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**PROTECTING RELIGIOUS LIBERTY IN THE
NEXT MILLENNIUM:
SHOULD WE AMEND THE RELIGION
CLAUSES OF THE CONSTITUTION?**

*Robert P. George**

“ORIGINALISM” AND THE CONSTITUTIONAL LAW OF RELIGION

The religion clause, or clauses,¹ of the First Amendment have been the source of profound interpretative controversy over the past fifty years or so. Curiously, though, this controversy has taken place within the context of a rather striking consensus, namely, the view

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1. It is customary to speak of two separate religion clauses of the First Amendment, viz., the “Free Exercise Clause” and the “Establishment Clause.” Although I shall follow the custom in this essay, I recognize the force of the challenge advanced against it by Richard John Neuhaus, Mary Ann Glendon, and others:

There are not two religion clauses. There is but one religion clause. The stipulation is that “Congress shall make no law,” and the rest of the clause consists of participial modifiers explaining what kind of law Congress shall not make. . . . The no-establishment part of the religion clause is entirely and without remainder in the service of free exercise. Free exercise is the end; no-establishment is a necessary means to that end.

Richard John Neuhaus, *A New Order of Religious Freedom*, *FIRST THINGS*, Feb. 1992, at 13, 15. See also Mary Ann Glendon and Raul F. Yanes, *Structural Free Exercise*, 90 *MICH. L. REV.* 477, 477 n.6, 540-41 (1991) (stating that the religion language in the First Amendment “is in the service of a single fundamental ‘freedom,’ the ‘free exercise’ of religion.”).

that interpretation in this area should be guided by the intentions of the Framers and Ratifiers.

Of course, many people believe that "original intent," or "original understanding," should guide constitutional interpretation in all, or virtually all, areas. Justice Antonin Scalia is a champion of this view. Whatever the shortcomings of "originalism," he argues, it remains the best—if only in the sense of being the least bad—theory of constitutional interpretation.² Perhaps it goes without saying, however, that many other jurists and scholars reject—even scoff at—originalism as a comprehensive theory of constitutional interpretation. The late Justice William J. Brennan, for example, famously derided originalist constitutional interpretation as "arrogance cloaked as humility."³

What I find remarkable, however, is that even people such as Brennan, who reject originalist readings of, for example, the First Amendment's free speech provision, or the Eighth Amendment's ban on cruel and unusual punishments, or the Fourteenth Amendment's guarantees of due process and equal protection, tend nevertheless to embrace originalism when it comes to the religion clauses.⁴ They insist that their particular interpretation of the words "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"⁵ is correct precisely because it is the interpretation most faithful to the historically recovered intentions of our nation's founders.⁶ They generally do not claim that courts have the authority to revise the religion clauses by way of "creative" interpretation to bring them "up-to-date" or into line with "our" values.

The reason for this, perhaps, is that they believe the Framers and Ratifiers of the First Amendment really did hold the views they themselves now hold about religious freedom and the relationship between church and state. So they are content to treat the matter as

2. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

3. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 435 (1986).

4. See *Lemon v. Kurtzman*, 403 U.S. 602, 642-43 (1971) (Brennan, J., concurring).

5. U.S. CONST. amend. I.

6. See, e.g., *School Dist. v. Schempp*, 374 U.S. 203, 212-214 (1963).

one to be resolved by originalist interpretation, confident the historical facts will support the judicial imposition of precisely the policies they prefer.

When it comes to the constitutional law of religion, then, the debate is not about whether interpretation ought to be guided by the "original understanding."⁷ Almost everyone agrees that it should be.⁸ Rather, the debate concerns what the Framers and Ratifiers originally understood the First Amendment to mean. The debate tends, in other words, to be about disputed matters of historical fact.

For example, did those who framed and ratified the First Amendment intend to require, under certain circumstances, judicially mandated "conduct exemptions" from neutral, general laws whose incidental effects bear adversely upon the religious beliefs or practices of certain individuals or groups? In interpreting the "Free Exercise Clause," Justice Sandra Day O'Connor, supported by legal historians such as Professor Michael McConnell, argues they did.⁹ However, Justice Scalia, supported by legal historians such as Professor Gerard V. Bradley, maintains with equal vigor that they did not.¹⁰ So Justice O'Connor would invalidate as unconstitutional even a neutral law of general applicability that happens only coincidentally to restrict someone's, or some group's, religious freedom unless the federal, state, or local government responsible for the law

7. There are, of course, interesting differences among partisans of competing forms of "originalism" in this and other areas of constitutional jurisprudence. I will not, however, address these differences here.

8. *But see* Robert J. Araujo, S. J., *A Dialogue Between the Church and Caesar: A Contemporary Interpretation of the Religion Clauses*, 34 B.C. L. REV. 493, 503 (1993) (discussing the practical difficulties in determining "original intent"); Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 840-45 (1986) (expressing doubt as to the wisdom of the use of an originalist interpretation in the context of the religion clauses).

9. *See* *Employment Div. v. Smith*, 494 U.S. 872, 902-03 (1990) (O'Connor, J., concurring); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). *See also* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990) (criticizing the use of text, history, and precedent, as well as the logic behind the *Smith* decision).

10. *See Smith*, 494 U.S. at 878; Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991).

could meet the burden of showing it (1) is necessary to advance a compelling governmental interest, and (2) represents the least restrictive or intrusive means of advancing that interest.¹¹ Justice Scalia, by contrast, would find no violation of the First Amendment's guarantee of "free exercise" in such a law, though he would have no constitutional objection to a decision by the relevant government, acting within its ordinary authority, to carve out exceptions to the law's general requirements in order to accommodate the free exercise of religion by those whose beliefs or practices would be impeded or otherwise adversely affected by the law.¹²

What is true of the "Free Exercise Clause" is also true of the so-called "Establishment Clause." Did those who framed and ratified the First Amendment's prohibition of "law[s] respecting an establishment of religion"¹³ intend to forbid all governmental aid to, or favor towards, religion? Or did they merely seek to ensure that such aid or favor is meted out in an evenhanded manner as between different religious traditions or communities? Justice John Paul Stevens, with the blessing of legal historians such as Professor Leonard Levy, insists that the original understanding of the "Establishment Clause" requires a wall of separation between church and state which is breached by *any* governmental aid to, or favor towards, any particular religion *or religion in general*.¹⁴ Chief Justice William Rehnquist, relying on the work of legal historians such as Professor Robert Cord, maintains that the original understanding permitted and even encouraged nondiscriminatory favor towards, and equal aid to, religion.¹⁵

I agree that the proper approach to interpreting the religion clauses is originalist. I think that the clauses do what those who framed and ratified them intended them to do. And I think that

11. See *Smith*, 494 U.S. at 899 (O'Connor, J., concurring).

12. See *id.* at 878-90.

13. U.S. CONST. amend. I.

14. See *Wallace v. Jaffree*, 472 U.S. 38, 53 n.37, 60-61 (1985); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* (1986).

15. See *Jaffree*, 472 U.S. at 106 (Rehnquist, J., dissenting); ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: CRISIS IN THE AMERICAN CONSTITUTIONAL SYSTEM* (1982).

historical scholarship can help us to recover the more or less straight-forward—even plain—meaning of the clauses. However, a good argument can be made—and my goal is to make it—that once the meaning of the clauses is recovered, it is evident that our constitutional law of religion is in need of reconsideration and, in at least some respects, revision. I wish to suggest that it is time for “we, the people” to deliberate anew about how best, as a matter of constitutional law, to protect religious freedom and to structure the relationship between religion and public life.

I shall make two separate arguments. The first concerns the “free exercise” problem, the second the “establishment” problem. Although these arguments are partially animated by a common concern, namely, the protection of religious freedom, they are, I believe, sufficiently independent of each other so that they do not necessarily stand or fall together. In other words, though I might be right on both counts or wrong on both counts, it is also possible that I am wrong on one but right on the other. If this is the case, I suspect that I am wrong about the need for debate and possible constitutional revision in the free exercise area. I am certainly less confident about the need for amendment of the “Free Exercise Clause” than I am about the need for amendment of the “Establishment Clause.”

THE “FREE EXERCISE” PROBLEM

In my judgment, Justice Scalia and Professor Bradley win their debate with Justice O’Connor and Professor McConnell over the original meaning of the “Free Exercise Clause.” While Professor McConnell does show that various jurisdictions enacted religiously-based conduct exemptions to neutral laws of general applicability at the time of our nation’s founding, he is unable to demonstrate that the Founders intended to empower the judiciary to impose such exemptions where legislatures decline to create them.¹⁶ So, I think McConnell’s contribution is to establish definitively that where a legislature wishes to grant a conduct exemption for religiously motivated behavior, there is not necessarily an “Establishment Clause” impediment to their doing so. But, as Justice Scalia contends, under

16. See McConnell, *supra* note 9.

the "Free Exercise Clause" it is up to the legislature, not the judiciary, to decide the question of whether to grant an exemption.¹⁷ There is no free exercise "right" to conduct exemptions. Properly interpreted, the "Free Exercise Clause" simply does not vest broad discretion or policy-making authority in the hands of judges by authorizing them to decide whether neutral, general laws are supported by a "compelling interest," or advance such an interest by the "least restrictive means."

The "Free Exercise Clause," as originally understood, gives fairly concrete guidance, but the restraints it places upon legislatures are modest: they may not ban or impede a religious practice simply because they do not like it, or because they believe it to be untrue, heretical, unenlightened, or whatever. Laws that have the effect of restricting religious freedom must be truly neutral and general to pass constitutional muster. They must not have as their object the limitation of anyone's religious freedom. Where, however, truly neutral and general laws happen to have adverse incidental effects on religious faith or practice, they do not—even presumptively—violate the "Free Exercise Clause" or authorize courts to mandate conduct exemptions. If such exemptions are to be granted, it is up to the legislature to grant them.

The Supreme Court has, in recent years, recovered the original meaning of the "Free Exercise Clause" and demonstrated its willingness to be guided by it in constitutional interpretation. In the 1989 case of *Employment Division v. Smith*,¹⁸ the Court rejected a claim by members of the Native American Church who argued, in effect, that the First Amendment entitled them to a conduct exemption from Oregon laws forbidding ingestion of peyote.¹⁹ In an opinion by Justice Scalia, a majority held that the "Free Exercise Clause" simply does not require states to prove to the satisfaction of judges that their neutral, general laws are necessary to advance a compelling state interest.²⁰ Although the Court came under ferocious attack from both the Left and the Right for this holding, it was, I believe, impeccably faithful to the original meaning of the "Free Exercise Clause."

17. See *Employment Div. v. Smith*, 494 U.S. 872, 887, 890 (1990).

18. 494 U.S. 872 (1990).

19. See *id.* at 882.

20. See *id.* at 882-87.

There is one feature of Justice Scalia's opinion for the Court in *Smith* that does strike me as dubious, namely, his attempt to distinguish *Smith* from earlier decisions mandating conduct exemptions from general laws in *Sherbert v. Verner*²¹ and *Wisconsin v. Yoder*.²² In my view, these decisions should simply have been reversed.²³ Instead, the Court preserved them in the legal equivalent of formaldehyde: they remain "good law," but for all intents and purposes they have been stripped of precedential value. Still, the Court was correct in refusing to follow the *Sherbert* and *Yoder* precedents by applying the "compelling interest" and "least restrictive means" tests to decide whether to mandate the conduct exemption sought by members of the Native American Church.²⁴

Now, it is important to see that in saying that *Smith* was rightly decided, I am in no way claiming that members of the Native American Church should not be granted a conduct exemption to enable them lawfully to ingest peyote as part of their religious worship ceremonies.²⁵ My claim is merely that they have no constitutionally

21. 374 U.S. 398 (1963).

22. 406 U.S. 205 (1972).

23. It is worth pointing out here that even prior to the Supreme Court's decision in *Smith*, courts applied the *Sherbert* and *Yoder* precedents very narrowly. See, e.g., *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 763 (9th Cir. 1981) (distinguishing *Sherbert* and *Yoder* as involving "an absolute dilemma" and "coercive restraints on religious observation imposed by state action"); *Hatch v. Goerke*, 502 F.2d 1189, 1192 (10th Cir. 1974) (distinguishing *Yoder* as involving a "sharp contrast [between a local regulation and] a complete and religiously founded concept of raising children"); *United States v. Boardman*, 419 F.2d 110, 113 (1st Cir. 1969) (distinguishing *Sherbert* as involving the imposition of a burden on "a practice which obviously is a cardinal element in the exercise of a religion"). Although the courts often applied the "compelling interest" and "least restrictive means" tests, claims to conduct exemptions rarely succeeded. See e.g., *Collins*, 644 F.2d at 763 (involving the prohibition of student-led prayer in public schools); *Hatch*, 502 F.2d at 1192 (involving a school's regulation of students' hair length); *Boardman*, 419 F.2d at 113 (involving a requirement to report for work under selective service order).

24. See *Smith*, 494 U.S. at 882-89.

25. Nor in saying that *Smith* was rightly decided am I endorsing the Court's decision in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). That is another matter that requires independent treatment going beyond the issues we are discussing here. For a compelling critique of *Boerne*, see Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*,

guaranteed—and, thus, judicially enforceable—right to such an exemption. If an exemption is to be granted, the decision as to whether to grant it is left by the Constitution in the hands of the Oregon legislature, not the federal courts. Someone could believe—in fact, I *do* believe—*both* that the Court was constitutionally correct in refusing to mandate a conduct exemption *and* that a just and prudent public policy would grant such an exemption. Here it is worth mentioning that, after its victory in the *Smith* case, the State of Oregon acted legislatively to create a conduct exemption for those who ingest peyote as part of a bona fide religious ritual.²⁶ So, in the end, the members of the Native American Church obtained the exemption they sought—the decision to grant it however, was made not by a judge, or by a vote of three judges or nine judges, but by the elected representatives of the people of Oregon.

When the *Smith* decision was handed down, critics claimed the Court had rendered the “Free Exercise Clause” a nullity.²⁷ Just three years later, however, this claim was exploded in the case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.²⁸ At issue in *Hialeah* were ordinances that prohibited the ritual killing of animals.²⁹ These ordinances were not truly neutral, general laws. Rather, they were restrictions on religious practices—associated with the Santeria religion—which many citizens of Hialeah considered to be barbaric and offensive.³⁰ Seeing the ordinances for what they were, the justices unhesitatingly, unanimously, and correctly invalidated them as violations of the “Free Exercise Clause.”³¹

I have argued that the Court has properly interpreted the “Free Exercise Clause” in cases like *Smith* and *Hialeah*. So why do I suggest the Clause may be in need of amendment?

111 HARV. L. REV. 153 (1997).

26. OR. REV. STAT. § 475.992(5)(a) (Supp. 1998).

27. See, e.g., John Delaney, *Police Power Absolutism and Nullifying the “Free Exercise Clause”*: A Critique of Oregon v. Smith, 25 IND. L. REV. 71 (1991); Michael P. Farris & Jordan W. Lorence, *Employment Division v. Smith and the Need for the Religious Freedom Restoration Act*, 6 REGENT U. L. REV. 65 (1995); *The Supreme Court, 1989 Term-Leading Cases*, 104 HARV. L. REV. 129, 198-209 (1990).

28. 508 U.S. 520 (1993).

29. See *id.* at 527-28.

30. See *id.* at 548-56.

31. See *id.* at 546-47.

It could be that the Court has interpreted the Constitution correctly, but, correctly interpreted, the Constitution is inadequate and in need of revision. A great many people believe that justice, or, at least, sound policy for the protection of religious freedom, requires a constitutional arrangement in which legislation that adversely affects anyone's religious belief or practice is scrutinized by the judiciary to ensure that it is, from a public policy viewpoint, absolutely necessary.³² If these people are right, then it is time to amend the Constitution to, in effect, authorize judges to apply the "compelling interest" and "least restrictive means" tests and decide in particular cases whether there should be conduct exemptions from neutral general laws.

Now, I myself am doubtful as to whether those advocating judicial decision-making are right. It is certainly wrong to suppose that a constitutional system that does not authorize judges to grant conduct exemptions is, in principle, unjust. Like the question of whether to have a system of constitutional judicial review of legislation at all, the question of whether judges ought to be able to mandate conduct exemptions is not one of justice, but of prudence. And I am not at all certain that it is more prudent to empower judges to grant conduct exemptions than it is to leave the decision to legislatures. I am, of course, familiar with the argument that says expansive judicial power is necessary to protect individuals and minorities—in this case individual members of minority faiths—from the depredations of legislative majorities. But the more I think about this argument in the context of American history, the less I am impressed by it. Nothing in the record, taken as a whole, ought to incline us to think that judges are more competent or trustworthy than legislators in resolving disputed questions of fundamental rights or other issues of moral consequence, or in striking the proper balance between individual

32. See, e.g., *Religious Freedom: Hearing on Congress' Constitutional Role in Protecting Religious Liberty Before the Comm. on Judiciary of the United States*, 105th Cong. (Oct. 1, 1997), available in 1997 WL 14152193; *Supreme Court Decision on Religious Issues: Protecting Religious Freedom After City of Boerne v. Flores*, written testimony to the Subcomm. on the Constitution, House Judiciary Comm., 105th Cong. (July 14, 1997) (written statement of Prof. Thomas J. Berg), available in 1997 WL 11234759.

freedom and other values to be advanced or protected by legislation.³³

So, in the grand debate I hope we will have over whether to amend the "Free Exercise Clause," my voice will be on the side of extreme caution in assessing proposals to expand the power of unelected and electorally unaccountable judges. If judges are, as Ronald Dworkin depicts them, the "princes" in "law's empire,"³⁴ then I am reminded of the biblical warning: "put not thy trust in princes."³⁵ Still, I believe the people as a whole, in their sovereign capacity, should make the decision as to how constitutional law should be structured in order to protect religious freedom and other values. Our system for protecting religious freedom should be

33. *But see* Justice Scalia's concluding remark in his opinion for the Court in *Smith*, 494 U.S. at 890, conceding that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in," but arguing that this is an "unavoidable consequence of democratic government." One possible way of dealing with this problem is to authorize courts to mandate conduct exemptions for members of minority faiths (only) where legislatures *would have* granted conduct exemptions for the same or substantially similar religious practices or religiously motivated acts—or omissions—engaged in by members of larger or more politically influential religious groups. So, for example, courts would be authorized to mandate a conduct exemption for participants in the Native American Church ceremonies from a general law forbidding the use of peyote, in a case like *Smith*, because the Oregon legislature presumably *would have* granted a conduct exemption for participants in Jewish and Catholic worship from a general law prohibiting the use of alcohol. The idea here is that peyote and alcohol use are similar in all relevant respects, which is arguably, albeit not certainly, true. In any event, this approach conceives the problem directly as one of "equal protection" and only indirectly as a matter of "free exercise."

Good "equal protection" grounds plainly exist even under current law for judicial intervention where an exemption is given to one religious group but arbitrarily denied to another. So, for example, the granting of an exemption from alcohol prohibition to Jews but not to Catholics would justify "strict scrutiny." But as soon as even arguably significant differences enter the picture—for example, mind alteration is not the object, nor is it ordinarily a consequence, of the use of wine in Jewish and Catholic worship; by contrast, it is the precise goal of peyote ingestion in American Indian religious ceremonies—the case for permitting courts to displace legislative judgment weakens. And, of course, it is often mere speculation to say what a legislature "would have done" in an arguably similar case.

34. RONALD DWORGIN, *LAW'S EMPIRE* 407 (1986).

35. *Psalms* 146:3.

whichever one the sovereign people choose, after thorough deliberation, from among the range of perfectly legitimate possibilities—all of which have costs and benefits.

If the “Free Exercise Clause” is to be amended, it is simply because “we, the people” believe it prudent to have a judicial check on legislative discretion when it comes to the question of conduct exemptions. Across the political spectrum stretching from the Christian Coalition to the American Civil Liberties Union, powerful sentiment exists for a constitutional “free exercise” principle authorizing judges to hold even neutral, general laws to the “compelling interest” and “least restrictive means” standards.³⁶ Though I myself have doubts about whether it is in fact prudent to vest this sort of authority in the hands of judges, I think that it is a basic constitutional question that merits the deliberation of the people, after which the matter ought to be resolved in accordance with their prudential judgment. If the sovereign people decide that, all things considered, it is best for judges to be empowered to decide whether a conduct exemption is warranted in any particular case, then the Constitution should be brought into line with their judgment—my own doubts regarding its wisdom notwithstanding.³⁷

But the way to bring the Constitution into line with the judgment of the people is not by judicial fiat. Judges certainly should not be able to confer upon themselves the power to mandate conduct exemptions, even where there is widespread popular support for their doing so. Rather, the task is one for a free and self-governing people,

36. See Bradley, *supra* note 10, at 246 (stating that groups, from the “new right” to the ACLU, denounced the *Smith* decision based on the Court’s dismantling of the “compelling interest” and “least restrictive means” tests to neutral law of general applicability).

37. As I view the matter, the proper resolution of the issue here is a matter of what Aquinas labeled *determinatio*—that is, the definitive choosing by sovereign authority among reasonable but mutually incompatible possible ways of serving the common good of political society—and distinguished from the straightforward derivation, by a process akin to “deduction,” of constitutional or other positive law standards from the principles of natural law or natural justice. See ST. THOMAS AQUINAS, *TREATISE ON LAW* (*Summa Theologiae*, Question 95, a.2). See also JOHN FINNIS, *AQUINAS 267-71* (1998); ROBERT P. GEORGE, *Natural Law and Positive Law*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 327-30 (Robert P. George, ed. 1996).

deliberating and deciding the matter in their sovereign capacity, as the ultimate human source of constitutional principles.

THE "ESTABLISHMENT" PROBLEM

I said at the beginning that I was more confident of my view that it is necessary to amend the "Establishment Clause." It is time for me to say why. Thomas Jefferson suggested the possibility of holding a constitutional convention every twenty years or so in order to permit each generation to establish a framework of government and set of constitutional principles that it judges to be suitable to the times.³⁸ Jefferson's suggestion was extreme, but there is a kernel of wisdom in it. Even the most perfect constitutions of government will necessarily mix timeless truths of political morality with principles and policies devised to deal with contingent historical circumstances whose passing can render those principles and policies inapposite and even irrelevant. In my view, the requirement of governmental respect and protection for religious liberty is a timeless truth.³⁹ By contrast, the words "Congress shall make no law respecting an establishment of religion,"⁴⁰ enacted a policy designed to deal with a set of circumstances that arose as a contingent matter of historical fact at the time of the American founding, but which no longer remains. The passing of these circumstances renders the so-called

38. See Letter From Thomas Jefferson to Samuel Kercheval (July 12, 1816), in *BASIC WRITINGS OF THOMAS JEFFERSON* 751 (Philip S. Foner ed. 1944).

39. See Robert P. George, *Religious Liberty and Political Morality*, in *WE HOLD THESE TRUTHS AND MORE: REFLECTIONS ON THE AMERICAN PROPOSITION* (1993). That for most of human history, as in some places today, the obligation to respect religious freedom was, and is, not recognized as a truth at all is not determinative. To say of a certain proposition that it states a "timeless truth" is to make a normative claim—a claim about what people ought to do or ought to have done; it is not to make an historical or other descriptive claim about what people do or have done. The truth of a morally normative proposition simply does not depend on people's acknowledgment of it or their willingness to conform their actions to the requirements it states—just as the truth of a descriptive claim about human behavior does not depend on whether people should engage, or should have engaged, in the behavior it describes.

40. U.S. CONST. amend. I.

“Establishment Clause” of the Constitution effectively irrelevant to contemporary problems.

This is by no means to assert that we should have an established religion in the United States or that there should be no constitutional prohibition of establishments of religion. Nor is it to suggest that the question of the place of religion in American public life, or the proper relationship between church and state, is no longer important. Nor is it to claim that the Constitution ought to be silent on this question. It is merely to say that the “Establishment Clause” of the First Amendment no longer offers any effective guidance to judges and other constitutional interpreters for the simple reason that it was framed to deal with circumstances which have long since faded into the past.

When judges and other interpreters today purport to be guided by the Clause’s terms, they are, at best, deceiving themselves. They do not extract meaning from the “Establishment Clause,” but, rather, invoke the Clause to justify resolutions they favor to specific problems of the relationship between religion and public institutions, for reasons having nothing to do with that clause or any other constitutional provision. In practice, this means that courts, and, ultimately, the Supreme Court of the United States, have come to enjoy a tremendous measure of essentially legislative power to establish the terms of the relationship between church and state. Some people, of course, think this is a very good thing. I do not. But even if they are right and I am wrong about the proper scope of judicial power in this area, surely it is not right or good for courts to exercise broad legislative power in this or any other area in the absence of a constitutional grant of power. So, at a minimum, the Constitution should be amended to ratify what has become the status quo: judges should be more or less explicitly granted authority to settle questions regarding the relationship of religion and public life according to their best lights.

Of course, some people contend that this is what the “Establishment Clause,” as it stands, is meant to do. They will allow, perhaps, that courts have made some poor decisions in exercising the power the Clause grants to them, but they insist that this does not mean judges have not been granted the power. Anyone granted power under a Constitution may, alas, exercise it unwisely or even unjustly. In

any event, one might argue, whether or not the courts have understood the "Establishment Clause" properly, it is certainly not devoid of meaning today. It is, in fact, capable of guiding judges and other interpreters. Historical developments have not rendered it inapposite or irrelevant to contemporary questions of church and state.

Now, when it comes to the meaning of the "Establishment Clause," protests will be lodged against me by liberals and conservatives alike. Liberals and conservatives sharply differ as to what guidance they believe the "Establishment Clause" gives to judges; but they agree that the Clause gives guidance. As is the case with the "Free Exercise Clause," each side argues that historical research vindicates its view as the one most faithful to the intentions of the Framers and Ratifiers.

As we have seen, division over the meaning of the "Free Exercise Clause" does not necessarily break out along conventional ideological lines. Division over the meaning of the "Establishment Clause," by contrast, does. The standard liberal view is that the Clause demands the "strict separation" of church and state.⁴¹ It forbids all state aid to religion—even if the state makes aid available to religious groups and institutions in an evenhanded manner.⁴² It requires a governmental policy of strict neutrality not only as between different religious views, but also with respect to religion itself. Government—federal, state, and local—must neither favor nor disfavor religion. It may not deliberately impede religious practice, but neither may it promote or encourage religion in any way.⁴³ Government must be neutral not only between Catholicism and Protestantism, and between Christianity and Judaism, but also between belief and unbelief, between, for example, ethical monotheism and atheistic materialism.

The conventional conservative view also interprets the "Establishment Clause" as requiring a sort of neutrality, but not the strict separation—or, no governmental support for religion—demanded by

41. See Andrew Rotstein, *Good Faith? Religious-Secular Parallelism and the "Establishment Clause,"* 93 COLUM. L. REV. 1763, 1775-76 (1993).

42. See *id.* at 1776.

43. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

liberalism.⁴⁴ Conservatives believe the Clause calls for governmental evenhandedness as between religious groups, but permits a favorable posture toward religion in general by federal, state, and local government.⁴⁵ They argue that the nation's founding principles and constitutional ideals—above all the belief in God-given natural rights—are themselves expressions of the tradition of ethical monotheism: Americans are, as Justice William O. Douglas—himself hardly a conservative!—wrote in the case of *Zorach v. Clauson*,⁴⁶ “a religious people whose institutions presuppose a Supreme Being.”⁴⁷

In its first great “Establishment Clause” case, *Everson v. Board of Education*,⁴⁸ a decision handed down more than one hundred and fifty years after the ratification of the First Amendment, the Supreme Court adopted the liberal view. It did so squarely on the basis of an appeal to the original intent of the Framers, which it supported by reference to historical materials and putative historical facts.⁴⁹ Although, since *Everson*, the Court has held back from rigorously applying the “strict separationist” doctrine it declared in that case, it has never abandoned its official adherence to that doctrine. While the Justices have over the years invented various tests by which to distinguish permissible from impermissible governmental religious expression or involvement with religion—the most significant of these being the three-pronged test of *Lemon v. Kurtzman*⁵⁰—the official jurisprudence continues to damn any governmental support for or endorsement of religion.

Many commentators have exposed errors in *Everson*'s historiography and, more importantly, its general approach to the “Establishment Clause.” I will not rehash these errors here. Anyone interested should consult Gerard V. Bradley's *Church-State Relationships in America*⁵¹ and Robert Cord's *Separation of Church and State*.⁵²

44. See Rotstein, *supra* note 40, at 1776-77.

45. See Dina F. El-Sayed, *What Is the Court Trying to Establish?: An Analysis of Lee v. Weisman*, 21 HASTINGS CONST. L.Q. 441, 454 (1994).

46. 343 U.S. 306 (1952).

47. *Id.* at 313.

48. 330 U.S. 1 (1947).

49. See *id.* at 8-15.

50. 403 U.S. 602 (1971).

51. GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* (1987).

These works will tell you why the Court was wrong to suppose the "Establishment Clause" meant what the majority and the dissent in *Everson* said that it meant, namely, that government may not favor or support religion. I will tell you what the Clause did mean.

It is important to recall that at the time of the founding, several of the states—probably a majority—had established churches, or "state" churches. These religious establishments endured well into the nineteenth century. The disestablishment of state churches was ultimately effected, not by the intervention of federal courts, but by the actions of the states themselves. Far from prohibiting the establishment of religions by the individual states, the "Establishment Clause" *protected* these establishments. More precisely, the Clause protected the authority of the states to establish religions against federal efforts to disestablish state churches, or to set up a competing national establishment.⁵³ The words "Congress shall make no law respecting an establishment of religion"⁵⁴ neatly and concisely forbade both a federally established church and federal interference with churches established by the states.

The key words here are "respecting an." Because of the presence of these words, the Clause cannot be interpreted simply as forbidding a national established church, similar to the Church of

52. See *CORD*, *supra* note 15.

53. Among the scholars who have come to accept this interpretation of the "Establishment Clause," at least as a matter of its original purpose and understanding, are Akhil Reed Amar, Stephen L. Carter, and M. Stanton Evans. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 30-40 (1998); STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 118 (1993); M. STANTON EVANS, *THE THEME IS FREEDOM: RELIGION, POLITICS AND THE AMERICAN TRADITION* 284 (1994). Do you doubt this interpretation could be sound? Please join me in a little thought experiment: Imagine that it is 1805 and Congress enacts legislation purporting to disestablish the Congregational Church in New Hampshire. The solicitor general for the State files a constitutional challenge to congressional authority to disestablish its Church. He denies that Congress was delegated a power by the Constitution to interfere with establishments of religion in the states. Can he go further? Can he cite a provision of the Constitution expressly denying such a power to the federal government? It is plain that he can: "Congress shall make no law respecting an establishment of religion."

54. U.S. CONST. amend. I.

England. The Clause plainly forbids something more than that. But what, precisely, is the “something more” that it forbids?

Liberals say the “something more” is *any government promotion of religion*. Conservatives say the “something more” is *government favoritism as between different religious groups*.⁵⁵ But both of these views are pure invention. Both appeal to the words “respecting an,” not in an effort to be guided by them, but merely as a rationalization for imposing by judicial fiat the policies they prefer. Neither the liberal nor the conservative view makes any sense of the words “respecting an,” which meant in 1791 exactly what they mean today—namely, “regarding,” “concerning,” “having to do with,” “touching upon,” etc. If we take these words seriously, that is to say, if we take the “Establishment Clause” seriously—since it, like other constitutional provisions, is made of words and means what the words mean—then it is clear that the restraint on government power, beyond the prohibition of a national church, has to do with the protection against the federal government of the authority of states not merely to promote religion in general, but to establish churches.⁵⁶

But what about the Fourteenth Amendment, and, particularly, the idea that it “incorporates,” and, thus, makes applicable to the states key guarantees of the Bill of Rights which originally applied only against the federal government? Is it not the case that the original meaning of the “Establishment Clause” has been effectively transformed by the Fourteenth Amendment into a prohibition on the states akin precisely to its original prohibition on federal power with

55. See John W. Huleatt, *Accommodation or Endorsement? Stark v. Independent School District: Caught in the Tangle of Establishment Clause Chaos*, 72 ST. JOHN'S L. REV. 657, 659 (1998) (discussing the differing views of separationists and nonpreferentialists).

56. In saying this, I do not mean to imply a strict “moral equivalence” between the liberal and conservative readings of the “Establishment Clause.” Despite its failings, the conservative interpretation has two significant advantages over the liberal alternative. First, it is faithful to the original understanding of the obligations of the *federal* government to be evenhanded in its treatment of religions in United States territories where it exercises police powers as the government of general jurisdiction. Second, and relatedly, it understands the concept of “establishment” correctly, even if it does not grasp the crucial significance of the words “respecting an.” The liberal interpretation both misses the point of these words and misunderstands what the American founders meant by religious “establishment(s).”

respect to religious establishments? Whatever is to be said for the “incorporation doctrine” as applied to other provisions of the Bill of Rights—especially those provisions which constitute guarantees of personal immunities against, for example, prohibition of the free exercise of religion, abridgement of the freedom of speech, and denial of trial by jury—it is, as Gerard Bradley has astutely observed, simply inapplicable to the “Establishment Clause.”⁵⁷ It is logically impossible to incorporate and apply against a state a provision whose purpose is to preserve the state’s prerogative. Incorporating the “Establishment Clause” is, as Bradley says, directly analogous to trying to incorporate and apply against the states the Tenth Amendment’s reservation to the states of powers not delegated to the federal government by the Constitution.⁵⁸ Logically, it makes no sense.⁵⁹

Please notice that I do not propose a wholesale attack on the “incorporation doctrine.” For purposes of this discussion, let us simply prescind from questions of the doctrine’s validity with respect to other provisions of the Bill of Rights. My point is that even granting its soundness elsewhere, incorporation cannot possibly apply to the “Establishment Clause” once the plain meaning of that clause is brought into focus.

It follows from what I have said that, properly understood, the “Establishment Clause,” far from forbidding even full-blown establishments of religion in the states, protects the prerogative of the

57. See Bradley, *supra* note 50, at 95.

58. See *id.*

59. Here I must mention—though it would take a separate article to do a responsible critique of—the effort of Professor Kurt T. Lash of Loyola Law School of Los Angeles to show that throughout the period leading up to the framing and ratification of the Fourteenth Amendment, “the general understanding was that any law which supported *or* suppressed religion as religion violated the nonestablishment principle that government has no power over religion as such.” Kurt T. Lash, *The Second Adoption of the “Establishment Clause”*: *The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1140-41 (1995). Although the concept that government has no power over religion is itself problematic and somewhat opaque, Lash deploys it in an effort to show that it was at least *logically* possible for the Framers and Ratifiers to incorporate and make applicable to the states a *revised* understanding, possibly, indeed, a *misunderstanding*, of the original “Establishment Clause.” I am doubtful as to whether the evidence Lash is able to adduce is sufficient to bear the great weight of his claim. Nevertheless, I would urge readers to consult Lash’s article and carefully consider that evidence.

states to establish churches. This, it will be objected, runs so profoundly contrary to contemporary American sensibilities as to disqualify it as an interpretation. However faithful my interpretation may be to the constitutional text, understood in historical context, my critics will say, no court would, should, or could adopt such an interpretation. The people would not stand for it.

Of course, I agree that the idea of established churches is anathema to contemporary Americans. (Indeed, I share the view that disestablishment was a good idea and I would oppose any effort to establish a national church or churches in the states.). What this shows, however, is that a constitutional guarantee of nonestablishment is not particularly salient at the moment. It is the settled and overwhelming public sentiment against religious establishments—and not the “Establishment Clause” or any other constitutional provision—which accounts for the absence of serious movements to establish churches in the states. Still, I have no objection to amending the Constitution expressly to prohibit state establishments. Nonestablishment is good policy and is entirely consistent with the constitutional will of the people. My point is simply that the actual words of the Constitution do not prohibit establishments and ought not to be misinterpreted as doing so. Such a misinterpretation strips the words of any power to guide judicial reasoning, effectively licensing judges to enact their own preferences as a purely legislative matter under the guise of giving effect to written constitutional guarantees.

Both the liberal and conservative views—sometimes called “strict separationism” and “non-preferentialism”—are poor constitutional interpretation, or, rather, are not constitutional interpretation at all; but they do represent two serious alternative norms of prudence and political morality for structuring the relationship between government and religion in ways stricter than what the Constitution as it stands actually allows. The decision between the non-preferentialist and strict separationist perspectives should not be left to the judiciary. There is no reason in principle or practice why judges are more likely than the people as a whole to choose more wisely or justly. As in the case of the “free exercise” problem—only more urgently—it is time for a grand national debate and constitutional resolution of the question of the proper relationship between church and state.

My own voice in this debate will be raised on the side of non-preferentialism. The national government and the states ought to be entitled to give due recognition to God as the truly ultimate source of the dignity of human beings, and, thus, of our most cherished rights and freedoms, as well as our basic moral obligations. Although I believe that government in a society such as ours ought to strive to be evenhanded in its treatment of various religious groups, I do not favor a policy of neutrality as between belief and unbelief or ethical monotheism and atheistic materialism. There is, in my view, profound truth in Justice Douglas' claim that the very institutions of our government and civil society presuppose a Supreme Being.⁶⁰ Unbelievers should not be persecuted or made to suffer political disabilities, for that would be an unjust imposition upon their freedom. Toleration of unbelief is perfectly consistent with an official policy of favor towards religion. But, by the same token, respect for the freedom of unbelievers does not require governmental neutrality as between belief and unbelief.

When it comes to questions of financial aid to religious institutions, the "strict separationist" position has appeal, though, in the end, I think it should be rejected here, too. The appeal lies in the idea that a policy of "no support" for religion would prevent the unfairness and divisiveness that, many people contend, would attend an inevitable competition among religious groups for scarce governmental funds, as well as the idea that people ought not to be taxed to support religious institutions whose faith they do not share.⁶¹

60. See *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

61. Fear of a divisive competition for public funds seems plainly to have been on the minds of several justices in *Everson*. See SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 568-69 (1984). According to Fine, following the justices' conference in *Everson*, J. Wiley Rutledge drew up a long memorandum expressing a deep concern about the case. He wrote,

"We all know that this is . . . really a fight by the Catholic schools to secure this money from the public treasury. It is aggressive and on a wide scale" and clearly intended to encourage children to attend religious schools. . . . He feared that if the lower court decision were affirmed, religious groups would zealously press their demands in the state legislatures, and he thought that "the worst thing that could happen to this country would be to throw its religious demands, financially speaking, into politics."

Id.

There are, however, in my view, two enormous problems with the “no support” perspective. First, it ends up effectively, and unjustly, “privatizing” religion and pushing it to the margins.⁶² Given the enormous expansion of governmental involvement in matters of health, education, and welfare, secularization is the inevitable result of a policy that says religion must retreat whenever government, or government support, enters the picture.⁶³ Second, and relatedly, religion and religious faith end up becoming victims of discrimination in the marketplace of ideas. Secular philosophical or ideological views that directly compete with religious views are eligible for support, and are thus advantaged, while religious views are treated as ineligible. Many people—and, though my own children attend public schools, I am one of them—perceive serious discrimination and injustice in a system in which religion is disabled from competing with secular ideological views in schools which are funded by tax dollars. Given the secularist ideology that prevails in many schools and other public institutions,⁶⁴ we find no comfort in the claim that the “no support” doctrine prevents unfair favoritism in public institutions. Secularism is not neutrality.⁶⁵ It is, to borrow John Rawls’ terms—though he might not appreciate my doing so for these purposes—a “comprehensive view”—a view about values and virtues, about

62. On the privatization of religion as the motive and “governing norm” of the Supreme Court’s strict separationist jurisprudence, see Gerard V. Bradley, *Dogmatomachy—A “Privatization” Theory of the Religion Clause Cases*, 30 ST. LOUIS U. L.J. 275, 301-09 (1986).

63. See Neuhaus, *supra* note 1, at 16.

64. If you doubt that secularist ideology in fact prevails in many public schools or that public school textbooks and curricula are often shaped by secularist assumptions, I urge you to consult the most careful and comprehensive recent study of the subject: WARREN A. NORD, *RELIGION AND AMERICAN EDUCATION: RETHINKING A NATIONAL DILEMMA* 138-91 (1995); see also Charles L. Glenn, *Religion, Textbooks, and the Common School*, THE PUBLIC INTEREST, Summer 1987, at 28 (examining the difficulty in creating a model of public education satisfactory to the beliefs and demands of all parents). These works should be read in light of J.S. Mill’s prescient analysis of the dangers of placing “the whole or any large part of the education of the people . . . in State hands.” JOHN STUART MILL, *ON LIBERTY* 119 (Prometheus Books 1986) (1859).

65. See J. Budziszewski, *The Illusion of Moral Neutrality*, FIRST THINGS, Aug.-Sept. 1993, at 32.

human nature, duty, and destiny—which competes with other “comprehensive views,” including religious views, for people’s fundamental allegiance.⁶⁶

Nor should we credit the idea that secularism prevents divisiveness. It could do that only if religious believers were to capitulate to its claims to be *the* legitimate “public philosophy” of the United States. But precisely because a great many believers—rightly—reject the idea that secularism is “neutral,” they will—rightly—refuse to capitulate to it. Far from being a shield against strife, a “no support” view that effectively establishes secularism as the state religion will itself become—indeed it has become—a cause of social division. This is not to suggest that the “non-preferentialist” alternative will eliminate religiously or philosophically based social division. Given the profound differences in our society over many basic issues of morality and justice, no policy that any responsible person would care to endorse could accomplish that. It is only to say that non-preferentialism is no more divisive than “strict separationism,” and it is fairer and truer to our nation’s founding principles.

CONCLUSION

We should not imagine that the American people no longer possess the intellectual or moral virtues required to deliberate wisely about what John Rawls calls “constitutional essentials and questions of basic justice.”⁶⁷ We should not fear a grand constitutional debate.⁶⁸ Let us, as a self-governing people, decide whether to amend

66. See JOHN RAWLS, *POLITICAL LIBERALISM* (1993). The author explores “comprehensive views” in political theory, and attempts to develop and defend a purely “political” liberalism that does not constitute or appeal to any particular “comprehensive view.” See, e.g., *id.* at 13, 177. “Political” liberalism may be affirmed by partisans of various reasonable competing “comprehensive views” who join an “overlapping consensus.” *Id.* at 150-52. But see Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 *YALE L.J.* 2475 (1997) and Heidi M. Hurd, *The Levitation of Liberalism*, 105 *YALE L.J.* 795 (1995) (arguing that Rawls’ efforts fail).

67. RAWLS, *supra* note 66, at 227-30.

68. From our very different moral and political vantage points, Sanford Levinson and I have converged on at least this conclusion. I would recommend to readers who tend to view the world his way rather than mine the powerful argument he advances in his article, *A Constitutional Convention: Does the Left Fear Popular Sovereignty?*, *DISSENT*, Winter 1996, at 27.

the “Free Exercise Clause” and how to amend the “Establishment Clause.” Let us soberly consider the proper scope of judicial power in the cause of protecting religious freedom. Let us identify principles to maximize the accommodation of people’s free exercise of religion, consistent with the religious freedom of others, and the just authority of the people, through their elected representatives, to act to protect public health, safety, and morals, and to advance the general welfare.

