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# Disestablished Religion in Pennsylvania and Kentucky: A Study in Constitutional Interpretation

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# *Disestablished Religion in Pennsylvania and Kentucky: A Study in Constitutional Interpretation* *

KENNETH S. GALLANT

The question of establishment of religion in American state constitutions may, to some, seem barely relevant any more. The relationship between church and state (in the narrow sense) sometimes seems caught in a vise between the 'no establishment' and 'free exercise' clauses of the federal constitution.[1] The early constitutional history of the states was far different. The states were the true battlegrounds between religious liberty and antidisestablishmentarianism.

The terms of the debate in the states throw light on the interpretive assumptions of early America – which throw light on whether the call of Attorney General Edwin Meese and others for a return to the 'intent of the framers' makes sense today as interpretive policy on a broad range of constitutional issues. Professor Jefferson Powell has shown rather convincingly that, for the most part, the framers of the Federal Constitution of 1787 themselves did not expect their subjective intentions to govern constitutional interpretation.[2] The task now is to understand how large groups have come to view 'intentionalism' as the predominant mode of constitutional interpretation.[3] This requires exploration of modes of interpretation of state constitutions as well as debate concerning the federal constitution. This is particularly true of the problem of interpreting the Bill of Rights, since by far the major part of early civil rights debate and litigation came out of state government.[4]

Synthesizing the experience in all of the states, or even the entire experience in one state, is far beyond the scope of this study; I will simply present two stories which may throw light on this problem, as well as show the diversity of religious feeling in early America. They are intended more to raise and illustrate questions than to answer them, and to suggest an agenda for further state constitutional research.

The subjects of these stories are Pennsylvania and Kentucky, two of the nominally 'disestablishment' states. Both states, it is said, did not have an Establishment.[5] Kentucky, a breakaway region of Virginia, is heir to the

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Jeffersonian Statute of Religious Freedom.[6] Kentucky's original constitutional guarantee of religious freedom, adopted upon its separation from Virginia in 1792, was modelled after that in the Pennsylvania Constitutions of 1776 and 1790:

> – That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man of right can be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent, that no human authority can in any case whatever control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious societies or modes of worship.[7]

Both the 1776 Pennsylvania Constitution and the 1792 Kentucky document were created by popular conventions called at the request of the national government – but not ratified by the people.[8]

For our purposes, the most significant difference between Pennsylvania and Kentucky was that the latter was still predominantly a frontier community. Pennsylvania was a relatively old region, with diverse but strongly entrenched religious groups, and a sufficiently strong Christian consensus to include this oath for legislators in its otherwise radical Constitution of 1776:

> *I do believe in One God, the creator and governor of the universe; the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration.*[9]

Kentucky on the other hand was extremely new: in 1792, there were few, if any, native white or black adult Kentuckians.[10] Its sentiment was extremely anti-clerical, as might be gathered from its prohibition on clergy in the legislature (and by 1799, the Governorship).[11] The largest religious groups, such as the Baptists, were strongly against any establishment, having been dissenters both in the northern Congregationalist and southern Anglican colonies. Moreover, one can hardly say that religion was a strong frontier influence, at least until the Great Revival of the turn of the nineteenth century.[12] It is thus not surprising that, from 1792 on, Kentucky's Constitution insisted '[t]hat the civil rights, privileges, and capacities of any citizen shall in no ways be diminished or enlarged on account of his religion.'[13]

In both states, judicial review was an intellectually acceptable doctrine before *Marbury v. Madison*.[14] In legally sophisticated Pennsylvania, constitutional questions and questions concerning religion reached the courts in fairly short order. By 1783, the Board of Censors, a septennial

advisory body created by the state constitution, had criticized the Supreme Court for failing to exercise judicial review.[15] The Pennsylvania Supreme Court declared a statute supporting a land claim invalid in 1793.[16] That same year, a Jew was fined for refusing to testify on Saturday.[17] By 1797, the federal circuit court for Pennsylvania had, in procedurally appropriate cases, twice held state statutes invalid on state constitutional grounds.[18] And, as we shall see, establishment of religion became an issue early.

Although Kentucky began as a relatively unsophisticated legal community, by 1801 the Courts embraced the use of judicial review to protect individual rights, especially the right to jury trial.[19] The one-page opinions in the earliest cases indicate an easy, unquestioning familiarity with the doctrine. By 1815, the Courts had enforced the constitutional guarantee of liberty of conscience to those with objections to bearing arms on behalf of the state.[20] By 1822 the converse right to bear arms had been vindicated by overturning a new statute limiting the right to carry concealed weapons, which had existed at the formation of the constitution.[21] Perhaps the most interesting case in the early Kentucky series was the 1820 decision overturning a statute which denied to free non-whites the right to defend themselves against whites, by implying from the Federal constitution a hybrid 'subject but not citizen' status.[22]

Establishment of religion, however, was barely noticed by the Kentucky courts until the late nineteenth century.[23] That is not to say that the battle was not fought vigorously; but it was fought in the press, the pulpit, and the Legislature.

## I. A POPULAR CONTROVERSY OVER RELIGION AND HIGHER EDUCATION IN KENTUCKY

Hostility towards government intrusion into religion and *vice versa* manifested itself early in Kentucky history. During the pre-statehood debates, citizens suggested that the clergy be forbidden either from bearing arms or from sitting in the Legislature, and the latter proposal was embodied in the Constitution.[24] It was not until 50 years after statehood, in 1843, that regular prayers were said before the Legislature.[25] In the controversy over Sunday mail service, a great many of its citizens favored such service. In short, the majority of Kentuckians in the pre- and early statehood periods appear to have favored a separation of church and state somewhat more complete than that which existed in most states just before the school prayer decisions, and perhaps today as well. At the core of this separation were the anti-clerical provisions of the constitution – the clergy at least would play no major government role.

Kentucky's remoteness from Eastern Virginia, with which it was originally joined, required that services be provided locally. Even before

the end of the Revolution, the Virginia Legislature began providing for education in the West, by granting 8,000 acres of land to start an institution to be called Transylvania Seminary. It also provided a Board of Trustees, and appointed its first members, a majority of whom happened to be Presbyterian.[26] The significance of this fact is that the Presbyterians were a small minority of the population of the Kentucky region, but as a group they shared an interest in promoting education and a belief in the place of religious principles in government. Transylvania Seminary suffered a history of fits and starts in the 1780s, but by statehood in 1792 it was a growing, if not prospering, concern.

The legislation creating Transylvania Seminary was devoid of reference to religion or privileges of any sect. In this respect, it differed greatly from that creating two other early Kentucky institutions. In 1794, the legislature, following a similar pattern of granting land, created Kentucky Academy. This academy was specifically guaranteed to have a majority Presbyterian Board of Trustees. Its religious mission was explicit but limited: it was forbidden from proselytizing students to any particular sect; but was allowed to encourage belief in the 'gospel system and . . . vital piety.'[27] Aside from the grant of land, no special privileges were given to Kentucky Academy. Nor is there any reason to believe that the legislature was showing favoritism to Presbyterianism. Because its tenets emphasized education, this church was simply the first to seek to establish this type of school. The next year, the Legislature created Franklin Academy, whose purpose was solely the 'extension of useful knowledge,' and which was forbidden to show religious preference in hiring or teaching.[28]

As with many institutions of that day, it is hard to say whether we moderns ought to call Transylvania or the other academies public or private institutions. Transylvania was referred to as a 'public' school in the statute authorizing its foundation.[29] Certain public fees and fines were reserved for its use.[30] On the other hand, separate authorizing legislation for a college is hardly surprising in the days before general corporation laws rendered specific incorporating statutes or legislative charters largely obsolete.[31] The original statutes made the Board of Trustees self-perpetuating, in the manner of a private institution, but the Legislature had no problem with revising those statutes or taking back the power to appoint members of the Board.[32] In short, Transylvania was created and managed with little thought to the modern categories of public and private, not surprising for the days before the *Dartmouth College* case made that distinction all important.[33] Some distinctions between schools were, however, made along a continuum between public and private. Neither Kentucky Academy nor Franklin Academy was called a public school in its enabling legislation, and neither was endowed with taxing authority. On the other hand the limitations placed on each in terms of religious

instruction are incompatible with our present notion of a private institution.[34]

In the event, the Kentucky Academy was unable to function as an independent institution and sought union with Transylvania Seminary. This it eventually got, in 1799.[35] The new institution, Transylvania University, was to be governed by the laws applying to the old Transylvania Seminary, so it would be nominally secular. Some members of the Seminary Board foresaw, however, that this union would create pressure on behalf of Presbyterianism and Calvinism at the new institution. And so there was. For nearly thirty years there was contention between those trustees who favored liberality in religion, which, depending upon the individual, meant either religious tolerance, or insistence upon teaching the principles of the liberal religions such as Unitarianism or some versions of Baptist theology, and those who favored running an essentially Calvinist Presbyterian school. This debate entered the public realm of press and pulpit. At one point in 1818, the Legislature took control, juggling the Board of Trustees to ensure the dominance of the liberal viewpoint.[36] This struggle is described at length in Neils Henry Sonne, *Liberal Kentucky,*[37] and by 1830 resulted in the triumph of the Presbyterians.

What is interesting to us is the terms of the debate. To some extent it was a debate which depended upon a reading of the state constitution. The modern lawyer would say this issue is relevant only to the extent that Transylvania was seen as a state institution. To a non-law trained populace, this was merely a part of the larger debate on the place of religion in society, not just in the state. Both sides of the debate argued the state constitutional question nonintentionally, although more research is needed to show whether intentionalism was wholly excluded from the debate. The following paradigm exchange did not directly discuss Transylvania, but typifies the debate on the place of religion in state and society. It began with the Presbyterian minister Rev. James Blythe, acting president of Transylvania University in 1815, arguing that Americans must acknowledge Christ in their public institutions by public proclamation, legal observance of the Sabbath and so on. He continued:

> No person will do me so much injustice as to suppose, that because I speak of the intimate, and indeed indissoluble union there is between a manly and ardent piety, and an equitable administration of our government, that therefore I am for an establishment of religion. No one would deprecate more sincerely than would I, anything that might have, though it should be but remotely, the effect of an establishment . . . .But the poor imperfect systems of human government, these creatures of finite, erring man, it is these that cannot stand upon their own feet, without the aid of religion.[38]

Rev. Blythe's oration showed a firm belief in the place of Christianity in secular life, and an equal belief that both state and federal institutions must allow it in such a place.[39] He agreed with Dr. James Fishback, one of Kentucky's early intellectuals, the core of whose political philosophy was that:

> From the very nature, and necessity of things, without the divine light, the motives and considerations of which are exhibited, and disclosed to the human mind by the Christian religion, our republican government could neither have been organized, nor can it be perpetuated . . . . Take the influence of [the religion of Jesus Christ] away, and a free government, must cease to exist, with its attendant felicities; while a government, correspondingly high toned, and arbitrary, with the force, and influence of sensuality, avarice and ambition, must be superinduced in order to preserve the social state and restrain the fell passions of infuriate man.[40]

These religionists feel no compulsion to justify this position by referring to the intent of the framers of the constitutional documents. They infer the place of religion in the state from the structure of the society created by those documents in the context of the natural order of things. Note also that Rev. Blythe depends on a narrow, but ordinary language, definition of 'establishment' to mean very nearly the European 'ideal' of a single church united with the state.

Such sentiments naturally stirred up a furor. The opposition, however, also used nonintentionalist reasoning, in denouncing these views as establishmentarian:

> Taking the constitution of the United States as a guide for the national government, and the constitution of Kentucky as a guide for our state authorities, it is doubtful that they can with constitutional propriety perform any official act the object of which is religion. As governments, they can have *no religion,* nor exercise any religious functions whatsoever . . . .[41]

This controversialist denounced Rev. Blythe's claim to be opposed to establishments as 'vile [and] hypocritical.' He added ironically:

> . . . this gentleman is not for an establishment of religion! No, nor for anything that would even remotely have that effect! He merely thinks that, in our *national, political,* or *sovereign* capacity, we are bound to be religious – that the *government* is bound to be religious – to sanctify the Sabbath, and keep it holy – by *law of course.* But this would not be an establishment, nor even remotely tend that way; neither would it be a violation of the Constitution.[42]

Note in this a use of 'establishment' in a different, but again ordinary language, sense: any measure which officially favors a particular creed 'establishes' or 'tends to establish' it.[43] The specific thoughts of the drafters remain irrelevant.

This type of non-intentional debate may usefully be compared with the discussions of the Kentucky Court of Appeals concerning judicial review. Most of the earliest cases accept such review without question.[44] They depended on a historical analysis of rights available at the time of the framing of the constitution, unconnected with any subjective notion of intentions of the framers. Additionally, history was seen in these cases as the only authority necessary to define the constitutional terms guaranteeing rights to Kentuckians. By contrast, in the case of conscientious objectors fined for failing to perform militia duty, the Court looked to the structure of the constitutional exemption for conscience to determine the way it should be applied.[45]

A different sort of text-based non-intentionalist view prevailed in the 1823 cases involving debt moratorium statutes. In holding them unconstitutional except as applied prospectively, the majority depends principally on an examination of the 'etymology or general acceptation in our own language' of the phrase 'law impairing the obligation of contracts.'[46] This is done in the context of what might be called 'natural law/social contract' theory, in which the nature of the social contract is structured by the nature of things in the world, and the purpose of a clause is defined by the context in which it is used, not by its author's mind. Although the context is different, this method bears obvious similarities to those of Rev. Blythe and Dr. Fishback.

The judges were a bit ahead of the preachers and newspaper publicists. The majority mentions in a subsidiary context suppositions concerning intent of framers.[47] A partial dissent went further, and included references to the writings of the framers in support of the position that even prospective debt moratoria are unconstitutional.[48] This was not quite full-blown intentionalist argument; the judge treated statements by the framers as contemporary interpretation of the constitution, not as authoritative statements of what they thought in writing the document.

It is for this study a fortunate coincidence that the partial invalidation of the debt moratoria aided the survival of Transylvania University by helping institutions which supported it.[49] The forces of the Presbytery finally took control of Transylvania. In practical terms, however, this was not necessarily a triumph for the mixture of religion and the state. Rather it was part of a process by which Transylvania became clearly identified with the private sector, as it is today. It was, however, a setback for the ideal of secular public higher education in Kentucky.

## II. RELIGION AND THE COMMON LAW IN THE PENNSYLVANIA COURTS

The Pennsylvania story is about a judicial slogan: Christianity is part of the common law. This first appears in an 1824 Pennsylvania Supreme Court decision concerning a prosecution for blasphemy, *Updegraph v. Commonwealth*:

> Christianity, general Christianity, is and always has been a part of the common law of Pennsylvania; Christianity, without the spiritual artillery of European countries; for this Christianity was one of the considerations of the royal charter and the very basis of its great founder, William Penn; not Christianity with an established church, and tithes and spiritual courts; but Christianity with liberty of conscience to all men.[50]

Updegraph had been indicted for the statutory crime of blasphemy, for saying 'That the Holy Scriptures were a mere fable; that they were a contradiction, and that although they contained a number of good things, yet they contained a great many lies.'[51] The defense claimed that the statute, enacted in 1700, forbidding speaking 'loosely and profanely of Almighty God, Christ Jesus, the Holy Spirit, or the Scriptures of Truth,'[52] had been 'virtually repealed by the constitution of [Pennsylvania],' and set forth an offense not known to the common law.[53] The prosecution apparently thought this case (and perhaps the statute underlying it) not very important, for the attorney general declined to file a brief or present argument in the Supreme Court.[54] Nonetheless, the Court, per Justice Duncan, took this opportunity to present a major exegesis on the place of Christianity in the law. He also, pehaps unconsciously, gave us a look at his court's principles of constitutional interpretation.

In reaching the conclusion that Christianity is part of the common law, the Court hybridizes methods of interpretation. The peroration of the opinion is pure intentionalism:

> The minds of William Penn and his followers would have revolted at the idea of an established church: liberty to all, preference to none; equal privilege is extended to the mitred Bishop and the unadorned Friend.[55]

Though, the Court concluded, equal privilege need not be extended to the blasphemer and atheist. Earlier in the opinion, Justice Duncan had spoken of the intent of the one particular Framer of the current state and federal constitutions as well. He wrote of how United States Supreme Court Justice Wilson included discussions of the laws against blasphemy in his lectures at the law school in Philadelphia (later the University of Pennsylvania Law School), just following his tenure in the Constitutional

Conventions of the United States and Pennsylvania.[56] While the Court is not as explicit as in its reference to the mind of William Penn, it obviously believed that Justice Wilson's writings shortly following the Constitutional Conventions reflected his attitude towards religion at the time he helped write the fundamental laws; and this attitude was relevant to the interpretation of the constitutions.[57]

In other places, however, the opinion relies upon non-intentionalist interpretive devices. It uses, for example, the same device used from 1801 in Kentucky: an appeal to the historical situation at the framing of the constitution.[58] In upholding the blasphemy statute, the Court depends heavily on the pre-Revolutionary existence of laws perceived as religiously based: not only the blasphemy laws, but statutes against perjury (because one took an oath on the Bible), and against breach of the sabbath, adultery, and homosexuality.[59] Some sort of interpretation like this is necessary to make the statement that Christianity is part of the common law relevant to the validity of a blasphemy statute. It is the historical validity of the Christian common law which implies the validity of the statute here.

One might expect this sort of constitutional interpretation to emerge from a conservative revolution perceived as restoring liberties newly usurped by the former authority. In such a situation, the new constitution serves as the guarantee of the old liberties.[60] It should not be surprising, however, to see interpreters following such a revolution giving weight to other values of the pre-usurpation government, not simply civil liberties. This type of interpretation may, of course, be based upon a mythology – as may the entire revolution. One would not guess from this Court's encomium on the liberality of William Penn and his followers that the Great Proprietor had actually presided at a trial for witchcraft, at which the defendant, although acquitted of the act, had been found guilty of having 'the common fame of a witch.'[61] Nor would one guess that liberty of conscience in early Pennsylvania was only extended to Trinitarian Christians, nor that all members of the House of Representatives were required specifically to deny such Catholic doctrines as transubstantiation as part of the oath of office.[62] Interpretation based on prior practice, however, does not depend upon anyone's subjective intentions.

The Court, as one of its subsidiary arguments, also points out the secular purposes of this enactment, the danger to good order 'likely to proceed from the removal of religious and moral restraints.'[63] The interpretation of the statute to find this purpose, as done by the Court here, in no way depends upon the subjective intent of its authors, but upon the perceived effects of its removal from the body of laws.

At any rate, the consequence of the Christianity of Pennsylvania was the validity of the blasphemy laws. Updegraph, however, 'beat the rap' due to a technical defect in the indictment; it was not alleged that he said the Bible

contained a great many lies 'profanely,' as required by the statute. Unlike today's courts, however, the early Pennsylvania court did not let such details get in the way of important constitutional statements.[64] While not addressing strictly the interpretive problem under discussion, this point is important as emphasizing the Court's idea of constitutional interpretation as guidance to the community, rather than as a duty to be avoided if possible.

The subsequent history of the statement that Christianity is part of the common law of Pennsylvania has two main branches, the Sabbath law branch, and the validity of wills branch. It was the latter which first reached the United States Supreme Court.

The peculiar will of Stephen Girard of Philadelphia provided that much of his immense estate should go to establishing a school for poor white orphan boys, from which all ecclesiastics, ministers, and missionaries of any sect should be excluded, as should all religious instruction. In *Vidal v. Girard's Executors,*[65] the French heirs of Girard claimed that the will was invalid as setting up a school incompatible with the common law Christianity of Pennsylvania. Justice Joseph Story's version of the doctrine upheld the validity of the will, claiming that it is not hostile to Christianity, but merely neutral between Christian sects. One senses here a devotion to liberal Christianity on Justice Story's part, but also care properly to apply Pennsylvania law in the federal courts.[66]

Shortly after the Civil War, the Pennsylvania Supreme Court addressed the question reserved by Justice Story, the validity of a will openly hostile to Christianity and religion in general. Levi Nice, after providing his heirs with a life estate in his real property, attempted to bequeath his property to the Infidel Society of Philadelphia, which was to be incorporated after his death.[67] The Court held that the corporation laws of the state would not sanction the creation of a corporation to promote infidelity or unbelief. Moreover, as such a purpose is not a 'charity,' the court would not undertake to provide a trustee in place of the non-existent corporation under the *cy près* doctrine.[68] Finally, as the institutions of Pennsylvania are based upon 'reverence for Christianity,' such insults to the beliefs of the populace and the good order of the Commonwealth would not in any case be permitted.[69] Such a rule could do no more than 'qualify young men for the gallows and young women for the brothel,' a quotation straight from *Updegraph.*[70]

The constitutional interpretation here is simplistic and non-intentionalist. The presumed bad consequences of a contrary interpretation are all that is needed to justify the rule of the case.

The slogan had a longer life in the Sunday closing statute cases. Sabbath statutes had been challenged and upheld even before *Updegraph,*[71] but afterwards chief reliance in upholding them was placed upon Christianity's

place in the common law. The rationale for upholding the statutes – and indeed for the slogan of *Updegraph* – shifted from case to case. Although that seminal case used language concerning the secular purpose and effects of blasphemy statutes, its principal thrust was to demonstrate the validity of direct injection of Christian principles into the law of the commonwealth. As a modern, and probably even as an eighteenth century Kentuckian, I would call this an establishment of Christianity. Nonetheless, this type of reasoning persisted well into the twentieth century. Even in 1927, the Pennsylvania Supreme Court, in holding professional baseball forbidden on Sunday, restated that

> Christianity is part of the law of Pennsylvania (Updegraph . . . ) and its people are christian people. Sunday is the holy day among christians. No one we think would contend that professional baseball partakes in any way of the nature of holiness and when contrasted with things that do, it is bound to be categorized as worldly.[72]

The question of intentionalist versus other modes of interpretation has long since disappeared. The court feels it need not interpret at all, but may merely rely on precedent to establish its constitutional point.

There was, however, another line of reasoning alluded to in *Updegraph* which became important. This is the reasoning, eventually adopted by the United States Supreme Court, which finds that the day of rest has secular purposes and effects as well as religious.[73] In this line of cases, religion plays a subsidiary role. If rest is necessary to the well being of the populace, as the legislature may constitutionally decide, one might as well choose the day which respects the wishes of the majority Christians. 'Majority Christians' here is a loaded phrase, for the first case clearly articulating this view upheld the Sabbath-breaking conviction of a Seventh Day Baptist, a christian who had no problems with the notion of resting on Saturday.[74] In this line of cases, the notion of Pennsylvania as a 'Christian community' recurs,[75] but its importance changes. In these cases Christianity is not part of the common law because otherwise men would be fit only for the gallows. Rather, the fact that the community is Christian merely makes respect of Christianity by the common and statute law reasonable, so long as some other purpose can be found for the enactment. (Only a cynic would be so uncharitable as to suggest that these cases represent not a secular justification for religious laws, but a retreat from the prevailing liberality of Pennsylvania even with regard to nonconforming Christian sects.) One consequence of this line is that duties to obey quasi-religious laws are seen as duties to the state only, and not as enforceable duties to individuals as members of a religious society.[76]

These two notions of the place of Christianity in the law of Pennsylvania co-existed in the courts for many years. Most members of the Common-

wealth's Supreme Court did not find them incompatible. It was not until the Supreme Court of the United States took over the question of Sunday closing as a federal matter, and adopted the secularist view of the Sunday closing laws,[77] that one could say that the basis in constitutional law of these statutes had finally been settled, and the statement that Christianity is part of the common law of Pennsylvania had been laid to rest.

## CONCLUSION AND AN AGENDA

The point of all of this is not to draw any major conclusions, but to indicate where more work needs to be done. One can say that the notion of disestablishment was not unitary, but meant widely different things in different communities. One can also solidly conclude that the prevailing mythology among both liberals and conservatives that the development of America has been monotonically towards secularism is wrong. However, these are not radically new insights.

There is a wealth of material on constitutional interpretation which came out of the early states and which has barely been explored. The scholar's task will not simply be the collection of these materials. As this small study indicates, regional differences are important. There is no reason to believe that notions of interpretation developed uniformly across the country. Similarly, methods of interpretation may change at different rates on different issues. At various times structural issues may or may not be treated differently from civil liberties issues.

The relationship between constitutional interpretation, other forms of legal interpretation, and religious and other hermeneutics must be explicated.[78] Study of the growth and development of the lawyer class and its intellectual position in society should also throw light on these matters.[79] Research should not, however, be limited to that class, but should expand to study popular attitudes towards interpretation.[80]

The question of the role of the Framer's intent in constitutional interpretation cannot properly be addressed until scholars have examined and assimilated this material, as well as the much more limited body of material which emerged from the early federal institutions.

## NOTES

1. We have reached a stage when the line between permissible state action to foster free exercise and impermissible establishment has become very thin. Compare *Estate of Thornton v. Caldor, Inc.*, 105 S.Ct. 2914 (1985), with *Sherbert v. Verner*, 374 U.S. 398 (1963). The Supreme Court recently, on free exercise grounds, rejected one of the most extreme – but time honored – methods for ensuring disestablishment: the exclusion of the

active clergy from state legislatures. *McDaniel v. Paty,* 435 U.S. 618 (1978).

2. Many of the comments here have been influenced by Powell, 'The Original Understanding of Original Intent,' 98 *Harv. L. Rev.* 885 (1985).
3. Powell, supra note 2, begins the task, by addressing the interpretive assumptions of nationalists and their adversaries in the sixty years before the American Civil War. As this paper shows, other debates are also useful in unmasking interpretive problems, and may show more complex patterns of development than the great debate over states' rights.
4. The debate over the Alien and Sedition Acts and Sunday mail service are of course important exceptions.
5. See, e.g., Levy, 'No Establishment of Religion: The Original Understanding,' in L. Levy, *Judgments* 169, 174, 192 (1972). Before the Virginia Statute of Religious Freedom, the area which later became Kentucky had, in form at least, Virginia's religious establishments.
6. S. Padover, *The Complete Jefferson* 946. Leonard Levy says that the credit for some of the ideas in Jefferson's famous statute belong to the Rev. Philip Furneaux. L. Levy, *Jefferson and Civil Liberties* 44 (1963).
7. Ky. Const. of 1792, Art. XIII, §3, 4 W. Swindler, *Sources and Documents of U.S. Constitutions* 149 (1975) [hereinafter *Swindler*]. The only differences from the Pennsylvania Constitution of 1790 are that 'societies' replaced 'establishments' in the last clause, and a few commas were left out. Pa. Const of 1790, Art. IX, §3, 8 *Swindler* 292. Cf. Pa. Const. of 1776, Declaration of Rights, II, 8 *Swindler* 278.
8. 4 *Swindler* 114 (Ky.); 8 *Swindler* 277, note.
9. Pa. Const. of 1776, Plan or Frame of Government, §10, 8 *Swindler* 280 (italics in original). By 1790, this was reduced to a provision that allowed disqualification if one does not 'acknowledge the being of a God and a future state of rewards and punishments.' Pa. Const. of 1790, Art. IX, §4, 8 *Swindler* 292. The 1776 Constitution acknowledges itself as 'agreeable to the directions of the honorable American Congress' and was prepared at the behest of the Continental Congress. Preamble, 8 *Swindler* 277.
10. See Daniel Drake, *Pioneer Life in Kentucky* 1, 7 (written 1847–48; reprinted 1948) (ed. Horine).
11. Ky. Const. of 1792, Art. II, §23; Ky. Const. of 1799, Art. II, §26; Art. III §6, 4 *Swindler* 144, 155, 156.
12. See generally Harvey Wish, *Society and Thought in Early America* 248–50 (1950); Neils Henry Sonne, *Liberal Kentucky* (1939) [hereinafter *Liberal Kentucky*].
13. Ky. Const. of 1792, Art. XII, §4; Ky. Const. of 1799, Art. X, §4, 4 *Swindler* 149, 162.
14. 1 *Cranch* 137 (1803).
15. *The Proceedings Relative to the Calling of the Conventions of 1776 and 1790,* 66–77 (1825), discussed in R. Branning, *Pennsylvania Constitutional Development* 18 (1960).

    The Supreme Executive Council explicitly sought review of the statute authorizing outlawry, and the Supreme Court upheld it, in 1784. *Respublica v. Doan,* 1 Dall. 86 (Pa., 1784).
16. *Austin v. University of Pennsylvania,* 1 Yeates 260 (Pa. Supreme 1793) (Yeates, J.). In *Respublica v. Cobbett,* 3 Dall. 467 (Pa. Supreme 1798), Chief Justice McKean suggests that state courts have the duty to test the constitutionality of legislation, but denies that the federal Supreme Court has the authority to differ with the states on this matter, and suggests a constitutional amendment to create a body which would explicitly be given the final power of judicial review. In *Commonwealth v. Franklin,* 4 Dall. 254 (Pa. 1802), the state Supreme Court upheld a criminal statute against a claim that it violated the state's constitution. The Court explicitly considered and adopted judicial review in *Emerick v. Harris,* 1 Binney 416 (Pa. 1808), relying upon *Austin, Cobbett,* and *Franklin.*
17. *Stansbury v. Marks,* 2 Dall. 213 (Pa. Supreme, Nisi Prius, 1793).
18. *United States v. Villato,* 2 Dall. 370 (C.C. Pa. 1797) (Iredell, J.) (treason prosecution held invalid because defendant's allegiance to the United States depended on naturalization under Pennsylvania statute itself invalid under state constitution); *Vanhorne's Lessee v. Dorrance,* 2 Dall. 304 (C.C. Pa. 1795) (claim to property based upon Pennsylvania statute negated by fact that statute violated state constitution). Cf. *Cooper v. Telfair,* 4 Dall. 14 (U.S. 1800).
19. *Guillon v. Bowlware's Adm'rs,* 2 Ky. 76 (1801) (Century edition); *Enderman v. Ashby,* 2

Ky. 53 (1801) (same); *Stidger v. Rogers,* 2 Ky. 52 (1801) (same). These cases invalidated three separate statutes as infringing on the right to a jury trial because they took away jury trials which would have been available at the time of the framing of the first Kentucky constitution. Their simplicity indicated an easy familiarity with judicial review.

It was not until 1823, in the midst of an intense political controversy concerning legislative debt moratoria, that the Court felt it necessary to justify judicial invalidation of legislative acts. *Blair v. Williams,* 14 Ky. 34 (1823).

20. *White v. M'Bride,* 7 Ky. 61 (1815).
21. *Bliss v. Commonwealth,* 12 Ky. 90 (1822).
22. *Eli v. Thompson,* 10 Ky. 70 (1820).
23. *Bush v. Commonwealth,* 80 Ky. 245 (1882) (disqualifying atheist as witness gives impermissible privilege to believers). See *Lawson v. Commonwealth,* 291 Ky. 437 (1942) (commenting on rarity of establishment cases).
24. Neils Henry Sonne, *Liberal Kentucky* 6; Ky. Const. of 1792, Art. II, §23, 4 *Swindler* 144.
25. *Liberal Kentucky,* supra note 12, at 7.
26. Act of May, 1780, 3 Littell's *Laws* 571 (Va.); *Liberal Kentucky,* supra note 12, at 46.
27. Act of December 12, 1794, 1 Littell's *Laws* 228.
28. Act of December 5, 1795, 1 Littell's *Laws* 296. Cf., e.g., Act of January 28, 1818, Ch. 175, §3, 1817 Ky. Acts 332, 333 (26th Gen. Ass.) (lottery authorized to build a Catholic Church).
29. Act of May 1780, 3 Littell's *Laws* 571 (Va.); accord, Act of May 1783, 3 Littell's *Laws* 571.
30. Act of 1790, Ch. 52, 3 Littell's *Laws* 577 (Va.); Act of 1791 Ch. 50, 3 Littell's *Laws* 573 (Va.); Act of February 24, 1820, 1 Dig. Ky. Stat. 719–20 (1834).
31. A general statute to allow for establishment of county seminaries and land grants thereto was passed in 1798. The land grants were specifically made 'subject to any future order of the legislature.' Act of Dec. 22, 1798, 2 Littell's *Laws* 245, 2 Dig. Ky. Stat. 1002 (1834). This power was invoked several times. 2 Dig. Ky. Stat. 1002–08 (1834). Kentucky did not have a general statute authorizing manufacturing corporations until the Act of February 2, 1841, Dig. Ky. Stat., Tit. 32, at 147 (Bound Supp. 1842).

    The Congressional chartering of the Communications Satellite Corporation (COMSAT) demonstrates that the legislative charter process retains economic importance in the space age.
32. Act of February 3, 1818, Chap. 294, 1817 Ky. Acts 554 (26th Gen. Ass.); *Liberal Kentucky,* supra note 12, at 157–58.
33. *Dartmouth College v. Woodward,* 4 Wheat. 518 (1819). John S. Whitehead, *The Separation of College and State* (1973), agrees that there was no clear distinction between public and private colleges in the period under discussion here. His contribution is the argument that *Dartmouth College* did not immediately create such a distinction, but set in motion a process of evolution lasting beyond the Civil War.
34. For these reasons, the conclusion that Transylvania University was 'state-owned,' *Liberal Kentucky,* supra note 12, at vii, is for our purposes misleadingly simple.
35. Act of Dec. 22, 1798, 2 Littell's *Laws* 234 (effective January 1, 1799). This statute allowed the Board to set up 'nurseries' or feeder schools for the University, and to provide scholarships for 'poor and promising youths.'
36. Act of February 3, 1818, 1817 Ky. Acts 554 (26th Gen. Ass.); *Liberal Kentucky,* supra note 12, at 157–58.
37. Id.
38. James Blythe, *Our Sins Acknowledged* (1815) (publication of sermon), quoted in *Liberal Kentucky,* supra note 12, at 119–24.
39. Id.
40. James Fishback, *The Philosophy of the Human Mind* 288 (1813), quoted in *Liberal Kentucky,* supra note 12, at 113.
41. Anonymous review in *Kentucky Reporter,* March 13, 1815, quoted in *Liberal Kentucky,* supra note 12, at 125.
42. Id. at 127.
43. Cf. *Engle v. Vitale,* 370 U.S. 421 (1962) ('nondenominational' prayer in public schools 'established' a creed).

44. Text and note 19 supra.
45. *White v. McBride,* 7 Ky. 61 (1815).
46. *Blair v. Williams,* 14 Ky. 34, 36 (1823).
47. *Lapsley v. Brashears,* 14 Ky. 46, 62–64 (1823) (companion case to *Blair*).
48. *Blair v. Williams,* 14 Ky. 64, 71–79 (1823) (partial dissent in *Blair* and *Lapsley,* published separately).
49. *Liberal Kentucky,* supra note 12, at 243–49.
50. 11 S. & R. 394, 400 (Pa. 1824).
51. Id. at 394.
52. Act of 1700, Ch. XLIV, *Laws of the Province of Pennsilvania* 9–10 (1714), reprinted as John D. Cushing (ed.), *The Earliest Printed Laws of Pennsylvania,* 1681–1713, 13–14 (1978).
53. 11 S. & R. at 394.
54. Id. at 398. This case is not like *Marbury v. Madison,* 1 Cranch 137 (1803), where there were political and strategic reasons for the government not to appear.
55. 11 S. & R. at 409.
56. Id. at 403–04.
57. Given the contexts, I do not believe there is an inconsistency in attributing a fully intentionalist view here, while having some reservations concerning the material discussed at notes 48–49 supra.
58. Text and notes 21–23, 47–48, supra.
59. 11 S. & R. at 403.
60. Compare text and notes 47–48, supra (civil liberties protected this way in Kentucky). While Kentucky was not one of the original thirteen states, its early connection with Virginia and its pioneer spirit resulted in strong support for the 'Spirit of '76.' Thus the remarks here apply to Kentucky with nearly the same force as Pennsylvania.
61. *Proprietor v. Mattson,* Pennypacker's Pa. Colonial Cases 35 (1683). The editor points out that some caution in guessing Penn's views is necessary because his charge to the jury does not survive.
62. Act of 1705, Ch. I; Act of 1705, Ch. XXIII, first published in *Laws of the Province of Pennsilvania* 32, 53, 58–69, reprinted as John D. Cushing (ed.), *The Earliest Printed Laws of Pennsylvania,* 1681–1713, 36, 55, 60–61 (1978).
63. 11 S. & R. at 406; see id. at 409.
64. 11 S. & R. at 399–400 (choice to consider 'grand objection' to Christianity first), 409–11 (defect in indictment).
65. 2 Howard 127 (1844).
66. This case was decided a few years after Justice Story, in *Swift v. Tyson,* 16 Peters 1 (1842), began the experiment of nationalizing the common law of commercial transactions.
67. *Zeisweiss v. James,* 63 Pa. 465, 467 (Pa. 1870).
68. Id. at 467–69.
69. Id. at 470–71.
70. Id. at 471, quoting from 11 S. & R. at 398–99.
71. *Commonwealth v. Wolf,* 3 S. & R. 48 (1817); *Commonwealth v. Eyre,* 1 S. & R. 347 (1815).
72. *Commonwealth v. American Baseball Club,* 290 Pa. 137, 143 (1927). A typical earlier case in this line is *Commonwealth v. Nesbit,* 34 Pa. 398 (1859).
73. *McGowan v. Maryland,* 366 U.S. 420 (1961).
74. *Specht v. Commonwealth,* 8 Pa. 312, 313 (1848). Specht's free-exercise-type claim, that resting on both his Sabbath and Sunday would cause him to violate God's commandment to work six days of the week, id. at 318–19, was rejected for lack of evidence that this was the import of the Biblical phase. Id. at 326.
75. Id. at 323.
76. *Mohney v. Cook,* 26 Pa. 342, (1855) (a tort is compensable even though the plaintiff was breaking the Sabbath law when injured); *Harvey v. Boies,* 1 P. & W. 12 (Pa. 1829) (lying under oath to an ecclesiastical tribunal is not perjury because the purpose of the perjury statute is to allow for the functioning of civil, not religious, society).
77. *McGowan v. Maryland,* 366 U.S. 420 (1961).

78. Cf. Powell, supra note 2 (discussing interpretive traditions of English Protestantism). Powell's principal focus is on structural rather than civil liberties issues.
79. Cf. Morris S. Arnold, *Unequal Laws Unto a Savage Race* (1985) (discussing origin of lawyer class in frontier Arkansas).
80. A recent study in this direction is T.H. Breen, *Tobacco Culture* (1985), tracing the history of so-called radical Country thought and its political consequences among the planters of Virginia.