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ORIGINALISM AND THE RELIGION CLAUSES:

A RESPONSE TO PROFESSOR GEORGE

by Kent Greenawalt

This response to Professor Robert George's thoughtful remarks tries to preserve the flavor of a brief rejoinder in a debate. I sketch differences with him over some major topics, but I do not develop these at length.

I. ORIGINALISM AS A GUIDE TO RELIGION CLAUSE INTERPRETATION

Professor George suggests that originalism has played a much greater and more widely accepted role in Religion Clause interpretation than in the interpretation of other constitutional guarantees. However, I am skeptical. It is true that Supreme Court opinions spend more time on original sources in religion cases, but that is largely because the sources are much richer. We have a much greater sense of various positions on religious issues when the Constitution was adopted, than on subjects such as free speech.[1] In most religion cases numerous sources can be lined up on each side, but they do not provide clear guidance. It is hard to suppose that they are the main determinants of decision. As with other areas of constitutional law, most judges apply fundamental values drawn from the past to resolve the problems they confront today.

Professor George sensibly refrains from discussing which variety of originalism to adopt. Entering that thicket would have necessitated a day-long seminar, not a brief debate; but, of course,

1. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1109 (1990) [hereinafter McConnell, *Free Exercise*]; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1413-14 (1990) [hereinafter McConnell, *Origins and Historical Understanding*].

identifying the scope of originalism makes a tremendous difference. Let me provide one example. As Professor Kurt Lash tells us, Justice Story believed that the Constitution permitted nonpreferential encouragement of Christianity.[2] Assuming that people believed such encouragement appropriate when the Bill of Rights was adopted, does it follow that such encouragement of Christianity now remains appropriate in a country of vastly greater religious diversity? Is one to be guided by the specific attitude about preferences held in 1791, or by the more general view that government should remain nonpreferential in its treatment of major religious traditions in the country? Two different versions of originalism could yield drastically different conclusions.

I am not an originalist in the sense that Professor George means. I do not think that the original understanding, either of those who enacted the constitutional provisions or of those who then read the provisions, should be the final determinant in constitutional adjudication. Nevertheless, I agree that original understanding, in some form, should be an important consideration in Supreme Court decisions. In this respect, Professor George's conclusions about original intent matter for individuals with my perspective, as well as for "purer" originalists like himself.

Two of Professor George's central conclusions regarding original intent lie on shaky ground. In both instances, much of the problem lies in the complex relation of the Fourteenth Amendment to the original Bill of Rights.

First, Professor George's conclusion that originalism supports the outcome of *Employment Division v. Smith*[3] is oversimplified in two crucial respects. Let us focus first on the Bill of Rights itself. Professor George accepts the assumption in *Smith* that the issue is whether the Free Exercise Clause requires only nondiscrimination or creates some broad religious right to exemption from general laws.[4]

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2. *See* Kurt T. Lash, *Introduction: The Status of Constitutional Religious Liberty at the End of the Millennium*, 32 LOY. L.A. L. REV. 1 (1998) [hereinafter Lash, *Introduction*]. By "nonpreferential encouragement of Christianity," I mean the government would promote Christianity but would not favor one branch of Christianity over others.

3. 494 U.S. 872 (1990).

4. *See id.* at 877-82.

If the issue is presented in this form, I believe the competing positions are about a stand-off. That means, I think Michael McConnell and Justice O'Connor's argument that a broad claim to exemption was intended is substantially stronger than either Professor Lash or Professor George believes.[5]

The point I want to make here is that this whole way of regarding the historical issue may be too crude. In reading Justice O'Connor's dissenting opinion in *City of Boerne v. Flores*,[6] I was particularly struck by the wording of the New Hampshire Constitution of 1784:

> Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience . . . provided he doth not disturb the public peace, or disturb others, in their religious worship.[7]

Would those who wrote and read this language have thought that a state possessed authority to prohibit the use of wine in worship because the legislators regarded alcohol use as undesirable? The emphasis on the "right to worship" suggests a negative answer. Perhaps religious claimants had no right to violate other laws, but enjoyed some insulation against laws restricting worship. It is difficult to square the language of the New Hampshire constitution with the central principle and result in *Smith*, a case involving the core of worship. One can conceive of the possibility that people in the late eighteenth century did not think free exercise of religion included any right of exemption from the obligations of most laws, but did think that basic worship practices were to some extent shielded from government interference. Of course, different people may have had varying ideas about what free exercise meant.

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5. *See id.* at 897 (O'Connor, J., concurring); City of Boerne v. Flores, 117 S. Ct. 2157, 2176-77 (1997) (O'Connor, J., dissenting); McConnell, *Free Exercise*, *supra* note 1, at 1117-18; McConnell, *Origins and Historical Understanding*, *supra* note 1, at 1415, 1511-12; Lash, *Introduction*, *supra* note 2.

6. 117 S. Ct. 2157, 2180 (1997) (O'Connor, J., dissenting).

7. N.H. CONST. of 1784, art. I, § 5.

Recognizing these possibilities reveals one of the difficulties with strict originalism that focuses narrowly on protected and unprotected practices. If people could not have imagined a government enacting a broad prohibition on the use of alcohol, one may be left to guess what they *would have thought* had they been confronted with such legislation.

Second, Professor George's originalist account concerns the relation between the Fourteenth and First Amendments. Remember, the Fourteenth Amendment makes the First Amendment applicable to the states. Professor Lash presents a strong argument that when the Fourteenth Amendment was enacted, a number of important people conceived constitutional free exercise as involving some right of exemption against neutral laws.[8] For a serious originalist, the perceived coverage at the time of the Fourteenth Amendment's enactment should control its application.[9] It is that amendment, not the original Religion Clauses, that applies to states and localities. If judges were guided by a narrower understanding of free exercise in interpreting the original clause and a broader understanding in interpreting the Fourteenth Amendment, the paradoxical result would be to offer citizens greater federal rights of free exercise against states than against the federal government. Judges might instead reasonably adjust the content of the right against federal action to correspond with the content of the right against state action.

Matters are somewhat more complicated with respect to the Establishment Clause. Professor George suggests that originally it was simply a federalism provision, keeping the national government out of a state's determination of whether or not to establish religion. So conceived, there would have been nothing in the clause to incorporate against the states. However, this conclusion is too hasty. Although the original Establishment Clause dealt mainly with the distribution of authority in a federal system, the clause presumably had

8. *See* Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1149-55 (1994).

9. One might argue, to the contrary, that people at the time of the later amendment had an overarching understanding that the understanding at the time of the Bill of Rights should control; but I am aware of no evidence to support such a displacement of their actual understanding about coverage.

some application to areas within the control of the federal government, such as federal territories, federal ships, and federal embassies abroad. Furthermore, all formal state establishment had ended by the time the Fourteenth Amendment was adopted.[10] Many states had nonestablishment provisions in their own constitutions[11] and, according to Professor Lash, many people accepted the notion that the nonestablishment concept of the First Amendment concerned more than federal distribution of authority.[12] Indeed, many considered the concept to cover certain subjects that more recently have been primarily regarded as matters of free exercise. Thus, at the time the Fourteenth Amendment was adopted many of those who reflected on the subject thought that the Establishment Clause contained ample content that could be incorporated against the states.

Even if the original clause was simply a federalism provision, one could conceive of substantive limits on religious activities of the national government in national domains. Such limits would attach in the same manner in which equal protection under the Fourteenth Amendment was read back into the Fifth Amendment Due Process Clause.[13] Moreover, as I have suggested, the Establishment Clause probably did have some original content in relation to federal territories. This content could be filled out according to the subsequent understanding of establishment limits on the states adopted under the Fourteenth Amendment. In sum, contrary to what Professor George argues, both the Free Exercise and Establishment Clauses were suitable for incorporation; each may have been understood in the middle of the nineteenth century in a broader way than when originally adopted.

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10. *See* Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1100 (1995). This legal change, alone, was consistent with a continuing view that states could establish religions if they wished, but the end of state establishments might well have diminished a sense of the federal clause as involving an important principle of state authority.

11. *See id.* at 1123.

12. *See id.* at 1091.

13. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

II. FLIGHT FROM ORIGINAL INTENT AS A BASIS FOR AMENDMENT

Professor George's argument for constitutional amendment seems to be this: If Justices have departed substantially from the original understanding in their interpretations, "we the people" should decide whether to keep principles the Court has created. Under this view, one should support amendment even if one favors constitutional principles the Court has illegitimately developed. This argument is very broad in its implications and does not offer prudent counsel about practical governance.

If Professor George's basis for amendment of the Establishment Clause is sound, it would apply to many other parts of the Bill of Rights and to aspects of the original Constitution. Should all the relevant provisions be amended? I see nothing in Professor George's position that suggests that the Religion Clauses are unique in this respect. Interpretation has wandered away from a narrow original understanding in many areas of constitutional law.

There is a tendency for judges' interpretations to wander away from original understanding when they are deciding issues under the pressure of modern conditions, even when judges sincerely employ some originalist methodology. A recommendation to amend the Constitution each time interpretation deviates from original understanding is a prescription for periodic wholesale amendment of the Constitution.

The prospect of continual amendment would not be so worrisome were a national debate over amendment of the Religion Clauses, and other provisions, a promising option for the nation. My view is more pessimistic on this score than that of Professor George. I am concerned about divisiveness and intemperate judgment. For example, the rush to amend the Constitution to overturn the ruling that flag burning was protected speech[14] has been more of a tribute to demagoguery than an edifying exploration of basic values. I believe that in the absence of a constitutional crisis, we should leave well enough alone.

14. *See* Texas v. Johnson, 491 U.S. 397, 417-18 (1989).

III. WHO SHOULD WE TRUST?

Professor George displays a consistent distrust of judges in comparison with legislators. Whether judges should be strongly deferential to legislative choice, or should play a major role in developing constitutional standards, is a vast topic. I favor a more activist judiciary than does Professor George, but here I limit myself to one point. As to certain rights, judges interpreting the Constitution can only add to the protection which legislatures provide.[15] Flag burning is an example. No one believes flag burning must, constitutionally, be a crime; legislators need not criminalize it. If judges do not defer to legislators, a legislative choice not to criminalize flag burning will stand, but a legislative choice to penalize flag burning may be overturned. Thus, giving power to judges adds to the total protection against one being treated as a criminal for burning a flag. Because of the interaction of the Free Exercise and Establishment Clauses, matters are more complicated in respect to the Religion Clauses, but it remains true that some activities are more likely to be protected if robust judicial review follows legislative choice. Thus, a choice for or against strong judicial review operates as a choice for greater or lesser protection of certain constitutional rights. If one believes in strong support for certain rights, one may favor active judicial participation without trusting judges more than legislators.

IV. CONCLUSION

Professor George offers a well considered and challenging perspective, but his contentions about the relevant original intent underlying the Religion Clauses and the Fourteenth Amendment are too simple. His wholesale condemnation of Establishment Clause doctrine is unjustified. His basis for recommending amendment of the Constitution rests on an unusual rejection of any judicial interpretations that do not conform with original intent and on a decidedly optimistic appraisal of the prospects of productive debates over amendment. Finally, Professor George's comparison of legislators

15. It is possible, of course, that legislatures may pay less attention to individual rights and constitutional values if the judiciary actively protects them. Insofar as legislatures become less protective because of judicial involvement, the statement in the text is not accurate.

and judges neglects the reality that in many contexts, judicial protection means more protection.