENCE (1644) (“An inforced *uniformity* of *Religion* throughout a *Nation* or *civill state*, confounds the *Civill* and *Religious*, denies the principles of Christianity and civility, and that *Jesus Christ* is come in the *Flesh*.”); John Locke, A Letter Concerning Toleration (1689), reprinted in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 46, at 52, 53 (“The care of souls cannot belong to the civil magistrate, because his power consists only in outward force; but true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God.”); ISAAC BACKUS, A HISTORY OF NEW ENGLAND: 1774–75,

century commonly placed provisions protecting the “rights of conscience” or the “free exercise of religion” alongside of other provisions that limited public office to members of a particular Christian denomination, authorized state support for Christianity, or granted special favors to a particular Christian church.¹¹² Almost

reprinted in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 46, at 65. Backus noted:

As the kingdom of Christ is not of this world, and religion is a concern between God and the soul, with which no human authority can intermeddle, consistent with the principles of Christianity, according to the dictates of Protestantism, we claim and expect the liberty of worshipping God according to our consciences

Id.; *see also* THOMAS PAINE, COMMON SENSE (Jan. 10, 1776), *reprinted in* 5 THE FOUNDERS’ CONSTITUTION, *supra* note 46, at 69 (“For myself, I fully and conscientiously believe, this it is the will of the Almighty, that there should be a diversity of religious opinions among us: it affords a larger field for our Christian kindness.”); Madison, Memorial and Remonstrance, *supra* note 97, at 82. Madison noted:

It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him Before any man can be considered as a member of civil society, he must be considered as a subject of the Governour of the Universe.

Id.; *see also* Act for Establishing Religious Freedom in Virginia (Oct. 3, 1875) (written by Thomas Jefferson), *reprinted in* 5 THE FOUNDERS’ CONSTITUTION, *supra* note 46, at 84. Jefferson wrote:

Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do

Id. *See generally* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991); Hamburger, *supra* note 3.

¹¹² *See* Delaware Declaration of Rights (1776) (“That all persons professing the Christian religion ought forever to enjoy equal Rights and Privileges in this state.”); MD. CONST., Declaration of Rights (1776) (“XXXIII. [A]ll persons, professing the Christian religion, are equally entitled to protection in their religious liberty. . . . XXXV. That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of support and fidelity to this state, . . . and a declaration of a belief in the Christian religion”); N.J. CONST. (1776) (“XVIII. That no person shall ever, within this colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience XIX That there shall be no establishment of any one religious sect in the Province, in preference to another; and that no Protestant inhabitant of this colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into

without exception, the extent of one's religious freedom depended upon how closely one embraced orthodox Protestant Christianity.¹¹³

Free exercise in such a regime was known as "religious toleration." "Tolerated" religions were free only to the extent that they did not threaten the established religion of the state.¹¹⁴ For example, most state constitutions in the late eighteenth century included a "proviso" following the Religious Freedom

any office of profit or trust, or being a member of either branch of the Legislature."); N.C. CONST. (1776) ("XIX. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences. . . . XXXII. That no person who shall deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding any office or place of trust or profit in the civil department within this state."); S.C. CONST. (1778) ("XXXVIII. That all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated. The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State. That all denominations of Christian Protestants in this state, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges."); MASS. CONST. (1780) ("And every denomination of Christians, demeaning themselves peaceably and as good subjects of the commonwealth, shall be equally under the protection of the law."); N.H. CONST. (1784) ("V. Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason. . . . VI. . . . *Provided notwithstanding* . . . And every denomination of Christians demeaning themselves quietly, and as good subjects of the state, shall be equally under the protection of the law."); VT. CONST. (1786) ("That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings. . . . Nevertheless, every sect or denomination of Christians ought to observe the Sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.").

¹¹³ See state constitutional provisions cited *supra* note 112. Even when the state constitution did not itself limit religious freedom to certain faiths, state courts limited the public expression of disbelief. See, e.g., *People v. Ruggles*, 8 Johns. Cas. 290 (N.Y. 1811) (upholding a blasphemy conviction under state common law). Chancellor Kent noted "that the case assumes that we are a christian people, and the morality of the country is deeply ingrafted upon christianity . . ." *Id.* at 294.

¹¹⁴ Thomas Paine made essentially the same argument in his *Rights of Man*:

Toleration is not the *opposite* of intolerance, but is the *counterfeit* of it. Both are despotisms. The one assumes to itself the right of withholding liberty of conscience, and the other of granting it. The one is the Pope, armed with fire and faggot, and the other is the Pope selling or granting indulgences. The former is church and state, and the other is church and traffic.

THOMAS PAINE, *RIGHTS OF MAN* (1791), *reprinted in* 5 *THE FOUNDERS' CONSTITUTION*, *supra* note 46, at 95. To Paine, the rights of conscience should be equal and "universal," and this was possible only where civil government relinquished its power to establish an official religion.

Clause indicating that the “freedom granted herein” should not be construed to permit acts of “licentiousness” or breaches of the peace.¹¹⁵ There is some question whether these provisos implied a degree of free exercise protection against otherwise generally applicable law.¹¹⁶ What is clear, however, is that the scope of religious freedom under these provisos was, in part, a function of one’s religious beliefs.¹¹⁷ In practice, the “equal rights of conscience” might be granted to non-Christian groups that were sufficiently non-threatening to Protestant belief and mores (in some cases, Judaism), but denied to “subversive” Christian sects (for example, Roman Catholics).¹¹⁸

In addition to suppressing subversive dissenting beliefs, most states took an active role in promoting and protecting the religious exercise of the Protestant majority.¹¹⁹ In many instances, churches and ministers were subsidized through

¹¹⁵ See generally Hamburger, *supra* note 3, at 918 (listing and discussing the meaning of the “caveats” in state constitutional provisions protecting religious liberty).

¹¹⁶ Professor Michael McConnell argues that, were it not for an implied exemption of religious motivated conduct from generally applicable law, there would be no reason to add the provisos (exemptions are limited to those laws that do not implicate the peace or safety of the state). See McConnell, *supra* note 3, at 1462 (“The ‘peace and safety’ clauses identify a narrower subcategory of the general laws; the free exercise provisions would exempt religiously motivated conduct from these laws up to the point that such conduct breached public peace and safety.”). *But see* Hamburger, *supra* note 3, at 921 (arguing that these provisos “set forth the conditions under which government could deny a promised religious liberty”).

¹¹⁷ See *Ruggles*, 8 Johns. Cas. at 297 (affirming a blasphemy conviction under state common law); *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394, 398 (Pa. 1824) (upholding conviction under 1700 blasphemy statute which prohibited speech that willfully profaned “Almighty God, Christ Jesus, the Holy Spirit, or the Scriptures of Truth”).

¹¹⁸ Under the New York Constitution of 1777, for example, Jews were allowed to hold office, but not Roman Catholics. Under Maryland’s Constitution of 1776, Catholics could hold office, but Jews could not. See generally MORTON BORDEN, *JEWS, TURKS AND INFIDELS* 13 (1984).

¹¹⁹ Many state constitutions expressly singled out Protestant Christians as the focus of the religious liberty provisions. See, e.g., N.J. CONST. (1776) (“XIX. That there shall be no establishment of any one religious sect in the Province, in preference to another; and that no Protestant inhabitant of this colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature. . . .”); N.C. CONST. (1776) (“XXXII. That no person who shall deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding any office or place of trust or profit in the civil department within this state.”); S.C. CONST. (1778) (“XXXVIII. The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State. That

local tax assessments and were themselves generally exempt from property and import taxes.¹²⁰ Certain religious groups traditionally opposed to bearing arms were exempted from military service,¹²¹ and Christian religious scruples were protected from forced oaths at trial.¹²² Not surprisingly, atheistic scruples were not similarly protected.¹²³ Public disputes regarding the Trinity were allowed; public challenges to the divinity of Jesus Christ were not.¹²⁴ Thus, through a combination of positive support, legal exemptions, and official patrolling of public religious expression, most states “regulated religion” in a manner that provide just enough “free exercise” of dissenting religions to avoid recreating Europe’s internecine strife on American soil.¹²⁵ By tolerating “dissenting” religious groups to some degree, state legislatures could regulate the subject of religion and, at the same time, plausibly maintain that such regulations did not amount to the hated “religious establishment” of Anglican England.¹²⁶

all denominations of Christian Protestants in this state, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges.”); *Ruggles*, 8 Johns. Cas. at 292–97 (upholding state legal protections designed to suppress blasphemy).

¹²⁰ See BRADLEY, *supra* note 25, at 22–24 (discussing religious tax assessments in New England).

¹²¹ See McConnell, *supra* note 3, at 1468 (discussing militia exemptions in the states at the time of the Founding).

¹²² See *id.* at 1467.

¹²³ See *Ruggles*, 8 Johns. Cas. at 290; *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394 (Pa. 1824); see also BRADLEY, *supra* note 25, at 22 (discussing blasphemy laws in New England).

¹²⁴ For example, the New York Constitution in 1811 declared that “the free exercise and enjoyment of religious profession and worship, without discrimination or preference, should forever thereafter be allowed within this state, to all mankind.” N.Y. CONST. (1811). This provision did not prevent Chancellor Kent from upholding a common law blasphemy conviction against a defendant who publicly declared, “Jesus Christ was a bastard and his mother must be a whore.” See *Ruggles*, 8 Johns. Cas. at 293.

¹²⁵ See Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1671 (1989); see also Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047 (1996) (advocating that the religion clauses’ historical context cannot be divorced from the Founders’ experiences with religious strife arising out of the Reformation). The writings of the Founders are filled with references to the bloody religious wars across the sea. See, e.g., Jefferson, Notes on Virginia, *supra* note 101, at 79 (discussing the religious persecution in Europe as one cause of the immigration to America). Accordingly, it was good public policy that, to the extent practicable in a Christian society, Protestant religious exercise should not be compelled or restrained.

¹²⁶ See generally BRADLEY, *supra* note 25, at 24; Rubinfeld, *supra* note 16, at 2361 (arguing that the purpose of the Establishment Clause “was to bar Congress from tampering with state religion laws”).

Against this backdrop of state promotion of Protestant Christianity, it is understandable why Iredell would argue against placing the subject of free exercise in the proposed Constitution. Power to promote free exercise was itself power to promote religious orthodoxy. Adding a provision on the subject of religious liberty might give Congress an excuse to “protect free exercise” in *the states*; for example, by forbidding certain state religious establishments on the quite plausible grounds that such establishments abridged the “free exercise” of “true religion.”¹²⁷ Thus, adopting something like the Free Exercise Clause—echoing provisions common in state constitutions—arguably created the need to add an additional clause forbidding any “law respecting an establishment of religion”—wording unheard of on a state level—and is clearly protective of state establishments.¹²⁸ And both clauses made necessary the addition of the Tenth Amendment in order to ensure that Congress was given no excuse to adventure in free exercise protectionism: it was the states, not the federal government, who had the exclusive responsibility to protect or prohibit the free exercise of majoritarian religion. As Jefferson put it:

[A]ll lawful powers respecting [religion, speech, and press] . . . were reserved to the states, or to the people; that thus was manifested their determination to retain to themselves the right of judging how far the licentiousness of speech, and of the press, may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use, should be tolerated rather

¹²⁷ Likewise, the power to regulate (and protect) interstate commerce gave Congress power to trump state laws that interfered with the same. *See also* Wilson, *supra* note 110, at 157 (“[A] formal declaration upon the subject [of freedom of the press] . . . might have been construed to imply that some degree of power was given, since we undertook to define its extent.”). Interestingly, in the 1850s, a proposed treaty protecting the religious rights of United States citizens overseas raised the concern that this might imply congressional power to guarantee religious liberty in the several states. *See infra* note 278 and accompanying text.

¹²⁸ Even with this language, there were still those who insisted that the new constitution granted Congress power to regulate religion. *See, for example,* the Virginia Senate’s critique of the proposed Bill of Rights, *supra* note 73 and accompanying text. Notwithstanding the religion clauses Congress might:

levy taxes in any amount, for the support of religion or its preachers; and any particular denomination of Christians might be so favored and supported by the General Government as to give it a decided advantage over others, and in the process of time render it as powerful and dangerous as if it were established as the national religion of the country.

Id. Again, this interpretation was offered as a reason to *reject* the proposed Constitution.

than the use be destroyed¹²⁹

This explains why the two clauses were so often collapsed, or paraphrased, in the writings and speeches of the Founders.¹³⁰ To them, there was no critical distinction between the words of restriction in the Free Exercise Clause and the Establishment Clause: together (and especially when viewed alongside the Tenth Amendment) they expressed a principle of federalism—these subjects were beyond federal cognizance and exclusively reserved to the states. As Daniel Carroll put it in the House debates over the religion clauses: “As the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand; He would not contend with gentlemen about phraseology, his object was to secure the substance in such a manner as to satisfy the wishes of the honest part of the community.”¹³¹

D. *Federalism and the Alien and Sedition Act Debates*

Just a few years after the adoption of the First Amendment, the issue of federal power over First Amendment subjects arose during the debates over the Alien and Sedition Acts.¹³² The Federalist Party argued that the federal government had power to regulate speech and press when doing so was incident to an enumerated power—in this case, power to prevent insurrections.¹³³

¹²⁹ Kentucky Resolutions, *supra* note 94, at 132.

¹³⁰ See, e.g., *id.* at 132; Jefferson/Miller Letter, *supra* note 95, at 98; Madison, 1800 Report, *supra* note 70. Other have taken notice of this tendency. See LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 179–80 (1988); Bybee, *supra* note 16, at 1563–64 n.114. Even the famous religious dissenter Isaac Backus, in two editions of his book on New England History, badly misquoted the religion clauses due to his mistaken impression that Congress had adopted a version proposed (and rejected) early in the debates. See ISAAC BACKUS, 2 HISTORY OF NEW ENGLAND 341 (1795) (David Weston, ed. 1871); ISAAC BACKUS, AN ABRIDGMENT OF THE CHURCH HISTORY OF NEW ENGLAND 225 (1804). The version quoted by Backus read “Congress shall make no law, establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion.” See WILLIAM G. MCLOUGHLIN, 2 NEW ENGLAND DISSENT, 1630–1833, at 783 (1971); see also ANSON PHELPS STOKES, 2 CHURCH AND STATE IN THE UNITED STATES 17 (1950) (statement of Rep. Richard H. Johnson to the House of Representatives on Mar. 4, 1830) (“ . . . Congress shall pass no law respecting an establishing of religion, or prohibiting the free exercise thereof.”).

¹³¹ 1 ANNALS OF CONG. 757–58 (Joseph Gales ed., 1789) (statement of Daniel Carroll).

¹³² Sedition Act of 1798, 1 Stat. 596.

¹³³ See James Madison, Address of the General Assembly to the People of the Commonwealth of Virginia (Jan. 23, 1799) [hereinafter Madison, Address to the General Assembly], reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* note 46, at 139–40; see also John Marshall, Report of the Minority on the Virginia Resolutions (Jan. 22, 1799) [hereinafter Marshall, Minority Report], reprinted in 5 FOUNDERS' CONSTITUTION, *supra* note 46, at 136–

Because seditious libel was punishable at common law, and because the Acts—unlike the common law—allowed truth as a defense, the Alien and Sedition Acts had not “abridged” the freedom of speech or press and therefore were in compliance with the First Amendment.¹³⁴ According to the author¹³⁵ of the Report of the Minority on the Virginia Resolutions:

In a solemn instrument, as is a constitution, words are well weighed and considered before they are adopted. A remarkable diversity of expression is not used, unless it be designed to manifest a difference of intention. Congress is prohibited from making any law RESPECTING a religious establishment, but not from making any law RESPECTING the press. When the power of Congress relative to the press is to be limited, the word RESPECTING is dropt, and Congress is only restrained from the passing any law ABRIDGING its liberty. This difference of expression with respect to religion and the press, manifests a difference of intention with respect to the power of the national legislature over those subjects, both in the person who drew, and in those who adopted the amendment.¹³⁶

Notice the kind of argument advanced by the Federalists: First, it assumes that the original Constitution allowed Congress to regulate a First Amendment subject when doing so was incident to an enumerated power. Secondly, it reads the terms of restriction in the First Amendment as containing varying degrees of prohibition: the “respecting” language is an absolute prohibition on laws “respecting” religious establishments, but the term “abridge” is read to allow federal regulation of the subject of speech and press, so long as they are not “abridged.” This is, in other words, the residual implied power theory applied to the Speech and Press Clause.

As we saw in the previous section, Madison and Jefferson rejected every prong of the residual implied power theory as applied to any First Amendment subject. The original Constitution had not granted the federal government any power, express or implied, over subjects like religion, speech, and press. The words of the First Amendment were never meant to be parsed into varying

38 (noting that “[t]o contend that there does not exist a power to punish writings coming within the description of this law, would be to assert the inability of our nation to preserve its own peace . . .”).

¹³⁴ See Marshall, Minority Report, *supra* note 133, at 138 (“All ABRIDGMENT of the freedom of the press is forbidden, but it is only an ABRIDGEMENT of that freedom which is forbidden.”).

¹³⁵ *The Founders’ Constitution* names John Marshall as the author of the Minority Report. See *id.* at 136. Jean Edward Smith, in his recent biography, see JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION (1996), disputes this claim.

¹³⁶ Marshall, Minority Report, *supra* note 133, at 138.

degrees of restriction. The same absolute restriction that applied to religious establishments applied to free exercise, speech, and press: no law could be made “respecting” any of these subjects. Finally, the Tenth Amendment reserved “all lawful power” over these subjects to the states—including the power to *protect* these liberties.

All of these points were presented earlier, but it is important to specifically address how the context in which these arguments were made makes them as applicable to a situation in which Congress seeks to promote religion or speech, as they were applicable in a situation in which Congress seemed to be *abridging* speech and press. We are used to thinking about the Alien and Sedition Acts as having abridged individual liberty. In fact, during the debates, Madison argued that the Acts did abridge individual freedom: he disagreed with the Federalists that the common law ought to be the standard for freedom of the press, and he also argued that the Acts violated the “right of freely examining public characters and measures and free communication . . . has [] been justly deemed the only effectual guardian of every other right.”¹³⁷

But modern notions of individual liberty cannot obscure what was to Madison and Jefferson the central problem with the Acts: they violated the rights of the *states*. Listen to the opening words of the Kentucky Resolutions:

1. *Resolved*, That the several states composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government.¹³⁸

Likewise, James Madison, in his Address to the Virginia Assembly regarding the Alien and Sedition Acts, begins his argument by declaring the Acts a violation of state sovereignty:

The sedition act presents a scene which was never expected by the early friends of the Constitution. It was then admitted that the State sovereignties were only diminished by powers specifically enumerated, or necessary to carry the specified powers into effect. Now Federal authority is deduced from implication; and from the existence of State law [regarding libel], it is inferred that Congress possess[es] a similar power of legislation; whence Congress will be endowed with a power of legislation in all cases whatsoever, and the States will be stripped of every right reserved, by the *concurrent* claims of a paramount

¹³⁷ Madison, 1800 Report, *supra* note 70, at 144.

¹³⁸ Kentucky Resolutions, *supra* note 94, at 131.

Legislature.

The sedition act is the offspring of these tremendous pretensions, which inflict a death-wound on the sovereignty of the States.¹³⁹

This declaration that the Alien and Sedition Acts abridged the sovereignty of the states is all the more remarkable when one considers that the Acts did not interfere in any way with state laws on the subject of seditious libel. The problem was with the assertion of a *concurrent* power to regulate a subject meant to be completely removed from federal cognizance. Madison rejected the claim that the laws did not abridge the freedom of speech and press,¹⁴⁰ but his central claim was that it did not matter: the problem was not so much whether the law abridged the freedom of speech and press, which was arguable, but that Congress had addressed a subject beyond their reach. Worse, any construction that allowed Congress the power to address the subjects of speech and press—so long as they were not abridged, would also give Congress power to address the subject of free exercise—so long as it was not prohibited.¹⁴¹

Madison's argument fails if the First Amendment allowed benevolent federal laws respecting First Amendment subjects. If benevolent laws could be made on the subject of press (or religion), this would be possible only because *any* law—incident to an enumerated power—could be made on that subject, so long as the law avoiding “abridging” the press or “prohibiting” free exercise. That is why Jefferson's and Madison's language is so sweeping and unequivocal: “the liberty of conscience and the freedom of the press were *equally* and *completely* exempted from all authority whatever of the United States.”¹⁴² To try and make these words mean less than what they clearly say—to treat them as

¹³⁹ Madison, Address to the General Assembly, *supra* note 133, at 139 (emphasis added).

¹⁴⁰ See Madison, 1800 Report, *supra* note 70, at 142–43.

¹⁴¹ Madison noted:

Both of these rights, the liberty of conscience and of the press, rest equally on the original ground of not being delegated by the Constitution, and, consequently, withheld from the Government. Any construction, therefore, that would attack this original security for the one must have the like effect on the other.

... They are both equally secured by the supplement to the Constitution, being both included in the same amendment, made at the same time, and by the same authority. Any construction or argument, then, which would turn the amendment into a grant or acknowledgment of power with respect to the press, might equally be applied to the freedom of religion.

Id. at 146.

¹⁴² *Id.* (emphasis in original).

hyperbole—would be to unravel Madison’s lead argument.¹⁴³

Viewing the Alien and Sedition Acts debates as limited to the context of federal abridgment of individual liberty misses the states’ rights core of Madison’s and Jefferson’s argument: any attempt to enforce a national rule regarding religion, speech, or press would violate the reserved right of the states to regulate these subjects, including the “right of protecting the same.” When viewed in a states’ rights context, it makes sense that Jefferson and Madison would use phrases like “no power granted” and “all lawful powers reserved.” This same states’ rights context helps us understand Jefferson’s declaration in his Second Inaugural that “free exercise is placed by the constitution independent of the powers of the general government,”¹⁴⁴ and Joseph Story’s explanation in his commentaries that “the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions.”¹⁴⁵

E. *The Free Exercise Clause as a Mandate to Exempt Religion From Federal Law in Order to Prevent Its Abridgment*

Even if the adoption of the First Amendment was intended to prevent Congress from exercising implied power over the subject of religion, it is nevertheless possible to read the Free Exercise Clause as permitting—or requiring—Congress to tailor its laws in such a way as to avoid unnecessary abridgment of religious exercise. Under this reading of the Free Exercise Clause,

¹⁴³ As I pointed out above, both the Kentucky Resolutions (Jefferson), and the 1800 Report on the Virginia Resolutions (Madison) lead with the state sovereignty argument. Madison’s Report next explains why the Federalists are wrong to use the common law as a standard for freedom of speech and press. He then introduces the subject that will take up several pages of text:

Whatever weight may be allowed to these considerations [regarding the common law], the committee do not, however, by any means intend to rest the question on them. They contend that the article of amendment, instead of supposing in Congress a power that might be exercised over the press, provided its freedom was not abridged, was meant as a positive denial to Congress of any power whatever on the subject.

Madison, 1800 Report, *supra* note 70, at 143.

¹⁴⁴ See Jefferson, Second Inaugural, *supra* note 95.

¹⁴⁵ STORY, *supra* note 102, at §§ 988, 992. Thomas Cooley, in his 1868 treatise on state constitutions, adopts Story’s “no federal power” interpretation of the First Amendment religion clauses. See COOLEY, *supra* note 102, at 470 n.1; see also *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 397–98 (1866) (Miller, J., dissenting) (adopting Story’s view of the “whole power over the subject of religion”).

Congress would have an implied option—or obligation, depending on how one reads the Free Exercise Clause—of accommodating religion even as Congress exercises one of its enumerated powers.

A weak form of this approach would mean simply that Congress has within its discretion, when choosing among legislative options religiously neutral on their face, the ability to choose the option with the least impact on religion. This, however, would not result in Congress passing a law addressing the subject of religion, much less constitute a law based on a power relating to religion.¹⁴⁶

A stronger form would read the Free Exercise Clause to permit—or require—Congress to carve out an express religious exemption from an otherwise generally applicable statute, if that statute threatened to abridge religious exercise. Note that, under this view, Congress would have no power to interfere with state regulation of religion; the obligation would address only federal statutes based on separately enumerated powers which themselves threatened to abridge religious exercise.¹⁴⁷ In other words, this approach would not allow Congress to regulate religion as a means to advance an enumerated end.

The text itself is ambiguous in regard to religious exemptions—discretionary or mandated. Nor does the historical evidence we have reviewed so far help resolve the issue. There are numerous examples of Founders describing the religion clauses as removing *the subject* of religion, including the subject of free exercise, from congressional control. However, the Founders may not have considered granting an exemption from an otherwise valid federal law to constitute an exercise of power over the subject of religion. Instead, they may have viewed such exemptions as a refusal to *extend* federal power over religiously motivated conduct.¹⁴⁸

The Founders never expressly addressed the subject of religious exemptions from otherwise generally applicable federal laws. This may be due to the fact that, given the limited role Congress was expected to play in regulating matters potentially affecting religious liberty, there was little reason to consider the need for religious exemptions. Thus, given the context in which it was enacted, it is

¹⁴⁶ If the law has no plausible secular purpose, then even if formally neutral on the subject of religion, it would count as covert regulation on the subject of religion and should be subject to a religious gerrymandering analysis. *See, e.g.,* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Edwards v. Aguillard, 482 U.S. 578 (1987); Wallace v. Jaffree, 472 U.S. 38 (1985); Epperson v. Arkansas, 393 U.S. 97 (1968).

¹⁴⁷ Presumably, the same power also would exist to carve out exemptions for religion in order to avoid making a law “respecting an establishment.” One could, however, read the language of the Establishment Clause as implying a greater restriction on Congress.

¹⁴⁸ I will address the implications of post-First Amendment exemptions in the next section. *See infra* Part IV.

possible that the Free Exercise Clause—as of 1791—addressed legislation on the *subject* of religion, not legislation merely having an impact on religion.¹⁴⁹

F. *The Failed Militia Exemption Amendment*

During the House debates, Madison proposed adding language to the Second Amendment that would expressly exempt religious objectors from military service.¹⁵⁰ Madison’s proposal was passed in the House, but failed in the Senate. Although there is no clearly recorded reason for the rejection, some members of Congress expressed the view that questions regarding conscientious objectors should be left to the discretion of the “Government”¹⁵¹ or the “legislature.”¹⁵²

¹⁴⁹ *But see* McConnell, *supra* note 3. McConnell bases his argument on plausible interpretations of state free exercise provisions, viewing them as likely models for the federal clause, and on the religious commitments of framers like James Madison. *Id.* Elsewhere, I have argued that the evidence does not support McConnell’s conclusions regarding the original meaning of the Free Exercise Clause. *See* Lash, *supra* note 3; *see also* Hamburger, *supra* note 3. In any event, I am not aware of a single example of a Founder expressly interpreting the Free Exercise Clause to require—or even permit—an exemption from a generally applicable law.

¹⁵⁰ *See* 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1789) (statement of James Madison) (“[N]o person religiously scrupulous of bearing arms shall be compelled to render military service in person.”). The Select Committee modified this to “no person religiously scrupulous shall be compelled to bear arms.” *Id.* at 778 (statement of Chairman Boudinot).

¹⁵¹ *See id.* at 780 (statement of Rep. Egbert Benson) (“It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government.”). Benson’s full remarks are as follows:

Mr. Benson moved to have the words “but no person religiously scrupulous shall be compelled to bear arms,” struck out. He would always leave it to the benevolence of the Legislature, for, modify it as you please, it will be impossible to express it in such a manner as to clear it from ambiguity. No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government. If this stands part of the Constitution, it will be a question before the Judiciary on every regulation you make with respect to the organization of the militia, whether it comports with the declaration or not. It is extremely injudicious to intermix matters of doubt with fundamentals.

I have no reason to believe but the Legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of; but they ought to be left to their discretion.

Id. at 779–80.

¹⁵² *See id.* at 796 (objection of Rep. Thomas Scott) (stating that exemptions were “a legislative right altogether”). *See generally* McConnell, *supra* note 3, at 1500–03 nn.465–81 (documenting the arguments advanced by supporters and detractors of the “Militia Exemption Clause”). There is no indication that anyone thought that adding such an amendment to the Constitution might give Congress an excuse to involve itself in religious matters. This may be

These members did not specify whether they were referring to the legislatures of the states or the federal Congress. If they were referring to the discretion of the federal government, then these remarks would be evidence that some members of Congress believed that they had power to enact religious exemptions from generally applicable law—even in the absence of a constitutional mandate.¹⁵³

In fact, there is reason to believe these remarks referred to the discretion of state government to exempt religious objectors. The proposed religious exemption was to be added to what is now the Second Amendment—an amendment explicitly referring to *state militias*.¹⁵⁴ States had the primary responsibility to recruit and train militias—which Congress could then call forth “to execute the Laws of the Union, suppress Insurrection, and repel Invasions.”¹⁵⁵ At the time of the adoption of the Bill of Rights, states were responsible for meeting federal quotas for troops; the decision whether to grant a religious exemption was in the hands of the state legislatures who, in fact, had different policies.¹⁵⁶ Until well into the next century, Congress itself made no

due to the fact that the proposed amendment addressed an extremely narrow subject. There was little chance a provision regarding conscientious objectors could be read as a broader grant of federal power over religion. Of course, to the extent that some members harbored such concerns, this was another reason to vote against the proposed amendment which, after all, failed.

¹⁵³ Professor Michael McConnell has written that congressional consideration of militia exemptions indicates that such exemptions were considered by many to be an appropriate means of protecting the religious conscience. See McConnell, *supra* note 3, at 1500. McConnell also believes that the rejection of the proposal does not necessarily mean that the Founders believed that the First Amendment would not itself occasionally require exemptions from generally applicable (federal) law. See *id.* at 1500–03.

¹⁵⁴ U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

¹⁵⁵ *Id.* art. I, § 8, cl. 15–16. At the time of the adoption of the First Amendment, there was no federal conscription. During the revolution, the Continental Army was comprised of paid volunteers, so self selection obviated the need for exemptions. Towards the end of the war, as volunteers became scarce, states initiated their own drafts with their own individual systems of exemption. See JOHN WHITECLAY CHAMBERS III, *TO RAISE AN ARMY: THE DRAFT COMES TO MODERN AMERICA* 21 (1987). One year after the Bill of Rights was ratified, Congress enacted the Uniform Militia Act of 1792, ch. 33, 1 Stat. 271 (1792). Under this Act, all males age 18–45 were to enroll in their state militia. See *id.* The Act further states: “all persons who now are or may hereafter be exempted by the laws of the respective states, shall be, and are hereby exempted from militia duty . . .” See *id.* This approach tracks the theory underlying the First and Tenth Amendments that regulation of religion—including religious exemptions from the military—was a subject best left to the states.

¹⁵⁶ See, e.g., Uniform Militia Act of 1792, ch. 33, 1 Stat. 271–72 (1792). It states:

Section 1 . . . every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five

law respecting conscientious objectors; there was no federal conscription.¹⁵⁷ Thus, for the first one hundred years of the Constitution, it was the governments of the several states that exercised discretion over the issue of religious exemptions from military service. In light of the historical practice in place at the time of these debates—a practice that would not change for the next several decades—it seems most reasonable to interpret these comments as referring to the discretion of the states, not the federal government.¹⁵⁸

Not only is there no clear evidence of Founding support for federal religious exemptions, the context in which the First Amendment was enacted seems to cut against any intention to grant Congress the power to enact religious exemptions. Discretionary religious-based exemptions mandated at a federal level would have triggered all of the Antifederalist concerns raised in the previous section. The Antifederalists, after all, wished to avoid giving the federal government any excuse to regulate religion. Thus, it makes sense that, originally, religious exemptions from the militia were not made a federal matter; each state was allowed to enact its own policy.¹⁵⁹ Even those members of Congress who believed that religious exemptions were sometimes appropriate might nevertheless expect state control to be sufficient protection. This would be a reasonable expectation in light of the limited regulatory powers of the federal government and the long-standing tradition of exemptions in the states.¹⁶⁰

As far as proponents of the Constitution were concerned, separationists like Jefferson and Madison seem unlikely advocates of discretionary religious exemptions. Both men were highly suspicious of any government control over the subject of religion. Jefferson, for example, believed there was “no natural right in opposition to his social duty.”¹⁶¹ Madison, who otherwise seemed more

years (except as herein excepted)

Section 2 . . . and all persons who now are or may hereafter be exempted by the laws of the respective states, shall be, and are hereby exempted from militia duty.”

Id.

¹⁵⁷ See CHAMBERS, *supra* note 155, at 288.

¹⁵⁸ Note that Representative Benson opposed the amendment in part because it would allow the judiciary to interfere with “the organization of the militia.” See 1 ANNALS OF CONG. 796 (Joseph Gales ed., 1789) (statement of Rep. Benson).

¹⁵⁹ It also makes sense that this changed in 1863—the midst of an upheaval that would result in a transformation of the original Federalist basis for the First Amendment. See generally Lash, *supra* note 3.

¹⁶⁰ See McConnell, *supra* note 3. A shift in this view would require shifting one’s views from “states autonomy as guarantor of individual liberty” to “state autonomy as threat to individual liberty.” I believe such a shift had occurred by 1868. See *infra* Part V.

¹⁶¹ See Jefferson/Danbury Baptist Letter, *supra* note 101, at 96.

sympathetic toward religion,¹⁶² nevertheless appears to have been more devoted to the principle of “no federal power” than to the principle of religious accommodation.¹⁶³ His proposed militia exemption amendment would have removed the issue from the discretionary control of the legislature.¹⁶⁴ When Madison spoke of the “immunity of Religion from civil jurisdiction,”¹⁶⁵ that “immunity” seemed to exclude the possibility of legislative accommodations. For example, Madison was against the practice of employing military chaplains for navy crews at sea, despite the obvious impact on the sailors’ ability to freely exercise their religion.¹⁶⁶ Conceding the difficulty of the issue, Madison wrote that it was “safer to trust the consequences of a right principle, than reasonings in support of a bad one.”¹⁶⁷ In other words, better to abridge free exercise than give the legislature an excuse to *regulate* religious exercise. In sum, even if Madison was willing to constitutionalize scrupulous objection to war, he likely would not have embraced the idea of *discretionary* accommodation of religion.

Finally, if the separationists had little reason to embrace discretionary accommodation of religion, the Antifederalists had even less reason to do so. This would open the door to federal power over the subject of religion—something Antifederalists were loath to concede. Thus, it is hard to locate a constituency in Congress who would have been in favor of discretionary religious accommodations.¹⁶⁸ In fact, as the next section will show, in the early decades of the Constitution, Congress declined a number of opportunities to pass legislation accommodating religious exercise.

G. Summary

Although the words of the First Amendment are ambiguous, much of the commentary by the Founders is not. Rather than focusing on the specific words

¹⁶² See McConnell, *supra* note 3, at 1452.

¹⁶³ Michael McConnell has argued that Madison may have been open to exemptions in order to further the goals of religious pluralism. *See id.* at 1454–55. McConnell, however, does not address Madison’s more separationist arguments in his Detached Memoranda. *See* Madison, Detached Memoranda, *supra* note 101, at 103–05.

¹⁶⁴ *See supra* note 150 and accompanying text.

¹⁶⁵ James Madison, Letter to Edward Livingston (July 10, 1822) [hereinafter Madison/Livingston Letter], *reprinted in* 5 THE FOUNDERS’ CONSTITUTION, *supra* note 46, at 105.

¹⁶⁶ Madison, Detached Memoranda, *supra* note 101, at 104.

¹⁶⁷ *Id.*

¹⁶⁸ Theoretically, there may have been “Antifederalist accommodationists” who were in favor of such exemptions. If such an animal existed, it was not in numbers sufficient to leave an historical record.

of the religion clauses, time and again the Founders linked the First Amendment to the Tenth and read these words to express the general principle that Congress had no power whatsoever over the subject of religion (establishments or free exercise), power over the same being reserved to the states. Not only does this approach explain the unique language of the First Amendment in comparison with the rest of the Bill of Rights, it also tracks the text of the Tenth Amendment and the concerns of those who adopted the amendment in the hope that it would protect the states from federal interference with religion. The most likely interpretation, in light of the text and Founding commentary, is that the religion clauses were meant to remove—or prevent—the possibility that Congress might use religion as a means to advance enumerated ends.

It is possible that the First Amendment leaves room for religious exemptions from generally applicable federal laws. However, such a reading is reconcilable with the express statements of the Founders only if such exemptions were understood as *not* constituting an exercise of power over the subject of religion. And the option existed only where federal law itself threatened to abridge religious exercise. The evidence in support of this view, however, is rather weak: there is little, if any, evidence that the Founders anticipated the need for religious exemptions from federal law, and the context in which the First Amendment was enacted cuts against a reading of the First Amendment that would require such exemptions.

IV. HISTORICAL PRACTICE IN THE POST-ADOPTION PERIOD

In the period between the Founding and Reconstruction, the federal government involved itself with religion and religious exercise in a variety of ways. Weighing the relevance of postenactment activities to the original consensus behind the religion clauses is fraught with difficulty. Nevertheless, if the post-enactment activities of Congress are consistently and unambiguously at odds with the “no federal power” explanation, at the very least this raises the possibility that we have incorrectly understood either the text or what the Founders meant when they said that Congress had “no power” over the subject of religion.

Nevertheless, such circumstantial evidence should be viewed in light of what we have established in the previous section. No Founder at any time expressed the view that any part of the Constitution legitimately granted Congress power—direct or indirect—over the subject of religion. To the contrary, what evidence we have shows remarkable consistency regarding the opposite: the federal government had no such power. This, at the very least, raises a presumption in favor of the no federal power theory. Thus, if the historical record presents us with an ambiguous congressional practice that could be interpreted either as

consistent with, or inconsistent with, the no power theory, the presumption dictates that the practice be interpreted in manner consistent with the most plausible understanding of the text and the Founders' express statements.

Similarly, when confronted with unambiguous congressional practice—acts that cannot plausibly be interpreted as consistent with the no power theory—these acts will be presumed to be *inconsistent* with the most plausible understanding of the Founders express statements, unless such unambiguous activity is so pervasive and consistent that it overcomes the most plausible understanding of those statements. In other words, sporadic unambiguous action inconsistent with the no power theory will be presumed to be *in violation* of the most plausible interpretation of the Constitution. Congress, after all, sometimes breaches the limits of the Constitution.¹⁶⁹ The alternative—allowing post-enactment practices to presumptively control the meaning of the Constitution—seems unacceptably *post hoc*.

Finally, in considering specific practices, we also should keep in mind what was *not* established in the prior section. Even if there were general consensus regarding the existence of congressional power over the subject of religion, there may have been little if any consensus regarding *why* such a restriction was a good idea. Separationists like Madison and Jefferson applauded the denial of power as a first step in the direction of complete religious liberty.¹⁷⁰ To a separationist, all religious establishments (both state and federal) are bad. Defenders of states' rights, on the other hand, might have viewed the religion clauses as necessary to guaranty state autonomy to regulate religion as the individual states saw fit. Under this view, religious establishments are neither good nor bad; they simply are a matter for each state to decide for itself. Finally, some Founders may have questioned the Constitution's failure to acknowledge God and continued to believe that civil government had an important role in the promotion of religion, but nevertheless agreed that local governments were in the best position to promote the religious beliefs of the community. Under this view, religious establishments are *good*, but should be administered at the local level.

All three of these approaches are consistent with the strict "no federal power" theory of the religion clauses. However, because they are based on different views regarding the ultimate *goal* of the federal restriction, each

¹⁶⁹ One could, I presume, reverse the presumptions: post-adoption conduct could be explored first, interpretive theories derived from such conduct, and only then turn to the text and actual statements made by the Founders regarding the meaning of the Constitution. This approach, however, would make congressional practice the measure of the meaning of the Constitution.

¹⁷⁰ See, for example, Madison's failed attempt to add an amendment to the Constitution that would have protected the equal rights of conscience in the states. *See supra* notes 150–51 and accompanying text.

approach might lead to different conclusions regarding the *scope* of the restriction. For example, if you voted in favor of the religion clauses because you believed that *any* government exercise of power over religion is inherently unjust (or unchristian, as the case may be), then you would probably consider any government entanglement with religion—say, presidential proclamations calling for a national day of prayer—to be in violation of the “spirit,” if not the letter, of the Constitution. On the other hand, if you believed that government promotion of religion was a good thing, but voted for the religion clauses in order to protect the autonomy of the states, then you might be open to some degree of federal promotion of religion as long as the federal activity did not imply that the federal government had power to interfere with state regulation of religion. In sum, even if there was consensus regarding the core meaning of the religion clauses, one’s view of how far that “core” extended might depend on one’s reasons for voting for the restriction in the first place.

A. Acts Regarding the Territories and Native Americans

*Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.*¹⁷¹

One of the initial acts of the First Congress was to make provisions for churches and missionaries in the territories.¹⁷² This took the form both of money and land grants, and it continued throughout much of the nineteenth century.¹⁷³ Territorial regulations included coerced observance of the Sabbath and prohibitions against (Christian) blasphemy.¹⁷⁴ Presuming that Congress believed its actions were justified under a plausible reading of the First Amendment, these actions are inconsistent with the idea that Congress had *no power* over the subject of religion.

For this reason, congressional promotion of religion in the territories is sometimes cited as evidence that, whatever else might be forbidden by the Establishment Clause, that clause was not understood as a barrier against laws which generally promote religious exercise.¹⁷⁵ Of course, we could go much further than this: such regulation appears to indicate that Congress believed it had power to coercively establish religion in the territories and restrict its free exercise—or, at the least, Congress believed it had the authority to delegate the

¹⁷¹ The Northwest Ordinance, ch. 8, 1 Stat. 50, 52 (1787) (quoting art. III).

¹⁷² See Bradley, *supra* note 47.

¹⁷³ See generally ROBERT CORD, SEPARATION OF CHURCH AND STATE 57 (1982).

¹⁷⁴ See BRADLEY, *supra* note 25, at 102.

¹⁷⁵ See *id.*

same power to territorial governments. How do we reconcile the presumptive no power theory of the First Amendment with what we know about contemporary regulation of religion in the territories?

To begin with, congressional power in the territories is plenary.¹⁷⁶ In this

¹⁷⁶ See *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 42 (1890). Justice Bradley noted:

The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the Territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the Territory or other property belonging to the United States.

Id. at 42. See *National Bank v. County of Yankton*, 101 U.S. 129, 133 (1879). Chief Justice Waite reasoned:

In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States.

Id. at 133; see also *Benner v. Porter*, 50 U.S. (9 How.) 235, 242 (1850) (explaining that territorial governments established by Congress “are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the Territories, combining the powers of both the Federal and State authorities”).

In *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 435 (1856), Chief Justice Taney noted in dicta that the Bill of Rights applied with equal force in the territories. If so, then presumably any exercise of power over religion in the territories could be exercised with equal vigour outside the territories. Even if principles of federalism stood as a barrier to similar action outside the territories—prior to the Fourteenth Amendment, if Congress believed the Bill of Rights applied in the territories, then any action involving religion in the territories would stand as evidence that Congress interpreted the First Amendment to allow Congress some power to regulate religion. In fact, the Court has never held that the Bill of Rights, much less the religion clauses themselves, applied directly to their actions in the territories. See *Downes v. Bidwell*, 182 U.S. 244, 257 (1901). Congress during this period also apparently did not think that the religion clauses applied directly to the territories. For example, in 1860, Justin Morrill introduced a proviso to a bill that would criminalize polygamy in the territories: “Provided, that this act shall be so limited and construed as not to affect or interfere with . . . the right ‘to worship God according to the dictates of conscience.’” CONG. GLOBE, 36th Cong., 1st Sess. 1410 (1860). This phrasing is far closer to the wording in state constitutions than the wording of the federal religion clauses. The debates over the anti-polygamy bill show a concern for “the rights of conscience,” but the only direct reference to the religion clauses binding congressional

regard, congressional power is analogous to the powers of state governments.¹⁷⁷ Secondly, the “no federal power” theory was not necessarily based on the principle that laws respecting religious establishments were inherently bad. The principle merely removed the issue from the hands of the federal government and left it to the states. Notwithstanding the separationist views of men like Madison and Jefferson, many people throughout this period continued to believe that government regulation of religion in the *states* was an indispensable aspect of responsible government.¹⁷⁸ Pro (state) establishment members of Congress believed it was their duty to promote religion in the territories, just as it was their duty to do so in the states.¹⁷⁹ Thus, when Congress authorized territorial laws prohibiting blasphemy and mandating observance of the Sabbath,¹⁸⁰ it acted as a proto-state government, presumably preparing the territory—and the population therein—for admission to the Union, at which time such laws would continue to be enforced.¹⁸¹ In other words, in enacting these laws, a majority in Congress

action in the territories came from Representative Nelson who suggested that the Mormons had set up a theocracy under congressional authority—in violation of the Establishment Clause. *See id.* at 190 app. (remarks of Mr. Nelson). Similarly, the religious freedom clause of the Northwest Ordinance provides that “no person . . . shall ever be molested on account of his mode of worship . . . in the said territory.” ch. 8, 1 Stat. 52 (1789) (quoting art. II). This comes nowhere near the absolute restriction of the federal First Amendment and seems far closer to the “toleration” clauses of contemporary state constitutions.

¹⁷⁷ *See* U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”). Article I, § 8, Clause 17 gives Congress power “[t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States.” *Id.* art. I, § 8, cl. 17. By giving Congress “exclusive” legislative power, this implies general police power to govern the territory. *See* SMITH, *supra* note 17, at 28; *see also supra* cases cited in note 176.

¹⁷⁸ *See, e.g.,* STORY, *supra* note 102, at § 986 (discussing the interest of a state in protecting and promoting religious exercise). *See generally* Lash, *supra* note 3, at 1118.

¹⁷⁹ *See, e.g.,* STORY, *supra* note 102, at § 986.

¹⁸⁰ *See* BRADLEY, *supra* note 25, at 97–104; Lash, *supra* note 79, at 1096.

¹⁸¹ *See, for example,* the debates on the Anti-Polygamy Act, which banned polygamy in the territories. Representative Gooch commented:

I consider that this Government stands in the relation of parent to all these territories; that it is the duty of the General Government to provide a government for these territories; to enact laws for them; and, when they have reached a stage of maturity in which they are capable of instituting certain acts of legislation for themselves, it is good policy—and experience has taught us so—to authorize them to act for themselves. When they fail to govern themselves as they should, I believe we should adopt the same policy that a judicious parent pursues with reference to his child.

may have applied a “pro-state establishment” construction of the no power principle. If so, this would not undermine the broader principle that Congress—as Congress—had no power over the subject of religion.¹⁸²

Finally, the number of congressional acts that actually regulated religion *as religion* in the territories was quite small. Most of the federal government’s involvement with religion came in the form of educational aid to religious organizations serving Native Americans.¹⁸³ Although there was a religious component to this education, this by itself is not enough to make such aid an exercise of power over the subject of religion. Pursuing a policy of education in the territories required the assistance of private institutions, and the only institutions providing such a service at this time were religious organizations.¹⁸⁴

CONG. GLOBE, 36th Cong., 1st Sess. 1542 (remarks of Rep. Gooch).

During the debates over what to do about the Mormon practice of polygamy in Utah territory, there was very little discussion of the First Amendment. One member argued that the Mormons had set up a theological state in violation of the Establishment Clause. *See id.* at app. 190 (remarks of Rep. Nelson) (arguing that the Church’s corporate charter, if “liberally interpreted” would give the Church the power to make laws for the territory). Nelson also cites *Dred Scott* and was therefore aware of Taney’s dicta that the religion clauses applied in the territories. *See id.* at 192. If so, to the extent that these members voted to regulate polygamy because it violated Christian religious doctrine, this would be inconsistent with the “no power” principle of the religion clauses. However, there were secular reasons to vote against polygamy, and it was on these secular grounds that the law ultimately was upheld. *See Reynolds v. United States*, 98 U.S. 145, 168 (1878).

¹⁸² In fact, during the first decades, Congress seemed to go out of its way to avoid the charge that it was legislating on the subject of religion even in areas under its plenary control. For example, in 1811, Congress enacted a law that incorporated the Episcopal Church in what was then the District of Columbia. *See* 22 ANNALS OF CONG. 983–85, 995–98 (1811). This, in itself, was not a law regulating religion—Congress had simply granted the Episcopal Church the same opportunity it offered other groups to take advantage of the corporate form. President Madison, however, vetoed the bill on the grounds that enforcing the articles of incorporation in this case would place the government in the position of enforcing the tenets of a particular religion. *See id.* at 983–84. Upon return of the bill with Madison’s objections, the House declined to reconsider the bill on a vote of 74 to 29. *See id.* at 997–98. Given the importance of the corporate form to religious societies, good faith compliance with the Free Exercise Clause might have justified the act of incorporation—indeed, this may have been why Congress acted in the first place. However, even if this was the opinion of some members, that opinion was not so widely, or so confidently, shared by other members to garner enough votes to reconsider the matter.

¹⁸³ *See generally* ANTIEAU, *supra* note 25, at 167; CORD, *supra* note 173, at 57.

¹⁸⁴ *See*, for example, congressional act ceding land in the territory of Ohio to the United Brethren “for propagating the gospel among the heathen.” CORD, *supra* note 173, at 43; *see also id.* at 38 (noting an 1803 treaty with Kaskasia Indians that provided “federal money to support a Catholic priest in his priestly duties, and further to provide money to build a church”). In regard to the latter, the grant was in exchange for land. Obviously, it cannot be

No doubt, the policy was popular because it sought to both “civilize” and “Christianize” the Native Americans.¹⁸⁵ However, the mere fact that a policy coincided with religious purposes does not by itself transform the act into a regulation of religion as religion.¹⁸⁶ In fact, Congress did not regulate or require religious instruction and often conditioned funding on the continued advancement of secular educational goals.¹⁸⁷ Indeed, it would have required introducing a religious classification into laws had Congress wished to support Native American education but *exclude* religious institutions from participating in the federal program.¹⁸⁸ Thus, subsidizing religious education of the Indians neither implicates congressional power outside the territories nor does it stand as

taken as evidence that Jefferson believed he had power to tax for the provision of priests and the building of churches. This is just another example of plenary federal power to deal with the territories and acquisition of land. Jefferson’s actions do, however, raise some interesting questions regarding the executive’s power to use religion as a tool of foreign policy. *See infra* Part IV.C.4.

¹⁸⁵ *See* John Quincy Adams, Message of the President, 5 Cong. Deb. app. 2, 5 (1828) (“[A]s brethren of the human race, . . . we endeavored to bring [Indian tribes] to the knowledge of religion and letters.”).

¹⁸⁶ For the first 150 years of the Constitution, federal support of religious institutions providing secular services was not considered acting intentionally to support religion. *Compare* *Bradfield v. Roberts*, 175 U.S. 291, 299–300 (1899) (holding that there was no constitutional barrier to congressional appropriation of funds for maintenance of a District of Columbia hospital run by Roman Catholic nuns) *and* *Quick Bear v. Leupp*, 210 U.S. 50, 82 (1908) (rejecting the argument that the Constitution forbids payment of government held monies for support of religious schools on Indian reservation) *with* *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (requiring the exclusion of parochial schools from state educational assistance). This is not to say such aid was uncontroversial. The possibility that religiously neutral aid might indirectly fund Roman Catholic educational efforts was deeply controversial. For this reason, a number of states amended their constitutions to expressly forbid such aid. *See* *Lash*, *supra* note 79, at 1125. The so-called Blaine Amendment, for example, was an effort to amend the federal Constitution to forbid educational aid going to “sectarian institutions.” *Id.* at 1146.

¹⁸⁷ *See* Treaty With the Osages, Dec. 30, 1825, U.S.—Osage Tribe, 7 Stat. 240. Article 10 of the treaty states:

It is further agreed . . . that there shall be reserved two sections of land . . . to include the Missionary establishment . . . for the benefit of said Missions, and to establish them at the principal villages of the Great and Little Osage Nations, within the limits of the country reserved to them by this Treaty, and to be kept up at said villages, so long as said Missions shall be usefully employed in teaching, civilizing, and improving, the said Indians.

Id. at 242–43; *see also* H.R. REP. NO. 31–171, at 4 (1850) (“[I]t has been ascertained that no such office [of Indian Station Chaplains] exists at such stations, and that when clergymen are employed at such points it is as teachers of schools only.”).

¹⁸⁸ It also would have required a federal bureaucracy not then—or now—in existence.

an unambiguous example of power over the subject of religion—even as an aspect of territorial prerogative.¹⁸⁹

In summary, then, to the extent that congressional acts in the territories were exercises of power over the subject of religion, territorial powers are distinguishable from the generally enumerated—and limited—powers of Congress.¹⁹⁰ Moreover, most of the actions involving religion in the territories are ambiguous in regard to their use of religion either as a means or an end. In the end, Congress's actions in the territories do not clearly contradict the conclusions in the previous section that Congress had neither express power over religion, nor the option of using religion as a means to advancing an enumerated end.

B. Symbolic Acts

Ceremonial use of religious rhetoric and symbols have pervaded the actions of the federal government from its inception to the present. Washington himself initiated the tradition of concluding the Presidential Oath of Office with “So help me God.”¹⁹¹ The Supreme Court's tradition of opening its sessions with “God save the United States and this Honorable Court” apparently dates from the Court's first session in 1790.¹⁹² With the exception of Thomas Jefferson and

¹⁸⁹ In his book, *Separation of Church and State*, Robert Cord compiles the documents relating to the campaign to Christianize and “civilize” the Indians through the support of Christian missionaries. See CORD, *supra* note 173, at 62–73. No doubt, the documents are evidence of a dual-intent policy; those engaged in the project saw the missionary project as preparing the Indian for admission into “society.” The fact that these efforts coincided with religious goals, however, does not make them examples of government regulation of religion as religion. Put another way, because the actions could plausibly be justified on secular grounds and because no one claimed to be regulating religion, there is nothing in these actions necessarily inconsistent with the proposition that the Constitution contained no power to regulate religion.

¹⁹⁰ Similar in this regard are congressional requirements that territories seeking admission as states draft a constitution that includes religious liberty provisions. See, e.g., Act of Feb 20, 1811, ch. 21, 2 Stat. 641–43 (1811). Any such requirements became null once the territory became a state. See *Permoli v. First Municipality*, 44 U.S. (3 How.) 588, 610 (1845).

¹⁹¹ See Robert N. Bellah, *Civil Religion in America*, 96 DAEDALUS 1 (1967).

¹⁹² The first Supreme Court crier—one Richard Wenman—was appointed at the second meeting of the Supreme Court in 1790. See Appendix: *Centennial Celebration of the Organization of the Federal Judiciary*, 134 U.S. 711, 712 (1890). Presumably, he adopted the practice of “God save the United States and this Honorable Court” from the states—who in turn had adapted the English Crier's declaration “God save the Queen.” See Letter from Lord Chancellor's Office, House of Lords, Jan. 8, 1962 (copy on file with author) (describing the English Practice). Today, the crier is an employee of the Marshal's office, and not an official of the court. The office of Marshal of the Court itself was not created until 1867. Prior to that

Andrew Jackson, Thanksgiving proclamations—once again, initiated by Washington¹⁹³—were promulgated by every President between 1789 and the Civil War.¹⁹⁴ Beginning with the Continental Congress, continuing through the First Congress, and down to this day, Congress has consistently opened its sessions in prayer.¹⁹⁵

Although these symbolic links between church and state have been criticized from the beginning,¹⁹⁶ the voices of objection have always been a minority. Even those opposed to symbolic governmental acknowledgment of God generally conceded that such practices were permissible, if not wise. For example, Madison, whose scrupulousness in these matters went so deep as to lead him to veto a bill incorporating the Episcopal Church in the District of Columbia,¹⁹⁷ himself issued Thanksgiving proclamations, though later in private writings he regretted doing so.¹⁹⁸ To Madison, it was not the proclamation itself, but rather its form that triggered his greatest concern. In a letter to Edward Livingston, Madison objected to proclamations that used “the language of *injunction*.”¹⁹⁹ Such proclamations “have lost sight of the equality of *all* religious sects in the eve of the Constitution.”²⁰⁰ Madison then distinguished his own proclamations as non-sectarian symbolic gestures:

Whilst I was honored with the Executive Trust I found it necessary on more than one occasion to follow the example of predecessors. But I was always careful to make the Proclamations absolutely indiscriminate, and merely recommendatory;

time, the U.S. Marshals for the District of Columbia served as informal Marshal of the Supreme Court. See CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SUPREME COURT 761 (2d ed. 1979).

¹⁹³ See 1 STOKES, *supra* note 130, at 481–92. The official practice of “fast day” proclamations actually began with the Continental Congress. See *id.* at 451.

¹⁹⁴ See 3 STOKES, *supra* note 130, at 180–87.

¹⁹⁵ For a thorough discussion of the historical practice of congressional prayers, see the Supreme Court's opinion in *Marsh v. Chambers*, 463 U.S. 783 (1983).

¹⁹⁶ In the First Congress, New Jersey Representative Elias Boudinot introduced a bill recommending “a day of public thanksgiving and prayer.” 1 ANNALS OF CONG. 949 (Joseph Gales ed., 1789) (motion of Rep. Boudinot). Representative Thomas Tucker of South Carolina objected on the grounds that “it is a religious matter, and as such, is proscribed to us. If a day of thanksgiving must take place, let it be done by the authority of the several States.” *Id.* at 950. The resolution was approved, but there is no indication whether the majority voted in favor of the recommendation because they believed Congress did have power over the subject of religion, or because they believed a proclamation was not truly an exercise of power. See *id.*

¹⁹⁷ See 22 ANNALS OF CONG. 982–83 (1811) (message from President Madison).

¹⁹⁸ See Madison, Detached Memoranda, *supra* note 101, at 105.

¹⁹⁹ Madison/Livingston Letter, *supra* note 165, at 105.

²⁰⁰ *Id.*

or rather mere *designations* of a day, on which all who thought proper might *unite* in consecrating it to religious purposes, according to their own faith and forms. In this sense, I presume you reserve to the Govt. a right to *appoint* particular days for religious worship throughout the State, without any penal sanction *enforcing* the worship.²⁰¹

Madison thus distinguished between presidential *recommendations* for a day of prayer and proclamations *enjoining* the Country to pray.²⁰² True, recommendations were also problematic to Madison, but not because they were themselves an exercise of power. Instead, the problem was that “[a]ltho’ recommendations only, they *imply* a religious agency, making no part of the trust delegated to political rulers.”²⁰³ The mere fact that government was associating itself with religious trappings was enough to make Madison uncomfortable, but he distinguished such violations of the “spirit” from clear violations of the “letter.” Similarly, Madison criticized the practice of appointing congressional chaplains—not because of the symbolism, but because they were paid for out of the public treasury—to which the people are coerced to contribute.²⁰⁴ His solution was not the abolishment of the office of chaplain, but funding the office out of the pockets of the Congressmen themselves.²⁰⁵

Some separationists, of course, took a stricter view. Thomas Jefferson, for example, believed that presidential proclamations were in fact coercive, whatever their form. Indeed, he believed they had the effect of law, and for this

²⁰¹ *Id.* In his Proclamation of November 16, 1814, Madison wrote:

The two Houses of the National Legislature having by a joint resolution expressed their desire that in the present time of public calamity and war a day may be recommended to be observed by the people of the United States as a day of public humiliation and fasting and of prayer to Almighty God for the safety and welfare of these States, His blessing on their arms, and a speedy restoration of peace, I have deemed it proper by this proclamation to recommend that Thursday, the 12th of January next, be set apart as a day on which all may have an opportunity of voluntarily offering at the same time in their respective religious assemblies their humble adoration to the Great Sovereign of the Universe, of confessing their sins and transgressions, and of strengthening their vows of repentance and amendment.

James Madison, Proclamation (Nov. 16, 1814), *reprinted in* 5 THE FOUNDERS’ CONSTITUTION, *supra* note 46, at 102.

²⁰² *Cf.* Richardson v. Goddard, 64 U.S. (23 How.) 28, 43–45 (1859) (holding that “fast days” recommended by the governor are mere recommendations and do not excuse a purchaser from accepting responsibility for goods delivered on a fast day).

²⁰³ Madison, Detached Memoranda, *supra* note 101, at 105 (emphasis added).

²⁰⁴ *See id.* at 104; *infra* Part IV.C.3 (discussing federal chaplains).

²⁰⁵ *See* Madison, Detached Memoranda, *supra* note 101, at 104.

reason he refused to follow the “example of his predecessors.”²⁰⁶ Jefferson’s view, however, was the minority.²⁰⁷ Or, put another way, he put a “Jeffersonian spin” on the no federal power principle. To Jefferson, any government involvement with religion was impermissible—particularly, but not exclusively, involvement by the federal government.²⁰⁸

In general, the Founders’ position on the federal government’s use of religious symbols seems to depend on their position on the more general issue of the proper relationship between church and government—*federal or state*. There being no consensus on *that* issue in the early decades of the Constitution, each administration followed its own policy. According to Jefferson:

²⁰⁶ Thomas Jefferson in a letter to Samuel Miller wrote:

But it is only proposed that I should *recommend*, not prescribe a day of fasting & prayer. That is, that I should *indirectly* assume to the U. S. an authority over religious exercises which the Constitution has directly precluded them from. It must be meant too that this recommendation is to carry some authority, and to be sanctioned by some penalty on those who disregard it; not indeed of fine and imprisonment, but of some degree of proscription perhaps in public opinion. And does the change in the nature of the penalty make the recommendation the less a *law* of conduct for those to whom it is directed? I do not believe it is for the interest of religion to invite the civil magistrate to direct it’s exercises, it’s discipline, or it’s doctrines; nor of the religious societies that the general government should be invested with the power of effecting any uniformity of time or matter among them.

Jefferson/Miller Letter, *supra* note 95, at 98–99.

²⁰⁷ Andrew Jackson, who also declined to issue religious proclamations while in office, appears to have shared Jefferson’s concerns regarding the implications of Proclamations. See Letter from Andrew Jackson to the Synod of the Reformed Church (June 12, 1832), *reprinted in* 4 CORRESPONDENCE OF ANDREW JACKSON 447 (John Spencer Bassett ed., 1929). Jackson wrote:

I am constrained to decline the appointment of any period or mode as proper for the public manifestation of this reliance [on the efficacy of prayer]. I could not do otherwise without transcending those limits which are prescribed by the Constitution for the President and without feeling that I might in some degree disturb the security which religion now enjoys in this country in its complete separation from the political concerns of the General Government.

Id.; see also Daniel J. Dreisbach, “Sowing Useful Truths and Principles”: *The Danbury Baptists, Thomas Jefferson, and the “Wall of Separation,”* 39 J. OF CHURCH & STATE 455, 478 n.58 (1997).

²⁰⁸ Jefferson did issue proclamations when he was governor of Virginia. Although Jefferson may have been more willing to acquiesce when acting as a state—as opposed to a federal—official, no where in his writings does he indicate any agreement with those who argued that the states had any *legitimate* power over religion.

I am aware that the practice of my predecessors may be quoted. . . . Be this as it may, every one must act according to the dictates of his own reason, & mine tells me that civil power alone have been given to the President of the US. and no authority to direct the religious exercises of his constituents.²⁰⁹

Although one might agree with Jefferson that even symbolic religious acts by the federal government violate the concept of no federal power, there is no indication that this opinion was widely shared in 1791—or in the following decades.²¹⁰

C. Law

There are at least two clear classes of federal action involving religion in this period that occurred outside the territories and that had more than merely symbolic effect: the use of religious exemptions from otherwise generally applicable laws and the provision of chaplains at public expense for Congress and the Armed Forces.

1. Exemptions

a. Tax and Import Exemptions

Religious-based tax exemptions²¹¹ became part of federal law almost by default. At the time of the Founding, most, if not all, states exempted church property from the state's real estate tax.²¹² When the federal government moved to the District of Columbia, Congress enacted a law which adopted the tax policies already in place under Virginia law, including exemptions for churches

²⁰⁹ Jefferson/Miller Letter, *supra* note 95, at 99.

²¹⁰ Jefferson himself seems to accept the distinction between symbolic and coercive government activity when he distinguishes between direct and indirect use of governmental authority. *See supra* note 206.

²¹¹ One could argue that religious exemptions are not exercises of power on the subject of religion, but are instead efforts by the government to *not* influence the exercise of religion. *See Laycock, supra* note 17, at 313 ("Most exemptions do very little to draw adherents to a faith. But criminal liability or loss of government benefits is a powerful incentive to abandon a faith. Exemptions—treating religion differently—are generally more neutral because they generally minimize government influence on religion."). From another point of view, of course, religious exemptions from generally applicable laws constitute special treatment. *See City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997) (Stevens, J., concurring). The issues addressed in this section is whether (1) the exemptions were necessarily religious in nature, and (2) whether those enacting the exemptions viewed them as laws on the subject of religion.

²¹² For a general discussion of the historical practice of religious-based tax exemptions in the states, see the Supreme Court's opinion in *Walz v. Tax Commission*, 397 U.S. 664 (1970).

within the District.²¹³ Tax laws in the District, of course, are analogous to congressional action in the territories—Congress was acting in the capacity of a state legislature.

In the same period, Congress refunded import duties on religious articles on a case-by-case basis as recommended by the House Committee on Ways and Means. Whether these exemptions count as an exercise of power over religion depends upon how you characterize them.²¹⁴ To the extent that these exemptions were provided to church groups because of their role in advancing the cause of religion, this would be a case of exemption power exercised on behalf of religion.²¹⁵ On the other hand, to the extent that religious organizations receive exemptions simply because they are charitable organizations, these exemptions would not be understood as an exercise of power over religion as such.

Congress itself analogized these exemptions to those provided for other non-profit charitable activities. For example, in 1826, the House Committee of Ways and Means recommended an exemption from import duties for certain church vestments, furniture, and paintings. According to the Committee Report:

[T]he articles referred to by the memorialist, not having been purchased, or imported by him with a view to any commercial profits, and not being articles of consumption except as connected with the service of the Church over which he presides, it is but reasonable to exempt them from the payment of duties.²¹⁶

In 1842, Mr. J.R. Ingersoll of the House Committee of Ways and Means recommended remission of duties paid on certain church bells imported from

²¹³ See *id.* at 677.

²¹⁴ For example, compare J.P. THOMPSON, CHURCH AND STATE IN THE UNITED STATES 119 (1873) (“In many states, houses of religious worship are exempted from taxation for the support of the civil government, upon the ground that religion, as a conservator of public morals, assists in preserving the peace and order of society.”) with COOLEY, *supra* note 102, at 471 (Regarding state executive proclamations, government chaplaincies, and tax exemptions). Cooley noted:

This public recognition of religious worship, however, is not based entirely, perhaps even mainly, upon a sense of what is due to the Supreme Being himself, as the author of all good and of all law; but the same reasons of state policy which induce the government to aid institutions of charity and seminaries of instruction, will incline it also to foster religious worship and religious institutions, as conservators of the public morals, and valuable, if not indispensable assistants to the preservation of the public order.

Id.

²¹⁵ Today, under the holding of *Walz*, tax exemptions are justifiable attempts to avoid church-state entanglement which would occur should the taxes go unpaid. See 397 U.S. at 674.

²¹⁶ H.R. REP. NO. 19-206 (1826).

England:

They were imported . . . for what may be properly regarded public benefit and use. The general community which has received them has the advantage of them. They are not only designed to summon religious assemblies to places of worship, but are adapted to the celebration of great national events, and to animate the hearts of freemen on occasions connected with the honor and glory of their country.²¹⁷

Congress included these exemptions with those given to other secular non-profit activities. Again, if churches were understood as one of many charitable organizations, then *excluding* religious property from an otherwise available exemption would itself require an exercise of regulatory power along religious lines.²¹⁸

b. *Military Exemptions*

The issue of exempting religious objectors from state militia service was first discussed—and rejected—during the debates on what would become the Second Amendment.²¹⁹ As discussed in the previous section, Madison's proposal ultimately failed.²²⁰ Seventy years later, however, the 38th Congress believed that it had power to protect "the rights of conscience" and acted upon it. During the Civil War, an amendment to the Conscription Act provided an exemption from the draft for the religiously scrupulous.²²¹ The exemption was passed after a number of impassioned speeches regarding the rights of conscience.²²² Thus, by the time of the Civil War, a majority of Congress apparently believed that it had power to enact religious classifications in order to

²¹⁷ H.R. REP. NO. 27-19 (1842). Ingersoll goes on to cite as "precedents," the duties remitted on a statue of General Washington. *See id.* at 2.

²¹⁸ The idea being that regulation of one class of similarly situated groups tends to channel activity towards or away from the "exempted" group. *See generally* Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989) (proposing "an economic definition of neutrality" to determine when government action impinges impermissibly on religious choice).

²¹⁹ Madison proposed appending the following to what would become the Second Amendment: "no person religiously scrupulous of bearing arms shall be compelled to render military service in person." *See* 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1789). The Select Committee modified this to "no person religiously scrupulous shall be compelled to bear arms." *Id.* at 778.

²²⁰ *See supra* Part III.F.

²²¹ CONG. GLOBE, 38th Cong., 1st Sess. 204 (1864).

²²² *See id.* *See generally* Lash, *supra* note 3, at 1144–45.

protect the religious scruples of a conscientious objector.

The significance of this exemption depends on a number of factors. First, as discussed in the last section, providing an exemption may not have been understood to constitute an exercise of power as such. The granting of exemptions, then, does not necessarily imply that Congress believed it had the general power to act on behalf of religious freedom. On the other hand, it is *possible*—if not necessary—to view this exemption as evidence that Congress believed it had some degree of responsibility to act affirmatively on behalf of religious exercise.²²³ However, the fact that the exemption was enacted over seventy years after the adoption of the First Amendment makes it rather weak evidence of the *original* understanding of congressional power.²²⁴

c. *Summary of Exemptions*

Federal exemptions respecting religion in the period between 1789 and 1868 are few and far between, and most are ambiguous regarding their status as exemptions for religion as religion. The only unambiguous example of a religious-based exemption—the Civil War military exemption—was passed just prior to the adoption of the Fourteenth Amendment, too many years after the Founding to reflect original intent.²²⁵ Taken together, these exemptions do not call into question the presumption, arrived at in the previous section, that the original understanding of congressional power did not include any discretionary power over the subject of religion.

2. *The Sunday Mail Controversy*

In the early nineteenth century, there was considerable public pressure to stop federal delivery of the mail on Sunday—the “Sabbath” to many Christian denominations.²²⁶ Delivery of the mail, it was argued, not only profaned the Sabbath, it also prevented postal employees from “enjoy[ing] the same opportunities of attending to moral and religious instruction or intellectual

²²³ I have argued as much. See Lash, *supra* note 3.

²²⁴ This exemption may, however, signal Congress’ intentions regarding the Fourteenth Amendment. See *infra* Part V; see also Lash, *supra* note 3.

²²⁵ Here too there is ambiguity because the exemption might reflect an exercise of discretion (not compelled by the First Amendment, but good policy nonetheless) or it might reflect congressional compliance with the mandates of the First Amendment (necessary to avoid passing a law abridging the free exercise of religion—the rights of conscience). I believe the latter fueled the adoption of the militia exemption. See *id.*

²²⁶ See generally 2 STOKES, *supra* note 130, at 12.

improvement on that day which is enjoyed by the rest of their fellow citizens.”²²⁷ In other words, Sunday mail delivery arguably raised “free exercise” concerns.²²⁸ Congress, however, refused to stop Sunday mail delivery *on account* of the religious nature of the objections. The matter having been referred to the Committee of the Senate on the Post Office and Post Roads, Senator and future Vice-President Richard M. Johnson issued a report asserting that Congress had no power to resolve what was, essentially, a religious controversy. According to Johnson:

Should Congress, in their legislative capacity, adopt the sentiment, it would establish the principle that the Legislature is a proper tribunal to determine what are the laws of God. . . . [T]he constitution has wisely withheld from our government the power of defining the divine law. . . . It is the settled conviction of the committee that the only method [of] avoiding [the slippery slope to religious establishments], with their attendant train of evils, is to adhere strictly to the spirit of the constitution, which regards the General Government in no other light than that of a civil institution, wholly destitute of religious authority.

What other nations call religious toleration, we call religious rights.²²⁹

Johnson lost his seat in the Senate that year, but was reelected to the House of Representatives the next year,²³⁰ where he elaborated on his prior report:

Congress acts under a constitution of delegated and limited powers. The

²²⁷ William McCreery, Minority Report to the House of Representatives (March 5, 1830), *reprinted in* 2 STOKES, *supra* note 130, at 18. The minority report declaimed any intention of establishing a rule of religious or moral law, but instead argued what would become the standard justification for Sunday Closing laws: societal health. After rejecting the argument that the petitioners sought congressional resolution of a religious controversy between “Jews, Sabbatarians, and other denominations,” McCreery claimed that:

The good of society requires the strict observance of one day in seven. Paley, and other writers on moral philosophy, have shown that the resting of men every seventh day; their winding up their labors and concerns once in seven days; their abstraction from the affairs of the world, to improve their minds and converse with their Maker; their orderly attendance upon the ordinances of public worship and instruction have a direct and powerful tendency to improve the morals and temporal happiness of mankind.

Id.

²²⁸ These concerns were sometimes regarded in the states. *See State v. Ambs*, 20 Mo. 214, 218 (1854) (upholding Sunday closing law in part on free exercise grounds).

²²⁹ 2 STOKES, *supra* note 130, at 15–16.

²³⁰ *See id.* I am not aware of any connection between Johnson losing his seat in the Senate—at that time an appointment made by the state legislature—and his position on Sunday mail delivery. Note that Johnson was elected to the House of Representatives the next year.

committee look in vain to that instrument for a delegation of power authorizing this body to inquire and determine what part of time, or whether any, has been set apart by the Almighty for religious exercises. On the contrary, among the few prohibitions which it contains, is one that prohibits a religious test, and another which declares that Congress shall pass no law respecting an establishing of religion, or prohibiting the free exercise thereof.²³¹

Johnson's report prevailed²³² and the petitions seeking to stop Sunday mail delivery were rejected.

Of course, even a Congress open to the idea of promoting the free exercise of postal workers nevertheless might have turned aside the calls to stop Sunday mail delivery on the grounds that such an accommodation came too close to a law respecting an establishment of religion. If so, however, their sensibilities were far more separationist than our own: there has been no regular Sunday mail delivery in the United States since early this century.²³³ More likely, a majority agreed with Johnson's argument that even this modest an accommodation should be rejected on the grounds that granting it would raise serious issues of congressional power over the subject of religion.

3. Federal Chaplains

Military chaplains were appointed as early as the Revolutionary War²³⁴ and were made an official part of the American armed forces in 1791.²³⁵ Opening

²³¹ 2 STOKES, *supra* note 130, at 17. Notice, once again, the incorrect quoting of religion clauses.

²³² "Mr. Johnson's celebrated Sunday Mail Report" was cited by Chief Justice Terry of the California Supreme Court as advocating the principle of "complete separation of church and state." *Ex parte Newman*, 9 Cal. 502, 506 (1858); see also *id.* at 514-15 (Burnette, J., concurring) (noting that legislatures may not force religious act or observance because it "has no power over such a subject"). Johnson's Report was officially endorsed by the Indiana, Illinois, and Alabama state legislatures. See 2 STOKES, *supra* note 130, at 18-19. The General Assembly of Indiana sent a memorial to Congress endorsing Johnson's Report and declaring "all legislative interference in matters of religion is contrary to the genius of Christianity; and that there are no doctrines or observances inculcated by the Christian religion which require the arm of civil power either to enforce or to sustain them." *Id.* at 19.

²³³ See 3 STOKES, *supra* note 130, at 110. For a general discussion of the history of congressional chaplains, see *Marsh v. Chambers*, 463 U.S. 783 (1983).

²³⁴ See *Marsh*, 463 U.S. at 794.

²³⁵ See 3 STOKES, *supra* note 130, at 111. In 1806, Congress passed "An Act for Establishing Rules and Articles for the government of the Armies of the United States." Ch. 20, 2 Stat. 359 (1806). Under this act, it was "earnestly recommended to all officers and soldiers, diligently to attend divine service; and all officers who shall behave indecently or irreverently at any place of divine worship, shall, if commissioned officers, be brought before a general

legislative sessions in prayer began in the first session of the Continental Congress in 1774,²³⁶ and the office of congressional chaplain was established by the First Congress in 1789.²³⁷ In the beginning, neither military nor congressional chaplains raised much controversy—indeed, Madison himself was a member of the committee that instituted the chaplaincy.²³⁸ By the 1830s, however, federal chaplains received increasing criticism from both Nativists—who objected to the appointment of Roman Catholics—and strict Separationists who were waging a successful battle against religious establishments in the states. In 1833, petitions were sent to Congress objecting to the employment of chaplains at public expense. According to one “Remonstrance”:

The constitution contains a full specification of all the powers that have been delegated by the people to their political representatives; none but civil powers are therein or thereby delegated; their representatives, therefore, not being vested with any ecclesiastical authority, have no right to legislate on religion, nor *officially* to do or perform, or direct to be done and performed, any ecclesiastical act or ceremony.²³⁹

The next decade witnessed increasing criticism of the use of federal chaplains, especially following the appointment of Roman Catholics.²⁴⁰ Prior to

court martial, there to be publicly and severely reprimanded by the president.” *Id.* at 360 (noting further that non-commissioned officers were to be fined). Article Four of that same act provided that:

Every chaplain, commissioned in the army or armies of the United States, who shall absent himself from the duties assigned him (excepting in cases of sickness or leaves of absence) shall, on conviction thereof before a court martial, be fined not exceeding one month’s pay, besides the loss of his pay during his absence; or be discharged, as the court martial shall judge proper.

Id.

²³⁶ See 1 STOKES, *supra* note 130, at 448.

²³⁷ See *id.* at 456–57. Earlier, in the Constitutional Convention, Benjamin Franklin successfully proposed turning to daily prayer as a means of breaking through an impasse in the debates. See *id.* at 454.

²³⁸ See *id.* at 456. Though he came to regret it. See Madison, Detached Memoranda, *supra* note 101, at 105.

²³⁹ H.R. DOC. NO. 23-9 (1833). In 1848, a similar memorial from the Kehukee Primitive Baptist Association in North Carolina was sent to Congress, objecting to chaplains in Congress and the military and to subsidizing religious teachers for the education of Indians on the grounds that such constituted acts “respecting the establishment of religion.” See S. MISC. DOC. NO. 30-2 (1848).

²⁴⁰ In 1832, Congress appointed its first non-Protestant chaplain, the Reverend Charles Constantine Pise. See 3 STOKES, *supra* note 130, at 129. The appointment was controversial

the War with Mexico, there were no Catholic chaplains in the army; Catholic soldiers were expected to attend Protestant services.²⁴¹ In 1846, mainly to allay concerns by Mexican residents that the invading American Army was on a mission to destroy the Catholic Church, President Polk directed his Secretary of War to appoint a number of Catholic priests to accompany the Army into Mexico.²⁴² Prominent newspapers printed letters objecting to the appointment of Catholic “spies.” The Protestant New York Observer, for example, denounced the action as “a flagrant outrage upon the constitution.”²⁴³ In 1848, a Memorial sent to Congress from the Kehukee Primitive Baptist Association in North Carolina objected to chaplains in Congress and the military—as well as to the subsidizing of religious teachers for the education of Indians—on the grounds that these were acts ““respecting the establishment of religion””²⁴⁴ made all the more dangerous by “the rapid strides of priestcraft, now being made in these United States.”²⁴⁵

Congress eventually was forced to respond to the growing controversy. In the period from 1850 to 1854, Congress issued at least three separate reports on the constitutional status of government-paid chaplains. Each of these reports, with one significant exception which is described in detail below, followed the same general argument. First, the Constitution conferred power on Congress to appoint officers for both Houses of Congress and for the military. Second, this appointment power was unrestricted and included power to appoint religious officers if doing so was deemed “necessary and proper” by Congress and no express provision in the Constitution forbade such an appointment. Third, the Establishment Clause was not a prohibition on any and all congressional action involving religion, but merely prohibited coercive, or sectarian regulation—neither of which, it was argued, characterized the appointment of chaplains. Fourth, the practice of employing chaplains had deep historical roots. Finally, ending the practice would have serious free exercise implications for both soldiers in the military and the Congressmen themselves.

As the source of power to appoint military chaplains, the reports generally

enough to prompt Pise to give a public speech the next year in which he declared “I acknowledge no allegiance to the Pope’s temporal power.” *Id.* at 130.

²⁴¹ See 2 STOKES, *supra* note 130, at 76.

²⁴² See *id.* at 77.

²⁴³ *Id.* at 79. Stokes points out many of these critics did not object to Protestant Chaplains. See *id.* In fact, the Nativist attack on Roman Catholicism was based in part on the belief that Protestantism was the true American faith and ought to be promoted and encouraged.

²⁴⁴ See S. MISC. DOC. NO. 30-2 (1848). Again, notice the Establishment Clause is misquoted.

²⁴⁵ *Id.*

cite Congress's power "'to raise and support armies,' and to 'provide for and support a navy,' and 'to make rules for the government and regulation of the land and naval forces.'" ²⁴⁶ In the absence of a specific listing of officers to be appointed, it was as "necessary and proper" to appoint chaplains as it was to appoint "surgeons, or any of the numerous employe's in the medical staff[;]"²⁴⁷ "[both] are appointed under the [same] general authority to organize the army and navy, and we deem the one as truly a matter of necessity as the other."²⁴⁸ As far as congressional chaplains were concerned, Article I, section 2 of the Constitution grants Congress power to appoint its own officers to the extent it deemed this necessary and proper.²⁴⁹ Thus, "[t]he chaplain is an officer of the house which chooses him, and nothing more. He owes his place not to his belonging to a particular religious society, or holding a particular faith, but to the voluntary choice of the members of the house"²⁵⁰

Having established the source of congressional power, each of the reports narrowly defines the scope of the Establishment Clause's limitation on that power: "[Establishments] admit[] of no diversity in feature or substance; and those who enter its temples to minister at its altars, must first be measured by, and come up to its standards."²⁵¹ "[Although the Founders] intended . . . to prohibit 'an establishment of religion' such as the English church presented . . . they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators."²⁵²

The reports also stressed the nonsectarian nature of the chaplaincy: "There is no standard of faith to be measured by, or form of worship that must be

²⁴⁶ H.R. REP. NO. 171, at 1 (1850) [hereinafter Thompson's Report].

²⁴⁷ *Id.*

²⁴⁸ H.R. REP. NO. 124, at 7 (1854) [hereinafter Meacham's Report].

²⁴⁹ See Thompson's Report, *supra* note 246, at 4.

²⁵⁰ S. REP. NO. 376, at 2 (1853) [hereinafter Badger's Report].

²⁵¹ Thompson's Report, *supra* note 246, at 2; see Badger's Report, *supra* note 250, at 1–2. Badger's Report stated:

If Congress has passed, or should pass, any law which, fairly construed, has in any degree introduced . . . in favor of any church, or ecclesiastical association, or system of religious faith, all or any one of these obnoxious particulars—endowment at public expense, peculiar privileges to its members, or disadvantages or penalties upon those who should reject its doctrines or belong to other communions—such a law would be a 'law respecting an establishment of religion,' and therefore, in violation of the constitution. But no law yet passed by Congress is justly liable to such an objection.

Id.

²⁵² Badger's Report, *supra* note 250, at 4.

followed. Practice has required that they be simply ministers of the gospel.”²⁵³ “The range of selection is absolutely free in each house amongst all existing professions, of religious faith. There is no compulsion exercised or attempted, upon any member or officer of either house, to attend their prayers or religious solemnities.”²⁵⁴ Although the selection had until now always involved Christian chaplains, “that is not in consequence of any legal right or privilege, but by the voluntary choice of those who have power of appointment.”²⁵⁵ The choice of Christian chaplains “results from the fact that we are a Christian people . . . and in a land thus universally Christian, what is to be expected, what desired, but that we shall pay a due regard to Christianity, and have a reasonable respect for its ministers and religious solemnities[.]”²⁵⁶

All of the reports placed particular emphasis on the fact that the practice of federal employment of chaplains had roots going back to the first Congress, indeed, back to Washington himself.²⁵⁷ The practice “has been long in use and well known to the people.”²⁵⁸ Thus, whatever the restrictions of the religion clauses, “[t]ime and usage have given sanction to the employment of [congressional] chaplains.”²⁵⁹ The fact that the practice had continued unabated since the Founding, and that during that time no one denomination had monopolized the office, undermined the claim that the employment of chaplains might lead to a particular religious establishment.²⁶⁰

The reports also defended the federal chaplaincy as a means of promoting the free exercise of religion:

Were the office abolished, the soldier or sailor might with more than a show of plausibility complain that the “free exercise” of religion was denied him; that his constitutional rights were infringed. The nature of his employment and the necessity of discipline are such that he is not at liberty to go and enjoy the “free exercise thereof,” as the constitution provides.²⁶¹

²⁵³ Thompson’s Report, *supra* note 246, at 2.

²⁵⁴ Badger’s Report, *supra* note 250, at 2.

²⁵⁵ *Id.* at 3.

²⁵⁶ *Id.*

²⁵⁷ See Meacham’s Report, *supra* note 248, at 1; Badger’s Report, *supra* note 250, at 1; Thompson’s Report, *supra* note 246, at 4.

²⁵⁸ Thompson’s Report, *supra* note 246, at 3.

²⁵⁹ *Id.* at 4.

²⁶⁰ Meacham’s Report, *supra* note 248, at 5. Meacham’s Report includes a table showing the number and frequency of chaplains appointed from each religious sect. *Id.* at 9.

²⁶¹ Thompson’s Report, *supra* note 246, at 3. Thompson also argues that making provision for religious exercise will make for better soldiers. *Id.* at 3–4. The Report found that:

This argument was particularly true of sailors at sea: “[i]f you do not afford them the means of religious service while at sea, the Sabbath is, to all intents and purposes, annihilated, and we do not allow the crews the free exercise of religion.”²⁶²

The “free exercise” argument also was used—though less plausibly—to justify the employment of congressional chaplains. The 1853 Report by Senator Badger pointed out that a number of private concerns of members are paid for at public expense, including banking matters and other personal matters. Were those funds withdrawn, “how are all to be accommodated in the churches of the city? And of those who belong to either house of Congress some have not the means to procure such accommodations for themselves. Where, then, is the impropriety of having an officer to discharge these duties?”²⁶³ One report argued that, if the law could not accommodate the religious sentiments of members of Congress, then neither could it close government offices on Sunday: “[t]he officers who receive salaries, or per diem compensation, are discharged from duty on this day, *because it is the Christian Sabbath*, and yet suffer no loss of diminution of pay on that account.”²⁶⁴

Significantly, one report appears to rely on the Free Exercise Clause itself as a source of power for Congress to legislate on the subject of religion. Representative Meacham’s 1854 Report to the House argued that legislation protecting religious exercise was justified under the Free Exercise Clause itself:

There is a great and very prevalent error on this subject in the opinion that those who organized the government did not legislate on religion. They did legislate

The spirit of Christianity has ever had a tendency to mitigate the rigors of war, if as yet it has not been entirely able to prevent it; to lead to acts of charity and kindness; and to humanize the hearts. . . . [T]o abolish it, in this Christian age of the world, would seem like retrograding rather than advancing in civilization.

Id. In regard to chaplains at “Indian stations,” Thompson noted: “On inquiry of the Indian Bureau, it has been ascertained that no such office exists at such stations, and that when clergymen are employed at such points it is as teachers of schools only.” *Id.* at 4.

²⁶² Meacham’s Report, *supra* note 248, at 8.

²⁶³ Badger’s Report, *supra* note 250, at 2. Some members of Congress were more candid in regard to the “free exercise” argument in favor of congressional chaplains. According to Thompson’s Report of 1850, “[t]he propriety and necessity for their employment [chaplains] at the Capitol does not, perhaps, stand upon an equal footing in some respects with that of the services already referred to.” Thompson’s Report, *supra* note 246, at 4. Nevertheless, “[t]ime and usage have given sanction to the employment of [congressional] chaplains.” *Id.*

²⁶⁴ Badger’s Report, *supra* note 250, at 3. It is interesting to compare Badger’s argument with contemporary state court rulings upholding Sabbath Closing laws on the grounds of their secular utility, not their religious implications. See Lash, *supra* note 79, at 1105.

on it by making it free to all, “to the Jew and the Greek, to the learned and unlearned.” The error has arisen from the belief that there is no legislation unless in permissive or restricting enactments. But making a thing free is as truly a part of legislation as confining it by limitations; and what the government has made free, it is bound to keep free.²⁶⁵

Meacham’s argument is a rare example—indeed, the only one I know of prior to the Civil War—of a Congressman justifying a law on the subject of religion on the ground that such power was granted to Congress by way of the First Amendment.

All three reports utilize arguments that unambiguously contradict the “no federal power principle.” First, the reports expressly rely on congressional power to regulate religion when necessary and proper under a separately enumerated power. Secondly, the religion clauses are distinguished and given separate substantive definitions: the Establishment Clause in particular is narrowly construed to apply only to sectarian or coercive regulation of religion. Finally, one report cites the Free Exercise Clause itself as a potential source of congressional power to protect the free exercise of religion.

As was the case with militia exemptions, the weight of these statements as a matter of original intent is weakened by the fact that these arguments were not presented until more than sixty years after the ratification of the Constitution. Moreover, the arguments advanced to justify government chaplains cannot be reconciled with express statements made both by the Founders and members of Congress in the decades that followed the adoption of the Constitution. For example, Senator Badger’s argument states that government offices are closed on the Sabbath, “*because it is the Christian Sabbath*” seems directly at odds with Senator Richards’ 1830 Report on Sunday mail delivery which expressed the view that Congress had no power whatsoever over religion—especially on matters involving the Christian Sabbath.²⁶⁶ In particular, Meacham’s argument that the Free Exercise Clause introduced a degree of federal power over the subject of religion is simply not plausible as matter of original intent—nor does he cite any Founder or Founding period document to support such an interpretation.

4. *Treaties with Foreign Nations*

At the Founding, it was to the advantage of the federal government to keep religion out of foreign affairs. According to the 1797 Treaty with Tripoli:

²⁶⁵ Meacham’s Report, *supra* note 248, at 9.

²⁶⁶ See *supra* Part IV.C.2.

As the government of the United States of America is not in any sense founded on the Christian religion—as it has in itself no character of enmity against the laws, religion or tranquillity of Musselmen—and as the said states never have entered into any war or act of hostility against any Mahometan nation, it is declared by the parties, that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries.²⁶⁷

More than half a century later, the Senate was forced to consider whether its power to ratify a treaty should be used to require affirmative protection of the free exercise rights of citizens abroad. In 1850, the Taylor administration negotiated a commercial treaty with Switzerland that protected only Christian-American citizens traveling abroad.²⁶⁸ American Jews complained and lobbied for express language guaranteeing them equal rights to enjoy the privileges extended under the treaty.²⁶⁹ Upon taking office, President Fillmore sent a message to the Senate stating:

It is quite certain that neither by law, nor by treaty, nor by any other official proceeding is it competent for the Government of the United States to establish any distinction between its citizens founded on differences in religious beliefs . . . [] and we are not at liberty, on a question of such vital interest and plain constitutional duty, to consider whether the particular case is one in which substantial inconvenience or injustice might ensue. It is enough that an inequality would be sanctioned hostile to the institutions of the United States and inconsistent with the Constitution and the laws.²⁷⁰

The Senate accepted the proposed treaty only if the offending clause was

²⁶⁷ Treaty of Peace and Friendship, Nov. 4, 1776–Jan. 3, 1797, U.S.-Tripoli, art. XI, 8 Stat. 154, 155. The clause indicating that the U.S. is not founded on the Christian religion was omitted from the 1805 Treaty of Peace and Amity which superceded the earlier treaty. See 1 STOKES, *supra* note 130, at 498.

²⁶⁸ Borden wrote:

On account of the tenor of the Federal Constitution of Switzerland, Christians alone are entitled to the enjoyment of the privileges guaranteed by the present Article in the Swiss Cantons. But said cantons are not prohibited from extending the same privileges to citizens of the United States of other religious persuasions.

BORDEN, *supra* note 118, at 83. The proposed Treaty reflected the fact that numerous Swiss Cantons discriminated against Jewish merchants. See *id.*

²⁶⁹ See *id.*

²⁷⁰ *Id.* at 84 (quoting 8 J. EXECUTIVE PROC. SENATE U.S. 290 (1852)).

removed.²⁷¹ Switzerland countered the Senate's proposal by rewording the article:

The citizens of the United States of America and the citizens of Switzerland, shall be admitted and treated upon a footing of reciprocal equality in the two countries, where such admission and treatment shall not conflict with the constitutional or legal provisions, as well Federal as State and Cantonal of the contracting parties.²⁷²

American Jews continued to object, believing that this proviso amounted to the same thing—Jews would be left subject to the discriminatory laws of individual Swiss cantons.²⁷³ In response to continued complaints, in 1853, Senator Joseph Underwood of Kentucky submitted a report to the House that recommended:

Resolved: That it would be just and wise on the part of the Government of the United States in future treaties with foreign nations to secure, if practicable, to our citizens residing abroad the right of worshipping God freely and openly according to the dictates of their own consciences by providing that they shall not be disturbed, molested or annoyed in any manner on account of their religious belief, nor in the proper exercise of their peculiar religion, either within their own private houses or in churches, chapels, or other places appointed for public worship . . . in convenient situations interfering in no way with or respecting the religion and customs of the country in which they reside.

Resolved, further, That it would be just and wise in our future treaties with foreign nations to secure to our citizens residing abroad the right to purchase and own burial places and to bury any of our citizens dying abroad in such places with those religious ceremonies and observances deemed appropriate by the surviving relatives and friends of the deceased.²⁷⁴

Speaking in support of Underwood's Resolutions, Senator Cass argued that the United States had the right to "procure for American citizens abroad immunity from local laws, so far as these interfere with the liberty of worshipping God."²⁷⁵ "Jew or Gentile, all are equal in this land of law and liberty; and as the former suffers most from illiberal persecution, his case is entitled to the most commiserations, and sure am I that public sentiment would

²⁷¹ *See id.*

²⁷² *Id.* (quoting HUNTER MILLER, 5 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 846 (1937)).

²⁷³ *See id.* at 86–87. Note, however, that it allowed the Senate to proceed in a formally religious neutral basis.

²⁷⁴ *Id.* at 87–88.

²⁷⁵ CONG. GLOBE, 33 Cong., 1st Sess. 681–91 (1854).

strongly reprove any attempt to create a distinction between them."²⁷⁶ Ultimately, the Senate passed both the Underwood resolutions and the proposed Swiss amendments to the treaty.²⁷⁷ Underwood's resolutions may have had an impact on the drafting of the subsequent 1858 Treaty with China:

The principles of the Christian religion as professed by the Protestant and Roman Catholic churches, are recognised as teaching men to do good, and to do to others as they would have others do to them. Hereafter, those who quietly profess and teach these doctrines shall not be harassed or persecuted on account of their faith. Any person, whether citizen of the United States or Chinese convert, who according to these tenets peaceably teach and practise the principles of Christianity, shall in no case be interfered with or molested.²⁷⁸

The Underwood Resolutions and, more so, the 1858 Treaty with China, are congressional attempts to protect the religious freedom of United States citizens overseas.²⁷⁹ It is not clear whether Congress was doing so pursuant to its power to ratify treaties, or as part of its responsibility to ensure that "no laws are made prohibiting the free exercise of religion," or both. Interestingly, some members warned that efforts to secure religious liberty overseas might give Congress an excuse to secure free exercise in the several states.²⁸⁰ At no time, however, was any voice raised objecting to the use of congressional power in an effort to secure the free exercise of United States citizens abroad.

The Senate's efforts to secure religious liberty overseas are unambiguous

²⁷⁶ *Id.*

²⁷⁷ See BORDEN, *supra* note 118, at 90 (reporting that the Underwood resolutions were passed sometime after the proviso was approved). See generally 2 STOKES, *supra* note 130, at 438–39 (stating that the upper echelons of the United States government responded to the indignation of Jewish citizens at the treatment of American Jews in Europe).

²⁷⁸ 7 MILLER, *supra* note 272, at 804; see also BORDEN, *supra* note 118, at 79. A.P. Stokes reports that this provision appeared in the 1903–1904 Treaty with China. See 2 STOKES, *supra* note 130, at 422.

²⁷⁹ Morton Borden notes that, at the time of the treaty, there were Jews living in China, and that the treaty was, therefore, an example of Christian hegemony in the U.S. government. See BORDEN, *supra* note 118, at 79. Borden does not mention whether these Jews were American citizens, or if so, whether they were engaged in religious activities that would have aroused the ire of the local officials. The only "oppression" facing the Jews in China Borden mentions involved the zealous activities of the Christian missionaries. See *id.* at 82.

²⁸⁰ Senator George Badger—the same senator who argued in favor of federal power to secure religious liberty during the chaplain debates—asked Senator Cass whether passing the Resolutions implied that Congress would have power to secure domestic religious liberty should there ever "be a state or States prohibiting religious toleration . . ." CONG. GLOBE, 33d Cong., 1st Sess. 1187 (1854). Cass responded that Badger's hypothetical was an "impossible case." *Id.*

legislative actions on the subject of religious liberty. Placed alongside militia exemptions and the arguments in favor of federal chaplains, the treaties may well reflect a growing feeling on the part of Congress in the mid-nineteen hundreds that securing religious liberty required affirmative action by the government. Once again, had these treaties been ratified closer to the Founding, they would have been stronger evidence of an original understanding that Congress had some power to protect the free exercise of United States citizens. The weight of such evidence, however, is substantially weakened by its late occurrence. On the other hand, to the extent that these activities reflected a new understanding of religious liberty, they may be quite relevant to the intended scope of the Fourteenth Amendment.²⁸¹

D. *Summary*

There is only one unambiguous example of congressional regulation of religion contemporaneous with the Founding—federal chaplains—and this practice was not publicly justified by Congress until long after the Founding. In light of the most plausible account of the original understanding of the religion clauses, a reasonable conclusion would be that the appointment of federal chaplains was unconstitutional. It is not unreasonable to suppose that the same people who framed the Constitution might occasionally support actions that cannot reasonably be reconciled with the most plausible interpretation of that document. Most scholars believe this is precisely what happened with the passage of the Alien and Sedition Acts.²⁸² Moreover, the appointment of government chaplains was a common and uncontroversial practice in the states at the time of the adoption of the Constitution, and nothing about the federal appointment implicated the rights of states—or of individuals—outside Congress and the military. Given the fact that core Federalist aspects of the religion clauses were not called into question, it seems at least as plausible to believe that Congress might err on the matter of chaplains, as on the more politically sensitive matter of seditious libel. Moreover, whatever weight this action might have, it is vastly outweighed by the more plausible interpretation of the text and the remarkably consistent public interpretations of the religion clauses by those most closely involved with their enactment.

There is also evidence that, in the years approaching the Civil War, Congress began to act on the understanding that it had some degree of power to protect the religious exercise of United States citizens. Once again, however, there is no evidence that any of the Founders shared this view at the time of the adoption of

²⁸¹ See *infra* Part V.

²⁸² See *New York Times v. Sullivan*, 376 U.S. 254, 273–77 (1964).

the Constitution and its first ten amendments. Over and over, in a variety of ways, and from a variety of ideological points of view, when they addressed the issue, the Founders expressly declared that Congress had no power whatsoever over the subject of religion. There is not a single piece of evidence that any Founder believed the contrary.

Finally, even these few exceptions generally track a Federalist reading of the religion clauses. Congress's power to enact legislation pursuant to a treaty, or establishing the federal chaplaincy, are analogous to Congress's power in the territories: neither interfere with state regulation of religion or even imply concurrent federal power to regulate religion in the states.²⁸³ Thus, these "exceptions" do not necessarily call into question the First Amendment's prohibition against any law "federalizing" any aspect of the subject of religion—that subject being an area reserved to the states under the Tenth Amendment. Overcoming that barrier would require an amendment to the Constitution.

V. THE FOURTEENTH AMENDMENT

Section 5 of the Fourteenth Amendment states: "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."²⁸⁴ "The provisions" of the Fourteenth Amendment include both the Privileges or Immunities Clause (considered by some as the intended vehicle for incorporation of the Bill of Rights)²⁸⁵ and the Due Process Clause—the clause actually relied upon by the Court for incorporation.²⁸⁶ I have argued elsewhere that there is good reason to believe that the Framers of the Fourteenth Amendment considered both free exercise and non-establishment to be privileges or immunities of citizens of the United States.²⁸⁷ I will not repeat those arguments here and will proceed on the assumption that the religion clauses are legitimately "incorporated" against the states, whether through the Privileges or Immunities Clause or the Due Process Clause.

Incorporation, however, creates a dilemma. If the religion clauses are among

²⁸³ The exception here would be the military exemption which arguably interfered with state regulation of religious exemptions from military service.

²⁸⁴ U.S. CONST. amend. XIV, § 5.

²⁸⁵ See, e.g., MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE* (1986); Amar, *Fourteenth Amendment*, *supra* note 109; Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 *YALE L.J.* 57 (1993); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *YALE L.J.* 1385 (1992); Lash, *supra* note 79; Lash, *supra* note 3.

²⁸⁶ See *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Gitlow v. New York*, 268 U.S. 652 (1925).

²⁸⁷ See Lash, *supra* note 79; Lash, *supra* note 3.

the “provisions” of the Fourteenth Amendment, then section 5 read literally would grant Congress power to enforce the religion clauses against state abridgment.²⁸⁸ But how can Congress sensibly be granted power over the subject of religion in order to enforce a provision that prohibits congressional power over that very subject? Even if Congress’s power under section 5 is limited to legislation prohibiting state legislation on the subject of religion,²⁸⁹ and providing remedies for the same,²⁹⁰ such legislation would still conflict with the most plausible reading of the original First Amendment. As discussed in Part II, the original no power principle was intended, at least in part, to protect state religious establishments from federal interference. Thus, section 5 of the Fourteenth Amendment appears to allow what the First Amendment forbids.

One could avoid the dilemma by conceding the general legitimacy of incorporation, but limiting its scope. Professor Akhil Amar, for example, has suggested that there may be less reason to incorporate the Establishment Clause than the Free Exercise Clause.²⁹¹ Amar’s theory is based in large part on a

²⁸⁸ See *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966). Although the Court recently struck down the Religious Freedom Restoration Act as beyond congressional power under § 5 of the Fourteenth Amendment, see *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), the problem in *Boerne* was that Congress had exercised broader powers than necessary to remedy potential violations of the Fourteenth Amendment. See *id.* The Court assumed that Congress had some degree of power to protect against intentional state abridgment of religious liberty. See *id.*

²⁸⁹ See *supra* note 288.

²⁹⁰ For example, 42 U.S.C. § 1983 provides a remedy for persons whose constitutional rights have been abridged by officials acting under color of state law. See 42 U.S.C. § 1983 (1994). Professor Jed Rubenfeld argues that the “antidisestablishment” norm that informed the original Establishment Clause remains in place even after the adoption of the Fourteenth Amendment and the incorporation of the Establishment Clause. See Rubenfeld, *supra* note 16, at 2373–78. He thus believes that, although Congress has power under § 5 to pass legislation of general applicability like § 1983, Congress does not have power to legislate national norms of the subject of religious liberty. See *id.* at 2378–80. Thus, the original religion clauses restrict congressional enforcement of the *incorporated* religion clauses, in a manner not true for the enforcement of other incorporated liberties. See *id.* at 2378. Professor Rubenfeld does not cite any historical evidence that the framers of the Fourteenth Amendment would have intended such a limitation on congressional power, but instead argues that such a special restriction is warranted given the original purpose to keep the subject of religion out of the hands of the federal government. See *id.* at 2351–58. Although he is surely correct regarding the *original* interpretation of the clauses, there is much evidence that very different interpretations developed in the period between the Founding and Reconstruction. See *supra* Part IV; see also Lash, *supra* note 79; Lash, *supra* note 3.

²⁹¹ See Amar, *supra* note 79, at 1157; Amar, *Fourteenth Amendment*, *supra* note 109, at 1232. More recently, Professor Amar has conceded the possibility that by 1868, the Establishment Clause was no longer interpreted as a states’ rights provision. See AKHIL REED AMAR, *BILL OF RIGHTS* 246–57 (1998).

reading of the original First Amendment that distinguishes the Free Exercise Clause from the “states’ rights protective” Establishment Clause.²⁹² However plausible this approach might be,²⁹³ the conflict between the First and Fourteenth Amendments remains even if the Establishment Clause drops off the list of incorporated rights. If the Free Exercise Clause is incorporated, then section 5 grants Congress power to enforce free exercise in the states. This power could be applied to prohibit state laws that discriminate among one or more religions on the basis of a preferred religious belief.²⁹⁴ Thus, even if only the Free Exercise Clause was incorporated, we are still left with irreconcilable amendments.²⁹⁵

Another way to reconcile the First and Fourteenth Amendments would be to remove religion from the list of subjects within the reach of section 5.²⁹⁶ For example, even if the religion clauses are appropriately incorporated against the states through section 1, perhaps there was no intention to bring the subject of religion within the reach of congressional power under section 5. This seems to preserve the vision of both the original religion clauses (no congressional power) and the goals of the new Fourteenth Amendment (protect religious liberty against state action). The problem here is justifying such a reading in light of the text and what we know of the historical intent behind the Fourteenth Amendment. The text makes no mention of the subject of religion at all, much less addresses it as an exception to section 5’s grant of congressional power. Moreover, there is no evidence that the framers of the Fourteenth Amendment intended section 5 to reach some, but not all, of the liberties protected under section 1. On the contrary, some of the framers of the Fourteenth Amendment expressly

²⁹² *Id.*

²⁹³ I believe the historical evidence strongly suggests that the framers of the Fourteenth Amendment intended to incorporate both clauses. *See generally* Lash, *supra* note 3.

²⁹⁴ *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 520 (1993). Discrimination on the basis of religion is now almost the sole focus on the Free Exercise Clause. *See* Employment Div., Dep’t of Human Resources of Or. v. Smith, 494 U.S. 872 (1990) (stating that the Free Exercise Clause generally does not require religious exemptions from generally applicable laws). In *Lukumi*, the Court noted that free exercise principles are violated whenever a law “discriminates against some or all religious beliefs.” *Lukumi*, 508 U.S. at 532. Thus, a state religious establishment that distributes benefits to some, but not all religions, would trigger free exercise protection, just as preferential treatment triggers discrimination analysis under the Equal Protection Clause. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

²⁹⁵ Note that power to enforce free exercise would include power to remedy past or prevent future intentional discrimination against religion. *See* City of Rome v. United States, 466 U.S. 156 (1980); Morgan v. Katzenbach, 384 U.S. 641 (1966). Even after the recent decision of *City of Boerne v. Flores*, Congress still has power to act where there is some evidence that intentional discrimination is going unremedied. *See* 117 S. Ct. 2157 (1997).

²⁹⁶ *See* Bybee, *supra* note 16, at 1616–19; Rubinfeld, *supra* note 16, at 2378–80.

mentioned the religion clauses and the rights of conscience to be among the liberties the Fourteenth Amendment was meant to protect²⁹⁷ and that section 5 granted Congress power to enforce those liberties.²⁹⁸

Even if one questions whether there is sufficient evidence that the framers of the Fourteenth Amendment intended to incorporate any provision from the Bill of Rights, there is no evidence that any member of the Thirty-Ninth Congress considered the religion clauses to be inappropriate candidates for incorporation, or inappropriate subjects for congressional enforcement against state action.²⁹⁹

²⁹⁷ In an 1871 speech, John Bingham, the author of § 1 of the Fourteenth Amendment, read the first eight amendments, including both religion clauses, and declared that the Fourteenth Amendment was designed to protect all such privileges or immunities. *See* CONG. GLOBE, 42d Cong., 1st Sess. 365–68 (1871). Senator Thomas Norwood noted in 1874, “Before [the adoption of the Fourteenth Amendment] any state might have established a particular religion . . . But can a state do so now? If not why? . . . The reason is, that the citizens of the United States have the new guarantee under the fourteenth amendment.” CONG. REC., 43d Cong., 1st Sess. (1874). Henry Dawes interpreted the Fourteenth Amendment to protect “free exercise of . . . religious belief.” *Id.* Many members of Congress cited the South’s abridgment of religious liberty as one of the problems meant to be addressed by the Fourteenth Amendment. *See generally* Lash, *supra* note 3.

²⁹⁸ According to John Bingham, the drafter of § 1 of the Fourteenth Amendment, “[t]he fourteenth amendment closes with the words, ‘the Congress shall have power to enforce, by appropriate legislation, the provisions of this article’—the whole of it, sir; all the provisions of the article; every section of it.” ALFRED AVINS, *THE RECONSTRUCTION AMENDMENTS’ DEBATES* 509 (1967). In a speech introducing the Fourteenth Amendment to the Senate, Senator Jacob M. Howard read the Bill of Rights, including the religion clauses, and then explained:

Now, sir, there is no power given in the Constitution to enforce and carryout any of these guarantees. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the . . . granted powers, but they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the states are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is done by the fifth section . . . Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution.

CONG. GLOBE, 39th Cong., 1st Sess. 2766, 2768 (1866).

²⁹⁹ *See* Lash, *supra* note 3; Lash, *supra* note 79.

Indeed, as discussed in the previous section, in the period just prior to Reconstruction, some members of Congress acted on the understanding that the Free Exercise Clause justified legislation protecting religious conduct.³⁰⁰ Thus, there is no indication in the text of the Fourteenth Amendment, or in the history surrounding its adoption, suggesting that Congress intended to treat religious liberty differently from any other incorporated right under sections 1 and 5.³⁰¹

There is, however, one way to reconcile the First and Fourteenth Amendment in a manner that grants Congress some degree of power over the subject of religion. Although the original First Amendment denied Congress such power, the First Amendment as of 1868 granted or permitted legislation on the subject of religion. In other words, it is conceivable that the First Amendment was implicitly amended at the same time that it was incorporated into the Fourteenth Amendment.

There is nothing unusual about a new amendment implicitly amending an old one. An obvious, if controversial, example is the Eleventh Amendment's effect on federal court jurisdiction to hear suits brought against a state or state level official.³⁰² Less controversially, "reverse incorporation" theory presumes that the Fourteenth Amendment's Equal Protection Clause amended the substantive scope of the Fifth Amendment's Due Process Clause.³⁰³ Certainly

³⁰⁰ See *supra* note 263 and accompanying text.

³⁰¹ One could argue that the mere logic of incorporation requires distinguishing the religion clauses from other incorporated rights within the reach of § 5. The argument would be that because the incorporated rights were express restrictions on congressional power, they cannot fall within the reach of § 5—at least absent express language demanding as much. See, e.g., Rubinfeld, *supra* note 16, at 2378–80. This argument, of course, presumes that Congress intended to incorporate the religion clauses as those clauses were understood in 1789. This, of course, is literally impossible: incorporation of the Establishment Clause is impossible unless that amendment no longer means what it meant in 1789. See *supra* Part II. As far as the need for express language is concerned, this is the reason why the Court rejected the "incorporation" reading of the privileges or immunities clause in the *Slaughter House Cases*, 83 U.S. 36 (1872). It is difficult to understand how one could accept implied incorporation (thus "amending" the original Federalist-based clauses to now apply against the states), but not accept an implied expansion of congressional power due to a clear statement requirement. Put another way, the need for a clear statement is really an argument against incorporation in general.

³⁰² See U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); *Hans v. Louisiana*, 134 U.S. 1 (1890). But see Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 246–52 (1985) (rejecting the current interpretation of the 11th Amendment as a broad expression of state sovereign immunity).

³⁰³ See *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497

the Thirteenth Amendment changed the original understanding of “property” protected under the Fifth Amendment.³⁰⁴ Thus, there is nothing theoretically implausible about the idea that the Fourteenth Amendment implicitly amended the First. The important question is whether it is plausible that those who framed and adopted the Fourteenth Amendment intended such a transformation.

There is a significant body of evidence which suggests that, by the time of Reconstruction, the Establishment Clause was interpreted at both a state and federal level, as expressing a principle of individual liberty (as opposed to a declaration of state prerogative).³⁰⁵ For example, prior to the Civil War, state courts for years had looked to the federal Establishment Clause for guidance in interpreting the religion clauses of their state’s constitution.³⁰⁶ This makes sense only if the federal provision was read as an expression of individual liberty. During this same period, Congress began to interpret the Free Exercise Clause as a provision justifying—and perhaps requiring—congressional legislation protecting religious freedom.³⁰⁷

As noted in the previous sections, these examples are not plausible interpretations of the original religion clauses. They are, however, indications of what the framers of the Fourteenth Amendment might have meant when they quoted the religion clauses as liberties to be protected under section 1 and section 5 of the Fourteenth Amendment. These “new” interpretations are also relevant to understanding what We the People of 1868 thought they were doing when they ratified the proposed amendment. Put another way, even if the popular understanding of the First Amendment in 1868 was nothing more than wishful thinking (and erroneous as an historical matter), there was nothing to prevent the people from making their wish the Constitution’s command. The people, after all, have the right to change their collective minds and add their new interpretation of the First Amendment to the text of the Fourteenth. In doing so, the First Amendment would have been amended insofar as its original purpose and scope were inconsistent with the purpose and scope of the Fourteenth.

Thus, section 5 stands as a plausible source of congressional power over the subject of religion. This is not to say there is incontrovertible evidence that it was

(1954).

³⁰⁴ Similarly, some scholars argue that the provisions of the Bill of Rights changed their shape in the process of being incorporated against the states. See Amar, *Fourteenth Amendment*, *supra* note 109. Note that Professor Amar addresses the issue of incorporation of the religion clauses differently than I do—especially in regard to the Establishment Clause.

³⁰⁵ See generally Lash, *supra* note 79.

³⁰⁶ See *id.* at 1105–31.

³⁰⁷ This occurred in limited settings that were generally beyond the states’ domain. See *supra* Part IV (discussion regarding foreign treaties, religious exemptions from military service, and the federal chaplaincy).

meant to serve as such. There are plausible arguments against incorporation in general, and possible (though, I think less plausible) arguments against the incorporation of one or both of the religion clauses. However, I think the best reading of the text and the history surrounding its adoption indicates an intent to both include religious liberty within the scope of the Fourteenth Amendment and to give Congress power to enforce the same against state action. In any event, however convincing my account might be, there does not appear to be any other plausible source of congressional power on the subject of religion.

A. Implications

Exploring the full implications of section 5 power over the subject of religion deserves more space than I can devote to it here. It is possible, however, to trace the likely outlines of such power, if it exists.

First, even if section 5 of the Fourteenth Amendment affects the substantive content of the First Amendment, that effect logically would be limited to the scope and purposes of the Fourteenth Amendment. Because section 5 grants Congress power to enforce the incorporated religion clauses, congressional power over religion would exist only to the extent appropriate to enforce those incorporated norms.³⁰⁸ For example, under section 5, Congress could regulate religion in regard to state action, but Congress would have no power to regulate private religious conduct.³⁰⁹ Similarly, although the amended First Amendment would probably allow Congress to address the subject of religion in its exercise of enumerated responsibilities, that power would be limited to cases where federal law itself threatened to abridge the religion clauses.³¹⁰

³⁰⁸ This point was recently emphasized by the Supreme Court. *See City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

³⁰⁹ Both the Privileges or Immunities and Due Process Clauses are protections against state, not private, action. *See* U.S. CONST. amend. XIV, § 5; *The Civil Rights Cases*, 109 U.S. 3 (1883). Thus, Congress would have no power to regulate parental religious instruction of their children, or to regulate the theological decisions of religious institutions. *See, e.g., United States v. Ballard*, 322 U.S. 78 (1944); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). Rubinfeld argues that interpreting § 5 as a source of congressional power to create national norms of religious freedom would give Congress power to enact the Children's Religious Freedom Act which would prohibit states from allowing parents unsupervised authority over the religious upbringing of their children unless the state ensures that parents not compel their children to practice a particular religion. *See* Rubinfeld, *supra* note 16, at 2371–72. However, under any traditional theory of state action, such parental decisionmaking is not attributable to the state, and thus would not fall within Congress's § 5 powers.

³¹⁰ This not only makes sense as a matter of constitutional text and Fourteenth Amendment history, it also tracks the Supreme Court's unitary interpretation of the First Amendment as applied against both state and federal governments.

Congressional power under section 5, then, depends upon the scope of the religion clauses. The current Court interprets the Free Exercise Clause as almost never requiring an exemption from a generally applicable law.³¹¹ Under a section 5 reading of congressional power, Congress's ability to legislate on behalf of free exercise is limited accordingly. Even under *Smith*, however, Congress may enact prophylactic laws that seek to remedy or prevent hard-to-discover intentional government discrimination,³¹² as well as laws accommodating free exercise when it is linked to a separate First Amendment right, like freedom of speech,³¹³ or is threatened by potentially discriminatory administrative enforcement.³¹⁴

Secondly, under section 5, Congress would have power to enforce both religion clauses. As was pointed out above, nothing in the text or history justifies distinguishing the Establishment Clause from the Free Exercise Clause in terms of the Fourteenth Amendment. Although Congress generally has regulated religion on behalf of free exercise liberty, there is nothing to prevent it from regulating on behalf of nonestablishment, to the extent that doing so does not conflict with another provision of the Constitution. For example, if the Court interprets the Establishment Clause to prohibit government action that creates a reasonable perception of government endorsement of religion, under section 5, Congress could act to prevent potential violations of this norm. For example, Congress might pass legislation requiring states to erect an appropriately sized disclaimer accompanying any private religious display in a public forum.³¹⁵ More controversially, to the extent that the Court continues to uphold the *Lemon* Test, Congress might pass legislation forbidding states from directly subsidizing religious schools as part of a general school voucher program.³¹⁶ To the extent the Court limits the scope of the Establishment Clause in future cases, the

³¹¹ See *Employment Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990).

³¹² See *City of Rome v. United States*, 446 U.S. 156 (1980); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

³¹³ See, e.g., *Smith*, 494 U.S. at 872; *West Virginia v. Barnette*, 319 U.S. 624 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

³¹⁴ See *Smith*, 494 U.S. at 872.

³¹⁵ See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 782 (1995) (O'Connor, J., concurring).

³¹⁶ See *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (striking down state financial aid to private religious schools). *But see* *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (upholding constitutionality of providing vocational rehabilitation assistance to a student at a private Catholic college); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (upholding constitutionality of providing a publicly funded sign language interpreter to a deaf Catholic school student).

congressional power over the establishment of religion would be similarly restricted (as is true under the Free Exercise Clause).

Third, the Fourteenth Amendment would have no effect on Congress's incapacity to regulate religion as a "necessary and proper" means to a separately enumerated end. The Fourteenth Amendment speaks only of "enforcing" the freedoms of section 1. Although Congress seems to have regulated on the subject of religion in the period just prior to Reconstruction, these actions were justified (or were justifiable) as attempts to prevent the government itself from violating the free exercise as it was then understood. For example, although the establishment of federal chaplains was partially justified under Congress's power to regulate the military (and create its own staff), both chaplaincies were expressly linked to free exercise concerns.³¹⁷ The Civil War militia exemptions seem to be an attempt to conform federal law to the requirements of free exercise.³¹⁸ Finally, the religious provisions in foreign treaties were obvious attempts to protect U.S. citizens overseas from religious discrimination.³¹⁹ In each case, there was a colorable claim that failing to act would result in an abridgment of the free exercise rights of U.S. citizens. There is no evidence in either the text of the Fourteenth Amendment, or the history surrounding its adoption, suggesting that Congress should have power to regulate religion in order to, say, facilitate the flow of Interstate Commerce³²⁰ or to enforce the religious provisions of a treaty absent a need to protect the free exercise rights of U.S. citizens.³²¹

³¹⁷ See *supra* Part IV.C.3.

³¹⁸ See *supra* Part IV.C.1.b; see also Lash, *supra* note 3.

³¹⁹ See *supra* note Part IV.C.4 and accompanying text.

³²⁰ But see Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-2(a), 2000e(j) (1994) (banning religious discrimination in private employment and requiring employers to reasonably accommodate the religious practices of their employees if they can do so without undue hardship).

³²¹ One might argue that, because the religion clauses were "reconstructed" in a manner that allowed for federal protection of free exercise and nonestablishment, that same transformation should be viewed as having lifted the original (Federalist) bar against regulating religion as an aspect of commerce (or another enumerated power). I do not believe, however, that the evidence supports such a broad reading of the impact of the Fourteenth Amendment. Not only is there no support for such a view in either the text or history surrounding the adoption of the Fourteenth Amendment, there also are non-Federalist reasons for retaining the original restriction on federal power to use religion as a means to an enumerated end. For example, advancing the exercise of religion beyond that required by the Free Exercise Clause or justified under § 5 of the Fourteenth Amendment might be viewed as unjustifiable promotion of religion. Therefore, because neither the text of the Fourteenth Amendment, nor the logic of incorporation, nor the debates surrounding its adoption, necessarily raise the issue of federal power beyond those granted under § 5, I see no historical justification for doing so.

Finally, there is the question of state government power over the subject of religion. Although the original federal government had no plausible source of power over the subject of religion, power to regulate religion was reserved to the states under the Tenth Amendment. Thus, it is at least theoretically possible that, even after incorporation, states might have some residual power to regulate religion even in the absence of a constitutional mandate, so long as the regulation does not violate the norms of the Free Exercise and Establishment Clauses. Once again, however, this reading of the Fourteenth Amendment, has no support in the text of the amendment, and little (if any) support in history. The text of the Fourteenth Amendment forbids states from making or enforcing any law abridging the “privileges or immunities of citizens of the United States.” To the extent that these privileges or immunities were intended to include the contemporary understanding of the federal religion clauses, then the text requires those same norms be applied against the states. In other words, whatever effect the First Amendment had on the legitimate powers of the federal government, so now would the Fourteenth Amendment affect the legitimate powers of the states.

This unitary reading of the norms of free exercise and establishment is supported by the history surrounding the adoption of the Fourteenth Amendment. In the period leading up to Reconstruction, northern courts began to interpret their own state constitution’s protection of free exercise and nonestablishment as reflecting the same norms expressed by the federal religion clauses.³²² State supreme court after state supreme court came to embrace the idea that what was true at the federal level should be true at the state level when it came to power over the subject of religion.³²³ In fact, I have found no evidence suggesting that any member of Congress, or any state official, believed that the states should have greater power over the subject of religion than the federal government.

Without evidence to the contrary, then, the most plausible reading of the Fourteenth Amendment would be as follows: to the extent that the Fourteenth Amendment incorporated the (new) principles of the First Amendment against the states, the scope of state power over the subject of religion became equal to that of the federal government. This means that, at the state level, government power over the subject of religion is permitted only to the extent that such power is allowed under the norms of the religion clauses themselves. Moreover, even if exemptions are not considered an exercise of power, and therefore permissible under the First Amendment, Congress would not have power to require states to exempt religiously motivated conduct from generally applicable state laws unless failing to grant the exemption arguably would trigger the protections of

³²² See Lash, *supra* note 79, at 1133–34.

³²³ See *id.*

the Free Exercise Clause.³²⁴ Similarly, federal or state laws singling out religion in an effort to separate church and state would be justified only where failing to do so threatened to violate nonestablishment norms as interpreted by the Supreme Court.³²⁵

VI. CONCLUSION

There are three possible sources of federal power to regulate on the subject of religion: the Necessary and Proper Clause of Article I, the original First Amendment Clauses, and section 5 of the Fourteenth Amendment. Of these three, only section 5 appears to be a plausible source of congressional power. If section 5 is such a source, then the most reasonable way to reconcile the religion clauses of the First Amendment and section 5 of the Fourteenth is to interpret the Fourteenth Amendment as implicitly amending the original religion clauses at the same time that it incorporated them against state action.

This account challenges the assumption made by most scholars that Congress has some degree of discretionary power over the subject of religion by way of the Necessary and Proper Clause.³²⁶ There is no support for such an interpretation in either the text of the Constitution or in the historical records of the Founding. In fact, the text of the First Amendment, as well as the history surrounding the adoption of the original Constitution and its first ten amendments, make any provision in the *original* Constitution a highly implausible source of power over the subject of religion.

Although I have suggested that the Fourteenth Amendment is a potential source of congressional power over the subject of religion, there is something to be said *against* this possibility as well. The entire subject of incorporation as a matter of original intent remains controversial, even if unlikely to be reversed.³²⁷

³²⁴ Presumably, the government would not have to wait until the Court declared that a particular accommodation was required. Moreover, under current principles, a legislative determination that an accommodation was required would be entitled to some deference from the Court. There are limits, however, to such deference. *See City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

³²⁵ This seems to be the logical corollary to the Court's holding in *Boerne* that Congress has power to regulate free exercise only to the extent that there is a plausible threat to free exercise as interpreted by the Court. *See id.* This calls into question numerous state constitutional provisions interpreted by state courts as "broader in scope" than the federal establishment clause. *See supra* note 43 and accompanying text.

³²⁶ *See* sources cited *supra* notes 17–18. It equally challenges those scholars who deny congressional power to regulate religion under section 5 of the Fourteenth Amendment. *See id.*

³²⁷ Compare Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981), with Michael Curtis, *Further Adventures of the Nine-Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89, 89 (1982); *see* Amar, *Fourteenth Amendment*, *supra* note 109.

Even if the doctrine of incorporation is conceded as a general matter, some scholars argue that incorporation does not apply with equal force to the religion clauses of the First Amendment.³²⁸ Finally, even assuming that the religion clauses were incorporated, and were intended to be within the scope of section 5, the idea that incorporation implicitly amends the substantive scope of the First Amendment may strike some readers as unreasonable.³²⁹

Nevertheless, this appears to be the most plausible account—indeed, the only plausible account—of congressional power on the subject of religion. This article merely traces the possible outlines of how the Fourteenth Amendment changes and interacts with the limitations of the original First Amendment. The subject deserves a much fuller discussion. But the very difficulty of the issue, and the obvious need for further exploration, belie the extraordinary silence in the current literature regarding just how and when the Constitution granted Congress power to regulate religion. The Supreme Court's current narrowing of the scope of both religion clauses calls into question the legal basis for the myriad ways in which both state and federal governments continue to exercise power over the subject of religion. This article hopes to trigger a serious discussion regarding the source and scope of that power.

³²⁸ See Amar, *Fourteenth Amendment*, *supra* note 109 (arguing that the establishment clause may not be an appropriate candidate for incorporation); Bybee, *supra* note 16, at 1609 (arguing that the Fourteenth Amendment was not intended to incorporate either religion clause).

³²⁹ See Rubinfeld, *supra* note 16.