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NORTH CAROLINA'S ESTABLISHMENT CLAUSE: HISTORY AND INTERPRETATION*

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The North Carolina Constitution guarantees the freedom of conscience. As originally ratified in 1776, the Constitution also prohibited any state establishment of religion. Yet in two revisions to the state charter—first during Reconstruction and again in 1971—North Carolinians reinscribed their rights of conscience while omitting the previously explicit disestablishment guarantee. How are we to interpret North Carolina's modern religious guarantees? This essay examines the political, religious, and legal history of North Carolina and the unique text and structure of the state charter in search of answers. As the United States Supreme Court continues to reinterpret the federal Free Exercise and Establishment Clauses, and on the tenth anniversary of a state resolution that would have declared North Carolina free to establish a state religion, this essay offers fresh insights into North Carolinians' fundamental religious rights.

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INTRODUCTION

In April 2013, members of the North Carolina General Assembly introduced a resolution stating that North Carolina could establish a state religion.[1] The act proclaimed state lawmakers' belief that the Constitution of the United States "does not prohibit states or their subsidiaries from making laws respecting an establishment of religion" and that the North Carolina legislature would not recognize federal court rulings to the contrary.[2] Christened the "Rowan County Defense of Religion Act," the resolution was a response to a legal challenge to the prayer practices of county commissioners who opened 97% of their board meetings with sectarian Christian prayers.[3] Several lawmakers signed on, the resolution passed its initial reading, and some North Carolina citizens reacted with enthusiastic support.[4] Others published critiques in news outlets nationwide.[5] In the months that followed, as the resolution stagnated in committee, and over years of litigation in federal court, lawmakers, jurists, and commentators remained focused on the dictates of the federal constitution. The en banc Fourth Circuit eventually resolved the lawsuit that sparked the debate,

1. H.R. 494, 2013-2014 Gen. Assemb. (N.C. 2013).

2. *Id*.

3. *See* Adam Cohen, *Can North Carolina Declare an "Official" Religion?*, TIME MAG. (Apr. 8, 2013), https://ideas.time.com/2013/04/08/can-u-s-states-have-official-religions/; *see also Press Release: ACLU and NC Residents File Lawsuit to End Unconstitutional Prayers at Rowan County Meetings*, ACLU (Mar. 13, 2013), https://www.aclu.org/press-releases/aclu-and-nc-residents-file-lawsuit-end-unconstitutional-prayers-rowan-county-meetings.

4. Staff Report, *Lawmakers Seek Defense of Religion Act*, SALISBURY POST (Apr. 3, 2013, 12:00 AM), https://www.salisburypost.com/2013/04/03/lawmakers-seek-defense-of-religion-act/; *House Speaker: State Religion Resolution is Dead, Will Not Be Voted On*, WBTV (Apr. 2, 2013, 9:22 PM), https://www.wbtv.com/story/21858974/state-lawmakers-join-fight-over-jesus-prayer-before-meetings/.

5. *See, e.g.*, Alexandra Petri, *Op-Ed: North Carolina Reinterprets Separation of Church and State*, WASH. POST (Apr. 3, 2013, 5:59 PM), https://www.washingtonpost.com/blogs/compost/wp/2013/04/03/north-carolina-reinterprets-separation-of-church-and-state/; Imam Abdullah Antepli, *Rowan County Defense of Religion Act: Mixing Religion With Politics in North Carolina*, HUFFPOST (Apr. 9, 2013, 12:11 PM), https://www.huffpost.com/entry/rowan-county-defense-of-religion-act-mixing-religion-with-politics-in-north-carolina_b_3041608.

holding that Rowan County's prayer practices violated the Establishment Clause of the First Amendment to the United States Constitution.[6]

Missing from the conversation was North Carolina constitutional law.[7] The federal Constitution sets a floor for protected civil liberties, not a ceiling; state charters often provide a "double source of protection" for the American people.[8] It is not unreasonable, then, to ask whether North Carolina's own charter prohibits the establishment of religion, whatever the federal Constitution demands. The State's foundational law includes at least one explicit religion clause.[9] A significant portion of its language predates the federal Bill of Rights.[10] The North Carolina Supreme Court has moreover long recognized that the State's governing document is "more detailed and specific than the federal Constitution in the protection of the rights of its citizens."[11] Far from an anomaly, this arrangement is a vital feature of our

6. Lund v. Rowan Cnty., 863 F.3d 268 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 2564 (2018).

7. North Carolina law was missing from *most* of the conversation, that is. The ACLU's complaint in *Lund* included a claim premised on North Carolina's religion clauses, N.C. CONST. art. I, §§ 13, 19. *See* Verified Compl. for Decl. and Inj. Relief and Nominal Damages at ¶¶ 4, 5, 44, Lund v. Rowan Cnty., No. 1:13-cv-207-JAB-JLW (M.D.N.C. Mar. 12, 2013), https://www.aclu.org/legal-document/lund-et-al-v-rowan-county-complaint. The claim was dismissed in a footnote by the district court and did not garner much additional attention. *See* Lund v. Rowan Cnty., 103 F. Supp. 3d 712, 733 n.10 (M.D.N.C. 2015). That was not the first time the ACLU of North Carolina had included a state constitutional establishment clause claim that was overlooked by the courts. *See, e.g.*, Joyner v. Forsyth Cty., No. 1:07-CV-243, 2009 WL 3787754, at *1 (M.D.N.C. Nov. 9, 2009), *aff'd*, 653 F.3d 341 (4th Cir. 2011), *then vacated*, No. 1:07-CV-243, 2014 WL 12879756 (M.D.N.C. Nov. 21, 2014) (noting sectarian prayer complaint's claim under Sections 13 and 19 of the North Carolina Constitution, upon which injunction was initially granted but later reversed as inconsistent with *federal* establishment clause law, as clarified by *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014)).

8. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

9. *See* N.C. CONST. art. I, § 13.

10. Much of the current language of Section 13 has been carried over from the State's two previous charters, the first of which was ratified in 1776—fifteen years before the Bill of Rights (1791). *See infra* note 37. For a detailed overview and history of the North Carolina Constitution's religion clauses, *see infra* Part II.

11. Corum v. Univ. of N.C., 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) (citing Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983)).

federalist system: By design, States may more vigorously or more broadly protect citizens' rights than they are required to by federal law.[12]

So what *does* the North Carolina Constitution say about the relationship between church and state?

This essay begins to answer that question. The analysis is not limited to the decade-old debate over Rowan County. Yet in effect, I ask whether the General Assembly really could establish a state (or county, or municipal, or public school) religion, the United States Constitution notwithstanding. Current state Supreme Court jurisprudence suggests the answer is no.[13] But the existing caselaw is undertheorized and does not grapple with the complexities of the state Constitution's text, structure, and history. Rather than take existing judicial decisions at face value, this paper offers a fresh assessment.

The exercise is not wholly academic. The U.S. Supreme Court has recently called into question much previously-established federal Establishment Clause law,[14] leading Justice Sotomayor to accuse the Court's majority of "dismantl[ing] the wall of separation between church and state that the Framers fought to build."[15] She and other Justices have expressed growing concern that the government's "ability to remain secular" is in serious contemporary jeopardy.[16] Meanwhile, other Justices have long

12. *See generally* Brennan, *supra* note 8; Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304 (2019) (discussing and embellishing on Judge Jeffrey S. Sutton's 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018)); *see also, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2236 (2022) (reasoning that "people of the various States may evaluate [the interests of women and in "potential life"] differently" and that the federal Constitution "does not prevent the people's elected representatives from deciding how abortion should be regulated").

13. *See infra* Part III.

14. During the 2022 term, for example, Justice Gorsuch announced that the Court had "long ago abandoned *Lemon* [*v. Kurtzman*, 403 U.S. 602 (1971)] and its endorsement test offshoot." Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2414 (2022); *see also id.* at 2428 n.4 (collecting cases in which the Court "criticized or ignored *Lemon* and its endorsement test variation"). The earliest decided case cited in support is dated 2005. *See id*.

15. Carson v. Makin, 142 S. Ct. 1987, 2012 (2022) (Sotomayor, J., dissenting).

16. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 U.S. 2012, 2041 (2017) (Sotomayor, J., dissenting); *see also, e.g.*, *Carson*, 142 S. Ct. at 2004 (Breyer, J., dissenting) (suggesting that the Court has "effectively abandon[ed]" the "play in the joints" between the Establishment and Free Exercise clauses).

questioned the incorporation of the Establishment Clause to the states.[17] The Court's recent decisions also suggest that the Establishment Clause's companion provision—the Free Exercise Clause—is the more powerful guarantee.[18] Instead of "play in the joints" of the federal religion clauses, we may be witnessing the birth of an ascendent Free Exercise Clause that overshadows more traditional guarantees of secular neutrality toward religion.[19] With so much federal First Amendment jurisprudence in flux, it is more essential than ever to understand what the states' charters permit and protect, including in North Carolina.

The paper proceeds in four parts. Part I introduces North Carolina's current religion clauses, including the state's Free Conscience Clause and several additional provisions touching on religion as a special and protected feature of the state's modern legal scheme.

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17. The U.S. Supreme Court has held that both the Free Exercise and Establishment Clauses apply to the states through the Fourteenth Amendment. Everson v. Bd. of Educ. of Ewing Tp., 330 U.S. 1, 13–15 (1947); *see also, e.g.*, Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943). Justice Thomas has long questioned that assessment. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2263 (2020) (Thomas, J., concurring); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 (2004) (Thomas, J., concurring), *abrogated on other grounds by* Lexmark Int'l v. Static Control Components, Inc., 572 U.S. 118 (2014). Justice Thomas is not the first to advance these theories, *see* Wallace v. Jaffree, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting), and he almost certainly will not be the last.

18. *See, e.g.*, *Kennedy*, 142 S. Ct. at 2434 (Sotomayor, J., dissenting) (accusing the Court of "yet again paying almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion"). *See also* Andrew R. Lewis, *The New Supreme Court Doctrine Against Religious Discrimination*, WASH. POST (July 7, 2022, 7:00 AM), https://www.washingtonpost.com/politics/2022/07/07/scotus-carson-makin-maine-schools-bremerton-football-coach/ ("Together, these decisions' [*Carson v. Makin* and *Kennedy v. Bremerton School District*] legal analyses expanded religious liberty and free speech protections, while weakening the First Amendment's establishment clause limitations which separate church and state."); Jim Oleske, Tandon *Steals* Fulton's *Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSBLOG (Apr. 15, 2021, 10:13 AM), https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/.

19. *See Carson*, 142 S. Ct. at 2002–03 (Breyer, J., dissenting). "Play in the joints" describes the tension and interplay between the federal Free Exercise and Establishment Clause guarantees, as well as the traditional deference given to state decisionmakers who try to strike a balance between the two. *See id.*; *see also* Grant T. Sullivan, *Symposium: What 'Play in the Joints' Remains After* Espinoza*?*, SCOTUSBLOG (July 1, 2020, 12:49 PM), https://www.scotusblog.com/2020/07/symposium-what-play-in-the-joints-remains-after-espinoza/.

Part II charts the clauses' historical development. I begin with the North Carolina Declaration of Rights and Constitution of 1776, which included both a free conscience guarantee and an explicit (dis)establishment clause. These provisions reflected the unique social, legal, and political concerns of eighteenth-century North Carolinians, including their experience with an established Anglican church before the American Revolution. Yet when North Carolinians adopted revised constitutions in 1868 and 1971, they retained and expanded the freedom of conscience guarantee while omitting the earlier establishment provision entirely.

Part III returns to the present to explore North Carolina's contemporary church-state constitutional jurisprudence. I review a number of state appellate decisions touching on establishment and entanglement to show that North Carolina's charter has been interpreted in "lockstep" with the federal Establishment Clause.[20] This strategy for constitutional interpretation, in which judges construe state constitutional provisions as mirroring roughly analogous provisions of the federal charter, is common in state courts.[21] In North Carolina today, when state courts interpret the religion clauses of the state Constitution, federal First Amendment jurisprudence is accepted as authoritative commentary on the state's religious guarantees.

Part IV then pairs the historical and jurisprudential analyses to present a critique and three alternative frameworks for understanding North Carolina's religion clauses. The frameworks are not meant to conclusively resolve the meaning of North Carolina's constitutional guarantees on the establishment of church and state. Rather, I propose three interpretations that are more reasonable than federal lockstepping in light of the unique text and history of the state charter and invite North Carolina lawmakers, jurists, and the broader community to grapple with their implications. A brief final section concludes.

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20. The "lockstep" method of state constitutional interpretation is characterized by interpretation of "parallel state constitutional provisions in keeping with the federal courts' interpretation of their federal counterparts." Grant E. Buckner, *North Carolina's Declaration of Rights: Fertile Ground in a Federal Climate*, 36 N.C. CENT. L. REV. 145, 147 (2014). For additional information, *see infra* Parts III and IV.

21. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 194–95 (2009).

I. AN OVERVIEW OF NORTH CAROLINA'S CONSTITUTIONAL RELIGION CLAUSES

The current Constitution of North Carolina, ratified in 1971, contains one overarching Free Conscience Clause and a second, associated provision that governs when the state can appropriately consider religion in its decision-making. Both are included in the Declaration of Rights, the opening section of the state charter that enumerates individual rights and liberties. The Free Conscience Clause is located in Article I, Section 13:

> All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.[22]

An associated provision in Article I, Section 19, guarantees that:

> No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, *religion*, or national origin.[23]

Together, these clauses have been interpreted to "coalesce into a singular guarantee of freedom of religious profession and worship, 'as well as an equally firmly established principle of separation of church and state.'"[24] In the words of the North Carolina Supreme Court, "[s]tated simply, the constitutional mandate is one of secular neutrality toward religion."[25]

Yet North Carolina's religion clauses[26] say nothing—at least nothing explicit—about "secular neutrality" or the establishment of religion. Unlike

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22. N.C. CONST. art. I, § 13. Throughout this paper I refer to this provision as the "Free Conscience Clause." That title has not been employed by the North Carolina courts, but provides a convenient shorthand name for purposes of this discussion.

23. *Id.* art. I, § 19 (emphasis added).

24. Heritage Vill. Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 406, 263 S.E.2d 726, 730 (1980) (quoting Braswell v. Purser, 193 S.E.2d 90, 93, 282 N.C. 388, 393 (1972)).

25. *In re* Springmoor, Inc., 348 N.C. 1, 5, 498 S.E.2d 177, 180 (1998).

26. I use the term "religion clauses" in the lowercase to refer to the Free Conscience Clause, the equal protection and antidiscrimination language of § 19, and the host of other constitutional provisions that mention religion or particular religions. *See supra* notes 22–23 and accompanying text and *infra* notes 31–35 and accompanying text. Because courts have

the federal Constitution, which plainly prohibits the enactment of any "law respecting an establishment of religion,"[27] North Carolina's charter is limited on its face to an affirmation of the freedom of conscience and a declaration that religious affiliation is an impermissible basis for discrimination by the state.[28] Section 19 is, moreover, a general due process and equal protection provision that guarantees broad rights to equality under law, including equality on the basis of religion.[29] Despite these differences, North Carolina courts have held that the state's charter "secure[s] similar rights" to those protected by the federal Constitution, including the "same neutrality [to religion] on the part of the State."[30]

North Carolina's Constitution also differs from the federal charter by enumerating religion as an impermissible distinguishing characteristic or protected class within several specific areas of the law. The Constitution is explicit, for example, that jurors may not be excluded from service on the basis of religion.[31] The charter also permits the issuance of revenue bonds to support health care and higher education facilities "regardless of any church or religious relationship."[32] Elsewhere religion is positively distinguished as unique and worthy of special consideration. Article V, Section 2 explicitly permits the General Assembly to exempt "property held for . . . religious purposes" from taxation.[33] The state's constitutional affirmation of the importance of education, too, is founded in reverence for "[r]eligion [and] morality."[34] Article XI, Section 4 further suggests that the state's public welfare programs are among "the first duties of a civilized and Christian

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interpreted state establishment-type claims using a host of these clauses, not always at the same time or in the same parings, the lowercase shorthand signals a lack of cohesion and clarity about which clauses are "doing the work" in church-state separation and entanglement cases based on the North Carolina Constitution.

27. U.S. CONST. amend. I.

28. *See* N.C. CONST. art. I, §§ 13, 19.

29. *See* Munn-Goins v. Bd. of Trs. of Bladen Cmty. Coll., 658 F. Supp. 2d 713, 731 (E.D.N.C. 2009) ("North Carolina courts have read Section 19 coterminously with the Fourteenth Amendment."); Rhyne v. K-Mart Corp., 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) ("Article I, Section 19 of the North Carolina Constitution guarantees both due process rights and equal protection under the law . . . .").

30. *Springmoor*, 348 N.C. at 5, 498 S.E.2d at 180.

31. N.C. CONST. art. I, § 26.

32. *Id.* art. V, §§ 8, 12.

33. *Id.* art. V, § 2(3).

34. *See id.* art. IX, § 1.

state."[35] The Free Conscience Clause nevertheless remains the most important provision touching on religion in the North Carolina Constitution[36] and accordingly commands the bulk of this paper's focus.

II. HISTORICAL CONTINUITY AND CHANGE

Much of the language of today's Article I, Section 13 has been carried over from the State's earliest Constitution of 1776, giving the modern document's Free Conscience Clause deep historical roots.[37] But change as well as continuity has characterized North Carolina's charters. The State's first Constitution also included an explicit prohibition on the establishment of "any one Religious Church or denomination in this State, in preference to any other."[38] During Reconstruction, the people of North Carolina adopted an amended Constitution that maintained and expanded the original charter's freedom of conscience provision but dropped the disestablishment language entirely.[39] That arrangement was replicated in the now-current Constitution of 1971, which is silent on its face on the proper relationship between church and state.[40]

This Part examines in detail the history and development of North Carolina's constitutional religion clauses. I also present historical context for these developments, illuminating the *why* as well as the *what*. That history is

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35. *See id.* art. XI, § 4.

36. *See generally infra* Part III (discussing North Carolina's contemporary church-state separation and entanglement jurisprudence, which overwhelmingly refers to N.C. CONST. art. I, § 13, even as it interprets that section in lockstep with the federal First Amendment).

37. *Compare* N.C. CONST. of 1971 art. I, § 13 ("All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience."), *with* N.C. CONST. of 1776, Decl. of Rts., § 19 ("That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own Conscience and Understandings."). *See also infra* Appendix A (providing a side-by-side comparison of the state's freedom of conscience constitutional provisions of 1776, 1868, and 1971).

38. N.C. CONST. of 1776, § 34; *see also infra* Part II.A.

39. *See* JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 59 (G. Alan Tarr ed., 2d 2013); N.C. CONST. of 1868, Decl. Rts., § 26; *see also infra* Part II.B (explaining the adoption of the North Carolina Constitution of 1868 and its omission of an explicit religious establishment clause).

40. *See* N.C. CONST. of 1971; *see generally infra* Part II.C (discussing the drafting and ratification of the currently-in-force North Carolina Constitution).

important in its own right, as contemporary law and society are built upon and incorporate our collective past. For that reason, as well as for ease of organization, this section does not contemplate what the Constitutions' history can teach us about the modern charter's meaning. That analysis is reserved for Part IV.

A. *North Carolina's Explicit Establishment Clause of 1776*

Many of the words and ideas captured in today's Free Conscience Clause have been carried over unchanged from the state's first Constitution of 1776, adopted soon after North Carolina declared independence from Great Britain.[41] The original provision was located in Section 19 of the state's Declaration of Rights and avowed that "all men have a natural and unalienable right to worship Almighty God according to the dictates of their own Conscience and Understandings."[42] This phrasing used "men" in place of "persons" and omitted the modern guarantee that "no human authority shall, in any case whatever, control or interfere with the rights of conscience."[43] The language is otherwise the same.[44]

As is true today, the affirmation of individual North Carolinians' religious liberty did not include an attached, explicit prohibition on the

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41. For an excellent overview of North Carolina's first Constitution, *see* John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1760–76 (1992).

42. N.C. CONST. of 1776, Decl. of Rts., § 19. This is the language of the document in the Vault Collection maintained by the State Archives of North Carolina. *See Declaration of Rights, 1776*, N.C. DIGITAL COLLECTIONS p. 4, https://digital.ncdcr.gov/digital/collection/p16062coll32/id/26/rec/10. In the published versions of the 1776 Declaration of Rights published by both Professor Orth and Yale Law School's Avalon Project, the final two words of the clause ("and Understandings") are omitted. *See* Orth, *supra* note 41, at 1764; *Constitution of North Carolina: December 18, 1776*, THE AVALON PROJECT AT YALE LAW SCHOOL, https://avalon.law.yale.edu/18th_century/nc07.asp (citing FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (Francis Newton Thorpe ed., 1909)). Because this essay starts from the foundational premise that the precise language of the historical charter is important and instructive, quotes from the Constitution of 1776 rely on the archival document and replicate that document's verbiage, capitalization, punctuation, and other particulars except as indicated with brackets.

43. *See infra* Appendix A (offering a side-by-side comparison of the freedom of conscience provisions of 1776, 1868, and 1971).

44. *Id*.

establishment of religion by the state.[45] Yet unlike the modern charter, North Carolina's first Constitution also contained a separate and unambiguous Disestablishment Clause, located in Section 34 of the main constitutional text:

> [T]here shall be no Establishment of any one Religious Church or denomination in this State, in preference to any other[;] neither shall any Person on any Pretence [sic] whatsoever be compelled to attend any place of worship contrary to his own Faith or Judgment, nor be obliged to pay for the purchase of any Glebe or the Building of any house of Worship or for the maintenance of any Minister or Ministry, contrary to what he believes right, or has voluntarily and personally engaged to Perform, but all persons shall be at Liberty to exercise their own mode of worship, provided that nothing herein contained shall be construed to exempt Preachers of Treasonable or Seditious discourses from Legal Trial and punishment.[46]

This explicit Disestablishment Clause was organized just after the original charter's bar on active clergymen serving in the legislature or Council of State and a religious test for office.[47] That test barred any person "who shall deny the being of God or the truth of the Protestant Religion or the divine Authority either of the old or new Testament, or who shall hold Religious Principles incompatable [sic] with the Freedom and safety of the State" from holding "any Office or place of Trust or Profit in the Civil Department" of North Carolina.[48]

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45. *See* N.C. CONST. of 1776, Decl. of Rts., § 19. The First Amendment to the U.S. Constitution, by contrast, declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. CONST. amend. I. The U.S. Supreme Court has tried to read the two federal religion clauses in harmony, but it has also recognized that their "absolute terms" may sometimes invite clashes. *See* Waltz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970).

46. N.C. CONST. of 1776, § 34. The language, capitalization, and punctuation reproduced here is from *Constitution*, 1776, NC DIGITAL COLLECTIONS, V.C.47.1 pp. 16–17, https://digital.ncdcr.gov/digital/collection/p16062coll32/id/22/rec/1. A "glebe" is land possessed by a church or ecclesiastical benefice that is used as an endowment or for revenue. *Glebe*, BLACK'S LAW DICTIONARY (11th ed. 2019).

47. *See* N.C. CONST. of 1776, §§ 31–32.

48. *Id.* § 32; *see also* Orth, *supra* note 41, at 1764. Modern readers may sense tension between the state's disestablishment clause and its religious test provisions, which when paired seem to prohibit the State from preferring one religious denomination "in preference

In some ways these provisions mirrored the constitutions of other newly-formed states. As North Carolina legal historian John V. Orth observes, the drafters of North Carolina's first Constitution made ready use of "models from other states."[49] Orth notes, for instance, that North Carolina's 1776 provision on freedom of religion "follows almost word-for-word a section of the Pennsylvania Declaration of Rights."[50] Pennsylvania's early charter also declared that "all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding."[51] The same is true of Delaware's founding documents, approved three months before North Carolina's, which declared in nearly identical language that "all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings."[52]

North Carolina's declaration of religious liberty also differed from its neighbors' in important ways. Most fundamentally, both Pennsylvania and

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to any other" and yet prefer persons of certain religious denominations—most notably for the time Protestant Christians over Catholic Christians and Atheists—for statewide public service. The tension was "not so obvious" to many eighteenth-century Americans. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2179 (2003). For one, a clause prohibiting the establishment of any one "denomination" might refer to establishing a particular strain of Protestantism to the exclusion of other Protestant sects (e.g., the establishment of Anglicanism in Great Britain to the exclusion of all other religions, including non-Anglican Protestant Christian traditions). Religious qualification provisions were included alongside disestablishment guarantees in other early state constitutions. *See, e.g.*, PA. CONST. of 1776, art. X and Decl. of Rts., § 2 (prohibiting the deprivation or abridgement of "any civil right as a citizen on account of . . . religious sentiments or peculiar mode of religious worship" and also requiring legislators to swear an oath of belief in "one God" and the "Divine Inspiration" of the "Scriptures of the Old and New Testament"); *see also* McConnell, *supra* note 48, at 2178 ("Even after Independence, every state other than Virginia restricted the right to hold office on religious grounds."). In keeping with this trend, the federal No Religious Test clause, U.S. CONST. art. VI, cl. 3, may reflect less of a concern with religious establishment than with one state's religious test being adopted over another's. *Id.* at 2179. Alternatively, these competing laws and sentiments may collectively illustrate an American form of "moral" establishment that operates as "a religious establishment under another name." David Sehat, THE MYTH OF AMERICAN RELIGIOUS FREEDOM 28 (2011).

49. Orth, *supra* note 41, at 1765.

50. *Id.*

51. PA. CONST. of 1776, Decl. of Rts., § 2.

52. DEL. BILL OF RIGHTS of 1776, § 2, *reproduced in* Max Farrand, *The Delaware Bill of Rights of 1776*, 3 AM. HIST. REV. 641, 642 (1898).

Delaware included establishment clauses within their Declarations of Rights, explicitly linking the separation of church and state to religious liberty in a manner today familiar from the federal Constitution's Religion Clauses.[53] North Carolina's charter split these guarantees, locating freedom of conscience in the Declaration of Rights and the prohibition on the state's establishment of religion in the main text of the Constitution.[54]

The states' early constitutions also diverged in the particular ways that disestablishment would be accomplished. Pennsylvania and Delaware were content to prohibit various traditional trappings of state-sponsored religion, such as compelled worship and support for the ministry, without explicitly prohibiting the state establishment of religion itself.[55] North Carolina, by contrast, explicitly prohibited the establishment of any particular church by the state in addition to proscribing compelled worship and financial support.[56] This organization reflects the early constitutions of other states, including New Jersey, which also expressly prohibited the "establishment of any one religious sect in [the] Province, in preference to another."[57]

Varying approaches to disestablishment among early state constitutions reflected both shared and differing concerns among the former British colonies. Pennsylvania and Delaware may have employed parallel language to accomplish disestablishment because the two states shared a cultural and legal heritage of religious tolerance. Following early exploration and settlement by Dutch and Swedish traders and investors, the majority of the land that eventually became Pennsylvania and Delaware had been legally unified by the British Crown's 1681 grant of a charter to William Penn, one of America's most influential early Quakers.[58] Penn's charter nominally

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53. *See* PA. CONST. of 1776, Decl. of Rts., § 2; DEL. BILL OF RIGHTS of 1776, § 2, *reproduced in* Farrand, *supra* note 52, at 642; U.S. CONST. amend. I.

54. *See* N.C. CONST. of 1776, Decl. of Rts. § 19; N.C. CONST. of 1776, § 34. For a useful comparison of these clauses, *see also* Orth, *supra* note 41, at 1797–802 (table comparing the 1776 North Carolina Declaration of Rights to the rights declarations of Virginia, Maryland, and Pennsylvania).

55. *See* PA. CONST. of 1776, Decl. of Rts., § 2; DEL. BILL OF RIGHTS of 1776, § 2, *reproduced in* Farrand, *supra* note 52; U.S. CONST. amend. I.

56. N.C. CONST. of 1776, § 34.

57. N.J. CONST. of 1776, § 19.

58. *See* SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 110–12, 209, 216 (1972). Before European settlement of the area, the lands that today comprise Pennsylvania and Delaware were occupied by indigenous American societies including the Lenape. *See* Walter Licht, Mark Frazier Lloyd, J. M. Duffin, & Mary D. McConaghy, *The Original People and Their Land: The Lenape, Pre-History to the 18th*

provided preferential treatment for Anglicans—members of the Church of England—while also assuring freedom of worship and toleration for "all who believed in God," including Penn's Quaker co-religionists and the many Swedish Lutherans who settled in the region that in 1701 split to form the Delaware colony.[59] After independence, the two states' decisions to link disestablishment with individual rights to religious liberty within the same, unified constitutional provision may have reflected the especially diverse religious history of the early Pennsylvania colony.[60]

North Carolina's colonial religious history was distinct. Before the American Revolution, North Carolina's established church was the Church of England, and in the absence of an American bishop the colonial governor served as the colony's supreme representative of both English Crown and English Church.[61] In the wealthy eastern and north-central reaches of the territory, most settlers were Anglican and remained so until the Revolution.[62] In the comparatively poor and wild west, particularly in Orange, Mecklenburg, Wake, Guilford, and Rowan counties, most religiously-affiliated colonists were Presbyterian and Baptist.[63] These early frontier dissenters bucked against North Carolina colonial laws that required them to accept Anglican ministers in their communities and support them

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Century, WEST PHILADELPHIA COLLABORATIVE HISTORY (Mar. 1, 2023), https://collaborativehistory.gse.upenn.edu/stories/original-people-and-their-land-lenape-pre-history-18th-century. The religious tolerance of the early Pennsylvania colony did not ordinarily extended to the Lenape and other indigenous Americans.

59. *See* AHLSTROM, *supra* note 58, at 111, 207–09, 216–17.

60. *See id.* at 208 (noting Penn's plan for a colony where "religious freedom . . . would furnish a haven for poor and oppressed peoples, [and] an example of enlightened government for the world"); *see also* McConnell, *supra* note 48, at 2154 (describing Pennsylvania as a state where "anti-establishmentarian traditions ran . . . deep"); 5 THE FOUNDERS' CONSTITUTION, VOL. 5, AMENDMENTS I-XII, at 92 (Philip B. Kurland & Ralph Lerner eds., 1987) (reproducing a July 1788 statement by North Carolina Governor Samuel Johnston that "[i]n Pennsylvania, if any sect prevails more than others, it is that of the Quakers").

61. Paul Conkin, *The Church Establishment in North Carolina, 1765-1776*, 32 N.C. HIST. REV. 1, 2–3 (1955).

62. *Id.* at 9. Although almost certainly true for White settlers, Professor Conkin does not comment on the religious traditions of indigenous Americans or the many people of color who were held in bondage as slaves in the North Carolina colony.

63. *Id.* at 8. Many of these settlers arrived in the mid-eighteenth century. *See* CHRISTINE LEIGH HEYRMAN, SOUTHERN CROSS: THE BEGINNINGS OF THE BIBLE BELT 10–11 (1997) (describing the arrival of "Scots-Irish Presbyterians" and "Separate Baptists" into the Carolina "backcountry" in the 1750s and 60s).

financially.[64] Colonial religious minorities were also subject to laws that denied them authority to conduct community affairs according to the traditions of their own particular faiths—especially laws limiting dissenters' authority to perform marriages and operate chartered schools.[65] Adding to their dissatisfaction, by the time of the Revolution, these religious "minorities" outnumbered colonial communicants of the English Church.[66]

The 1776 founders who wrote and ratified North Carolina's first state Constitution were unquestionably influenced by these historical, cultural, and religious particularities. The meeting in Halifax, North Carolina, where the state's first organic law was drafted, was well-attended by representatives of both the eastern and western counties.[67] Residents of Mecklenburg and Orange counties in particular sent the convention "rather precise instructions" for the new constitution and declaration of rights.[68] Those instructions reflected the communities' large Presbyterian and Baptist populations, including their concerns as colonial religious minorities.[69] The Mecklenburg letter instructed the county's representatives at the convention to "oppose to the utmost any particular church or sect of Clergymen being invested with power to decree rights and ceremonies"—a reference to the colony's marriage rites law.[70] The county's representatives were also told "to oppose the establishment of any mode of worship to be supported to the opposition of the rights of conscience together with the destruction of private property,"

64. *See* Conkin, *supra* note 61, at 8, 10–14. Despite these laws, including a 1715 provision that assessed "all taxable persons" five shillings per year for the support of the ministry, colonial North Carolina had few Anglican ministers. *See* McConnell, *supra* note 48, at 2154. "The first, and until 1721 the only, Anglican minister in the colony was a notorious drunkard," and in "most of the colony there were no [paid Anglican] ministers at all." *Id*.

65. *See* Conkin, *supra* note 61, at 17.

66. *See* HEYRMAN, *supra* note 63, at 14. A comparison of absolute numbers should not overshadow the fact that, at the time of the American Revolution, only about 10% of Southern colonists were actively affiliated with an evangelical church. *See id.*

67. *See* Orth, *supra* note 41, at 1760.

68. *Id.* at 1761.

69. *See* Conkin, *supra* note 61, at 8 (noting the high Presbyterian population of Orange and Mecklenburg counties).

70. *Id.* at 28.

references to both church establishment and the levying of taxes for the Anglican church and its ministers' support.[71]

All of these concerns were reflected in North Carolina's Disestablishment Clause of 1776. Where Anglicanism had been the colony's established religion, the state's first charter explicitly prohibited the establishment of any particular church or sect.[72] In place of colonial laws requiring all North Carolinians to pay for the support of Anglican ministers and ministries, the new state's law barred compelled worship and prohibited the levying of taxes to support state-selected religions and religious leaders.[73] And instead of a governor with supreme authority over both civil and ecclesiastical affairs, North Carolina created a division between church and state, including by barring clergymen from serving as both leaders of a church and in the legislature or Council of State.[74]

B. *Disestablishing the Establishment Clause in the Constitution of 1868*

North Carolina's original charter remained in effect for more than ninety years, through the ratification and dissolution of the Articles of Confederation,[75] the adoption of the United States Constitution,[76] and the passage of the federal Bill of Rights.[77] The state Constitution was revised only after the defeat of the confederate states—including North Carolina—in

71. Instructions to the Mecklenburg County Representatives to the Provincial Congress of North Carolina, *in* 10 COLONIAL & STATE RECORDS OF NORTH CAROLINA 239, 241 (1775).

72. *Compare* Conkin, *supra* note 61, at 2–3, *with* N.C. CONST. of 1776, § 34.

73. *Compare* Conkin, *supra* note 61, at 4–5, *with* N.C. CONST. of 1776, § 34.

74. *See* N.C. CONST. of 1776, § 31 (barring clergymen from these governmental offices "while he continues in the exercise of his pastoral function"); *supra* note 61 and accompanying text (discussing colonial governor's office).

75. The Articles of Confederation were ratified in 1781 and remained in force until March 1789, when the current Constitution of the United States came into effect. *See* Articles of Confederation (1777), https://www.ourdocuments.gov/doc.php.

76. The United States Constitution was ratified by the states in 1788 and came into effect in March 1789. *See* Owings v. Speed, 18 U.S. (5 Wheat.) 420, 422–23 (1820).

77. The Bill of Rights—the first ten amendments to the U.S. Constitution—were ratified by the states between 1789 and 1791. *See The Bill of Rights: How Did It Happen?*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/bill-of-rights/how-did-it-happen.

the United States Civil War in 1865.[78] After the war, a provisional governor of North Carolina was appointed and a convention promptly organized to develop a new state charter.[79] The first convention's work was rejected at the polls by the voters of North Carolina in 1866.[80]

By the following spring, Congress had taken charge. The United States government formally declared in March 1867 that "no legal State governments" remained in the rebellious South, including North Carolina.[81] Congress then called a second constitutional convention for North Carolina, drawing delegates from among both the Black and White adult male residents of the state.[82] Congress instructed these delegates that their new charter had to satisfy certain explicit terms if North Carolina was to rejoin the Union as a coequal sovereign among the states.[83] Working quickly, the delegates met in Raleigh in January 1868 and had drafted, proposed, and obtained approval for a new state charter by April of that year.[84]

The state's 1868 Constitution was "a sharp break" from the old.[85] The new state Constitution reflected first and foremost the new, postbellum order of expanded federal power and Congress's oversight of the state constitutional convention. Several provisions were added to ensure that North Carolina's charter reflected Reconstructionist principals including universal male suffrage and the primacy of the federal Constitution.[86] The framers also

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78. Delegates to a State Convention in June 1861 "declare[d] and ordain[ed]" the dissolution of North Carolina's bond to the United States, ceding the "jurisdiction of the State of North Carolina" to the "Confederate States of America" in order to protect "the institution of negro slavery." *See* ORDINANCES AND RESOLUTIONS PASSED BY THE STATE CONVENTION OF NORTH CAROLINA, FIRST SESSION IN MAY AND JUNE 1861 (John W. Syme, printer, 1862), particularly art. IV, § 3, ¶ 3, available at https://docsouth.unc.edu/imls/ncconven/ncconven.html. For additional information about the Convention of 1861, *see* Orth, *supra* note 41, at 1774–75.

79. *See* Orth, *supra* note 41, at 1775.

80. *Id.* at 1776.

81. Act of Mar. 2, 1867, ch. 153, 14 Stat. 428.

82. Orth, *supra* note 41, at 1776.

83. *See* Act of Mar. 2, 1867, ch. 153, 14 Stat. 428-29.

84. Orth, *supra* note 41, at 1777.

85. *Id.*

86. *See* Act of Mar. 2, 1867, ch. 153, 14 Stat. 428 (primacy of the federal Constitution); Act of Mar. 23, 1867, ch. 6, 15 Stat. 2 (requiring adult male suffrage without regard to "race, color, or previous condition [of servitude]"); *see also* Orth, *supra* note 41, at 1779 (discussing changes in suffrage law in North Carolina, both in language and in fact); *id.* at 1777 (noting the document's professed allegiance to the federal Constitution).

added a preamble "piously thanking Almighty God 'for the preservation of the American Union.'"[87]

The updated organic law was also vastly expanded, with detailed provisions numbering 197 in all.[88] Significant space was dedicated to previously-unaddressed issues such as the structure of the judicial system, taxation and revenue, public education, and the powers of local units of government.[89]

But while the Constitution of 1868 was overall more detailed than its predecessor, not all of the earlier charter's provisions were retained. The state's original Disestablishment Clause was abandoned, leaving the Reconstruction Constitution without any language explicitly touching on state support of religion, churches, ministers, or worship.[90] In 1776, the state's Disestablishment Clause had been one of its most detailed.[91] In 1868, it was gone entirely.[92] No debate over this change is recorded in the Journal of the Convention,[93] and no surviving contemporaneous newspaper accounts comment on the decision.[94] If any documentation lays bare the founders' motivations or the sentiments of the men who approved the state's revised organic law, it is beyond the reach of most modern North Carolinians.

Yet religion was far from absent from the drafters' minds. On a broad, sociological scale, religiousness was growing among postwar Southerners—particularly among evangelical denominations of Protestant Christianity.[95] Although evangelicals claimed less than half of the South's adult White population in the 1830s, by the middle of the century the majority of Southern

87. Orth, *supra* note 41, at 1777 (quoting N.C. CONST. of 1868, pmbl.).

88. *Id.* at 1777. The Constitution of 1776 had spanned just seventy-one sections. *Id*.

89. *See id.* at 1779–80; *see also* N.C. CONST. of 1868, arts. IV (judicial department), V (revenue and taxation), VII (municipal corporations), and IX (education).

90. *Compare* N.C. CONST. of 1776, *with* N.C. CONST. of 1868.

91. At 121 words, the Disestablishment Clause was among the longest provisions in the original charter. *See* N.C. CONST. of 1776, § 34.

92. *Compare id. with* N.C. CONST. of 1868.

93. *See* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH CAROLINA, AT ITS SESSION 1868 (Joseph W. Holden, printer, 1868), available at https://docsouth.unc.edu/nc/conv1868/conv1868.html (hereafter 1868 CONVENTION JOURNAL).

94. My searches in ProQuest's Historical Newspapers database, which contains 275 periodicals from throughout American history, yielded no relevant information.

95. *See* HEYRMAN, *supra* note 63, at 5–6.

religious believers were affiliated with evangelical sects.[96] Several delegates to North Carolina's 1868 Constitutional Convention were evangelical religious leaders themselves. The Reverend J.W. Hood, for example, served as one of Cumberland County's delegates; he was also a Pennsylvania transplant who had relocated to North Carolina to organize a branch of the African Methodist Episcopal Zion Church.[97] Several additional delegates are referenced in the Journal of the Convention using the honorific "reverend."[98] Many of these presumably pious men opened the Convention's sessions with prayer.[99]

The Reconstructionist drafters also integrated religious considerations and sentiments into the State's updated Constitution. The document's preamble explicitly thanks "Almighty God, the Sovereign Ruler of Nations" for "the existence of our civil, political, and religious liberties"—an opening note of gratitude entirely new to the 1868 Constitution.[100] The first charter's religious test for office was retained but modified to make any professing monotheist eligible for statewide office.[101] In the Constitution of 1776, the religious test provision had been located just two paragraphs before the state's Disestablishment Clause; in 1868 it was integrated into the updated charter's article on suffrage and eligibility for office.[102]

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96. *Id*. *See also* GAINES M. FOSTER, MORAL RECONSTRUCTION: CHRISTIAN LOBBYISTS AND THE FEDERAL LEGISLATION OF MORALITY, 1865-1920, at 129 (2002) ("Methodists and Baptists, and to a lesser extent Presbyterians, dominated the South's [postwar] public life as in no other section of the country.").

97. Leonard Bernstein, *The Participation of Negro Delegates in the Constitutional Convention of 1868 in North Carolina*, 34 J. NEGRO HIST. 391, 391 (1949).

98. *See* 1868 CONVENTION JOURNAL, *supra* note 93.

99. *See id.*

100. *See* Orth, *supra* note 41, at 1777 (quoting N.C. CONST. of 1868, pmbl.); *see also State Constitution of 1868*, N.C. DIGITAL COLLECTIONS, V.C.47.6, https://digital.ncdcr.gov/digital/collection/p16062coll32/id/443.

101. *See* N.C. CONST. of 1868, art VI, § 5. The 1776 Constitution had prohibited anyone denying "the being of God, or the Truth of the Protestant Religion, or the Divine Authority either of the Old or New Testament" from holding office. N.C. CONST. OF 1776, § 32. That provision was modified in 1835 to exclude reference to Protestantism, effectively excluding only conscientious non-Christians. *See also* N.C. CONST. of 1776, amend. of 1835, art. IV, § 2. For a historic overview, including the ways in which these provisions were interpreted to apply to early Catholic and Jewish state officials, *see* Orth, *supra* note 41, at 1764–65, 1773.

102. *See* N.C. CONST. of 1776, §§ 32, 34.

The updated charter also included several entirely new provisions touching on religion. The new article on education, for instance, began with an invocation of "[r]eligion, morality, and knowledge" as the basis for all "good government and [the] happiness of mankind."[103] The newly-formed Board of Public Charities, tasked with overseeing prisons, orphan homes, sanitariums, and institutions for the blind and mute, was similarly attributed to the drafters' belief in the "civilized" and "Christian" status of the state.[104] These explicitly drawn links between religion and public services were not unprecedented for the time: During the nineteenth century, evangelical Protestantism was an important driver in movements for government-imposed social reform.[105] Although reformers' interests and concerns varied widely, during Reconstruction, some White Christian reformers worried in particular whether formerly enslaved women and men "freed by the Civil War" were "morally ready for citizenship."[106] One contemporaneously popular solution was to expand the powers of government, creating more direct controls over individuals' moral and social lives.[107] White Southerners had been skeptical of this model before the Civil War, concerned that a powerful, centralized federal government could outlaw slavery.[108] That reluctance dissipated once their fears were confirmed and many White Southerners' attentions turned from protecting the institution of slavery to regulating in detail the lives of the formerly enslaved.[109] After emancipation, some White Southerners reasoned that "[i]f the national government could outlaw the sin of slavery," governments at both the federal and state level should "also employ [their] power to end other forms of immorality."[110]

Religion also maintained its importance in North Carolina's Declaration of Rights. The Free Conscience Clause originally located in Section 19 was carried over to the new Constitution as Article I, Section 26, which proclaimed in mirrored terms that North Carolinians possessed a "natural and unalienable right to worship Almighty God according to the

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103. N.C. CONST. of 1868, art. IX, § 1. This is the same language employed in the Northwest Ordinance, art. I (1787).

104. *Id.* art. XI, § 7.

105. *See* FOSTER, *supra* note 96, at 74.

106. *Id.* at 78.

107. *See id*. at 78-81.

108. *See id.* at 24–25; 128–30.

109. *See id*.

110. *Id*.

dictates of their own consciences."[111] Significantly, an entire second clause was added to this provision, decreeing that "no human authority should, in any case whatever, control or interfere with the rights of conscience."[112] This expanded free conscience guarantee was almost twice as long as that adopted in 1776, stating both an affirmative right to worship in the manner of each individual's choosing and a negative right to be free of control or interference in the exercise of that liberty.[113] No debate over this expanded language is recorded in the convention's proceedings.[114]

As in 1776, the expanded religious liberty protection was likely influenced by the rights declarations of North Carolina's sister-states.[115] The Pennsylvania Constitution of 1790 contained the same language prohibiting "control or interfere[nce] with the rights of conscience" adopted by North Carolina in 1868.[116] The same could be said for Kentucky's Constitutions of 1792 and 1799 and Tennessee's Constitution of 1796.[117] The North Carolina drafters' decision to add this language suggests that they agreed with and found useful this expanded conception of the right of free conscience as it was articulated by these nearby states.

But if North Carolina's Reconstruction-period drafters adopted expanded religious liberty language from their neighboring states, they did

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111. Orth, *supra* note 41, at 1777; N.C. CONST. of 1868, art. I, § 26. The original clause likely contained the words "and Understandings," as discussed *supra* at note 42 and accompanying text. This language was dropped in the 1868 Constitution, although it is unclear if this was intentional or a reflection of the earlier provision's imperfect recording in legal treatises. *See generally id*.

112. N.C. CONST. of 1868, art. I, § 26.

113. *Compare id*. (at 37 words), *with* N.C. CONST. of 1776 § 19 (totaling 23 words). By the "affirmative" right I mean the right "to worship . . . according to the dictates of [one's] conscience[]"; the "negative" right refers to freedom from governmental "control or interfere[nce] with the rights of conscience." *Cf.* N.C. CONST. of 1868, art. I, § 26.

114. *See* 1868 CONVENTION JOURNAL, *supra* note 93.

115. For a side-by-side comparison of the state constitutional provisions discussed in this section, *see infra* Appendix B (comparing the constitutions of Kentucky, North Carolina, Pennsylvania, and Tennessee).

116. PA. CONST. of 1790, art. IX, § 3. This provision is reproduced in DEPARTMENT OF JUSTICE OFFICE OF LEGAL POLICY, RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE 97 (1986), https://www.google.com/books/edition/Religious_Liberty_Under_the_Free_Exercis/6gBqEOemAPsC (hereafter RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE).

117. KY. CONST. of 1792, art. XII § 3; KY. CONST. of 1799, art. X, § 3; TENN. CONST. of 1796, art. XI, § 3. These provisions are also reproduced in RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE, *supra* note 116, at 90, 101.

not do so wholesale. The three matching provisions from Pennsylvania, Kentucky, and Tennessee also contained establishment prohibitions that North Carolina declined to include in its charter of 1868.[118] These disestablishment principles were cast both in terms of individual rights and as limitations on state power, declaring 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" and that "no preference shall ever be given, by law, to any religious establishment or modes of worship."[119] More striking still, these disestablishment provisions were intertwined with the free conscience provisions in the Pennsylvania, Kentucky, and Tennessee Constitutions.[120] North Carolina's Reconstruction-era framers thus appear to have selectively chosen only two of the four guarantees in their sister-states' religion clauses, intentionally selecting those that protect freedom of conscience while avoiding those that spoke to the state's power to compel worship, support a church or ministry, or give preference to particular religious organizations or forms. Where other states articulated both free conscience and disestablishment guarantees, North Carolina's 1868 drafters seemed to care only for the former.

In more ways than one, then, explicit prohibitions on the establishment of religion were overlooked or actively omitted in the state Constitution of 1868, while guarantees for the freedom of conscience were retained and expanded. Other additions to the Reconstruction charter referenced religion or Christianity as foundational to North Carolina's social and political order. While several amendments to this constitution were adopted between 1873 and 1967, none touched on these clauses referencing the establishment or free exercise of religion.[121]

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118. PA. CONST. of 1790, art. IX, § 3; KY. CONST. of 1792, art. XII § 3; KY. CONST. of 1799, art. X, § 3; TENN. CONST. of 1796, art. XI, § 3; *see also* RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE, *supra* note 116, at 90, 97, 101. For a side-by-side comparison of these clauses, *see infra* Appendix B.

119. PA. CONST. of 1790, art. IX, § 3. Kentucky's and Tennessee's reconstruction-era disestablishment provisions are almost identical to Pennsylvania's, but differ slightly in the terminology and grammar used. *See* KY. CONST. of 1792, art. XII, § 3; KY. CONST. of 1799, art. X, § 3; TENN. CONST. of 1796, art. XI, § 3; *see also* RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE, *supra* note 116, at 90, 97, 101. For a side-by-side comparison of these clauses, *see infra* Appendix B.

120. *See infra* Appendix B.

121. For an overview of these amendments, *see* Orth, *supra* note 41, at 1781–89.

C. *The 1971 North Carolina Constitution*

After a century of change and amendments to the state organic law, North Carolina adopted its third, current charter in 1971.[122] Efforts had been made to "redraw" the Constitution as early as 1933 "in order to consolidate . . . changes and eliminate anachronisms," but the task was not actually completed until the late 1960s.[123] By then, both the governor and the State Bar Association agreed that a study was warranted to consider "revising or even rewriting" the North Carolina charter.[124] The task was given to a Constitution Study Commission in 1968, and their work was approved by the General Assembly in 1969 and ratified by the voters in 1971.[125] Legal historian John V. Orth characterizes the process as a "good-government measure, long-matured and carefully crafted by the state's leading lawyers and politicians, designed to consolidate and conserve the best features of the past."[126]

The revised charter was "not a fundamentally new constitution."[127] In many ways the document simply mirrored the state's Constitution of 1868, leaving substantive concepts untouched while clarifying their language and organization. The individual liberties guaranteed by the Reconstruction Constitution's Declaration of Rights, including those specific to religion, were retained in the Constitution of 1971.[128] Overwhelmingly, the changes made were "editorial" in nature, designed not to alter the charter's meaning

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122. N.C. CONST. of 1971; *see also* Orth, *supra* note 41, at 1759–60.

123. Orth, *supra* note 41, at 1789–90.

124. REPORT OF THE NORTH CAROLINA STATE CONSTITUTION STUDY COMMISSION TO THE NORTH CAROLINA STATE BAR AND THE NORTH CAROLINA BAR ASSOCIATION 5 (1968), [hereafter 1968 COMMISSION REPORT], https://www.ncleg.gov/Files/Library/studies/1968/st12308.pdf.

125. *Id.* at 5–8; Act of July 2, 1969, ch. 1258, 1969 N.C. Sess. Laws 1461. Professor Orth reports that the returns of the constitutional referendum are in the NORTH CAROLINA MANUAL, 1971, at 359–67 (Thad Eure ed., 1971) (tallying general election votes to ratify the 1969 revised and amended constitution enacted by the General Assembly in 1969). Orth, *supra* note 41, at 1791 n.244.

126. Orth, *supra* note 41, at 1790.

127. N.C. State Bar v. DuMont, 304 N.C. 627, 636, 286 S.E.2d 89, 95 (1982).

128. *See* 1968 COMMISSION REPORT, *supra* note 124, at 73–74 ("We do not propose the removal from the Constitution of any of [the] ancient guarantees of liberty."). *Compare also* N.C. CONST. of 1868, art. I, § 26, *with* N.C. CONST. of 1971, art. I, § 13.

but to "modernize the language and arrangement of the Article by clarifying obsolete matter and organizing the matter in more logical sequence."[129]

These editorial updates are evident in the 1971 charter's Free Conscience Clause. The provision was moved from Section 26 of Article I to Section 13, where it would be grouped with the freedoms of assembly and the press.[130] The language employed in the clause was also updated to reflect modern sentiments and usages.[131] The word "should" was replaced with the more authoritative "shall," positively limiting the government's power instead of merely encouraging its conscientious use.[132] That update is consistent with the Commission's goal of clarifying that "the rights secured to the people by the Declaration of Rights are commands and not merely admonitions to proper conduct on the part of government."[133] The 1971 revision also replaced "men" with "persons," emphasizing that people of all genders are equally entitled to the protections of religious liberty.[134] Although the drafters did not comment explicitly on this change, it is consistent with the Commission's general editorial goal of imposing uniform language where it believed "uniformity of meaning was intended" in the earlier document.[135] Where the 1868 Constitution's Declaration of Rights had alternated between "all men" and "the people," the current charter now refers only to "people" or "persons."[136]

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129. *DuMont*, 304 N.C. at 634–35, 286 S.E.2d at 94–95.

130. *See* N.C. CONST. of 1971, art. I, §§ 12–14. The religion clause followed the free assembly provision in the Constitution of 1868, but both were separated from provisions guaranteeing freedom of the press. *See* N.C. CONST. of 1868, art. I, §§ 20, 25–26. The grouping of freedom of religion with freedom of assembly and the press reflects the organization of the First Amendment to the United States Constitution. *See* U.S. CONST. amend. I.

131. *Compare* N.C. CONST. of 1971, art. I, § 13, *with* N.C. CONST. of 1868, art. I, § 26.

132. *Id.*

133. 1968 COMMISSION REPORT, *supra* note 124, at 74–75. The Commission Report does not speak to this particular change to the religion clause, instead expressing a general editorial principle for the Declaration of Rights. *See id.*

134. *Compare* N.C. CONST. of 1971, art. I, § 13, *with* N.C. CONST. of 1868, art. I, § 26.

135. 1968 COMMISSION REPORT, *supra* note 124, at 72. The Report does not specifically address gender-inclusive language, although these changes were made throughout the charter.

136. *Compare, e.g.*, N.C. CONST. of 1868, art. I, §§ 24–27 (containing three references to "the people" and one, in the religion clause, to "all men"), *with* N.C. CONST. of 1971, art. I, §§ 12–13, 15, 30 (containing references to "persons," "the people," or "all people," but never "men").

Article I was also revised to reframe "ancient guarantees of liberty" in more contemporary and precise language—and in some instances to "augment them by adding similar guarantees of a more current character."[137] Even before the contemporary Constitution was adopted, for example, the 1868 Constitution's Law of the Land Clause had been interpreted as "equivalent to the due process of law required by the [Fourteenth] Amendment to the Constitution of the United States."[138] Likely in keeping with the Fourteenth Amendment's dual guarantees of "due process" and "equal protection,"[139] North Carolina's Law of the Land Clause was expanded in 1971 to include "a guarantee of equal protection of the laws and a prohibition of improper discrimination by the State."[140] That expansion is the origin of Article I, Section 19's current guarantee that no person can be "subjected to discrimination by the State because of race, color, religion, or national origin."[141] As the next Part makes clear, this provision has been paired with the more explicit Free Conscience Clause in modern separation of church and state cases.[142] Since the early seventies, these clauses have been read together to guarantee the "singular" principle of a religiously-neutral state.[143]

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137. 1968 COMMISSION REPORT, *supra* note 124, at 74.

138. Yancey v. N.C. State Hwy. & Public Works Comm'n, 222 N.C. 106, 106, 22 S.E.2d 256, 258 (1942).

139. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

140. 1968 COMMISSION REPORT, *supra* note 124, at 74. *Compare also* N.C. CONST. of 1868, art. I, § 17 (law of the land clause), *with* N.C. CONST. of 1971, art. I, § 19 (Law of the Land Clause expanded to include equal protection and nondiscrimination language).

141. 1968 COMMISSION REPORT, *supra* note 124, at 18–19, 74; N.C. CONST. of 1971, art. I, § 19.

142. *See* Heritage Vill. Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 406, 263 S.E.2d 726, 730 (1980); *see also supra* notes 24–25 and accompanying text.

143. *Heritage Vill. Church*, 299 N.C. at 406, 263 S.E.2d at 730 (citing Braswell v. Purser, 282 N.C. 388, 393, 193 S.E.2d 90, 93 (1972)); *In re* Springmoor, Inc., 348 N.C. 1, 5, 498 S.E.2d 177, 180 (1998) (quoting *Heritage Vill. Church*, 299 N.C. at 406, 263 S.E.2d at 730).

III. THE STATE'S CONTEMPORARY CHURCH-STATE SEPARATION JURISPRUDENCE

North Carolina courts did not frequently adjudicate church-state establishment or entanglement issues before the late 1960s and early 1970s.[144] The shift was part of a broader explosion of interest in constitutional law in the mid-twentieth century, both at the federal and state levels,[145] including in the federal Establishment Clause.[146] During that period, Americans' rights and liberties became "increasingly federalized" and it was perhaps "only natural" that state courts "saw no reasons to consider what protections, if any, were secured by state constitutions" instead.[147] In many ways, the states' constitutions had become "forgotten law."[148] Yet by the

144. To research this section, I searched a commercial legal database for all North Carolina cases including the phrase "Article I Section 13" or "Article I Section 26" and controlled for the date on which cases were decided to account for organizational differences among North Carolina's three historical Constitutions. I concentrated on the Free Conscience Clause because it is more tailored to disputes over religious liberty and the separation of church and state than the modern Section 19, which is an overarching due process and equal protection guarantee, or the context-specific guarantees located in the modern Articles V and IX. I located 34 cases decided after January 1, 1971 containing the phrase "Article I Section 13" and 5 cases decided before January 1, 1971 containing the phrase "Article I Section 26." Many of the cases address religious liberty (the right to practice freely) rather than disestablishment (the right to a religiously-neutral government), where the courts assessed the merits of the religion-based claims at all. *See, e.g.*, Bd. of Provincial Elders of S. Province of Moravian Church v. Jones, 273 N.C. 174, 183, 159 S.E.2d 545, 552 (1968) (in one of the earliest-decided responsive cases, the court did not reach the constitutional question in a dispute about one church's right to call itself "Moravian" after a split with another congregation, because plaintiff failed to show injury necessary to support entry of a preliminary injunction). The analysis that follows reflects my research findings, concentrating specifically on the cases affecting disestablishment or the separation between church and state.

145. *See* Brennan, *supra* note 8, at 493–94.

146. *See* Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 588 (2006) (discussing the U.S. Supreme Court's "first modern Establishment Clause case," Everson v. Bd. of Educ., 330 U.S. 1 (1947)).

147. *See* Brennan, *supra* note 8, at 495.

148. Jim Hannah, *Forgotten Law and Judicial Duty*, 70 ALB. L. REV. 829, 829 (2007). Arkansas Supreme Court Justice Hannah's remarks are part of a larger Albany Law Review symposium held on "The Reemergence of State Constitutional Law and the State High Courts in the 21st Century," which provides a fascinating glimpse into this still-timely topic. *See generally* Volume 70, Issue 3 of the ALB. L. REV. (2007).

1970s, even a Justice of the United States Supreme Court—the late William J. Brennan, Jr.—was urging attorneys to file civil rights cases specifically raising state constitutional claims.[149]

During this initial period of renewed interest in state constitutional law, the North Carolina Supreme Court initially looked directly to federal First Amendment jurisprudence to understand the meaning of the North Carolina charter. In 1967, the state Supreme Court declared that "the freedom protected by" the state's Free Conscience Clause "is no more extensive than the freedom . . . protected by the First Amendment to the Constitution of the United States."[150] Similarly, in the 1970 case of *Raleigh Mobile Home Sales v. Tomlinson*,[151] the Court determined that a Sunday closing ordinance enacted by the capital city did not violate the state Constitution, despite requiring certain businesses to close on Sunday, allegedly in order to "aid the observance of Sunday as a day of Christian worship."[152] The Court rooted its decision in caselaw interpreting the federal Establishment Clause, not the state's own constitutional text or history.[153]

North Carolina courts were not the first or only courts to employ this interpretational approach. Sometimes called "lockstep" constitutional interpretation, the method involves construing state constitutional provisions "identically with federal court interpretations of their federal

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149. *See* Brennan, *supra* note 8, at 502. Justice Brennan was no doubt influenced by the conservative lean of the U.S. Supreme Court under Chief Justice Warren Burger and, later, Chief Justice William Rehnquist. *See id.* at 495 (describing, in 1977, a "trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being, the enforcement of the *Boyd* principle with respect to application of the federal Bill of Rights and the restraints of the due process and equal protection clauses of the fourteenth amendment").

150. *In re* Williams, 269 N.C. 68, 78, 152 S.E.2d 317, 325 (1967).

151. 276 N.C. 661, 174 S.E.2d 542 (1970).

152. *See id.* at 663–64, 671, 174 S.E.2d at 544, 550.

153. *Id.* at 665, 174 S.E.2d at 545 (citing, among other cases, S.S. Kresge Co. v. Tomlinson, 275 N.C. 1, 165 S.E.2d 236 (1969)). *Kresge* discusses a challenge primarily under the First Amendment, and its analysis did not hinge on the plaintiffs' claims under the North Carolina Constitution. *See* 275 N.C. at 10, 165 S.E.2d at 241. *Raleigh Mobile Home Sales* also cites as support *Clark's Charlotte, Inc. v. Hunter*, 261 N.C. 222, 134 S.E.2d 364 (1964), a case decided on both federal and state constitutional grounds—but on a due process, not church-state separation, theory. *See* 276 N.C. at 644, 174 S.E.2d at 545; *Clark's Charlotte*, 261 N.C. at 232, 134 S.E.2d at 371. Other cases cited by the *Raleigh Mobile Home Sales* court include the federal Supreme Court decisions *McGowan v. Maryland*, 366 U.S. 420 (1961), and *Hennington v. Georgia*, 163 U.S. 299 (1896). *See* 276 N.C. at 666, 174 S.E.2d at 546.

counterparts."[154] Yet unlike courts in some other states,[155] North Carolina's Free Conscience Clause has been interpreted exclusively using the lockstep approach. For example, in 1998, the state Supreme Court held unconstitutional a statute that attempted to exempt from taxation all property "owned by a home for the aged, sick, or infirm" so long as the home was owned, operated, and managed by a religious or Masonic organization.[156] A nonprofit but non-religious residential community for the elderly mounted a facial challenge to the statute, claiming that it made preferential tax treatment contingent on religious affiliation and so was an unconstitutional "law respecting an establishment of religion."[157] The court applied federal Establishment Clause jurisprudence to determine that the statute violated "both" the federal and state constitutions.[158] Excluding from the tax base property owned "only by religious (and Masonic) organizations" caring for the ill and elderly, the court held, "provides unjustifiable awards of assistance to religious organizations and cannot but convey a message of endorsement [of religion] to slighted members of the community."[159]

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154. Buckner, *supra* note 20, at 154.

155. *See, e.g.*, Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865, 867–68 (2007) (discussing Minnesota's "decision-tree approach").

156. *In re* Springmoor Inc., 348 N.C. 1, 4, 12, 498 S.E.2d 177, 188–85 (1998) (holding unconstitutional N.C. GEN. STAT. § 105-275(32) (1997)).

157. *Id.* at 4, 498 S.E.2d at 179.

158. *Id.* at 12, 498 S.E.2d at 184. The North Carolina Supreme Court applied federal Establishment Clause cases including *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664 (1970), *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). *See Springmoor*, 348 N.C. at 5–11, 498 S.E.2d at 180–84. Because the court held that the law violated both the state and federal Constitutions, rather than using federal jurisprudence in order to construe the state Constitution in particular, some scholars might consider this a "dual sovereignty" approach. The "dual sovereignty" approach is generally characterized by state court decisions premised "on both federal and state constitutional grounds," often by "simply appl[ying] a federal construction to state constitutional provisions." Robert F. Utter, *Swimming in the Jaws of the Crocodile*, 63 TEX. L. REV. 1025, 1029 (1985). Because I do not see a meaningful distinction between "lockstep" interpretation and this joint interpretational scheme—both look to federal caselaw in order to discover the meaning of state constitutional provisions—I do not find much use in distinguishing the interpretational schemes in this piece. Others more interested in classification of these interpretational models may find Utter's overview of "present methods of state constitutional analysis" useful. *See id.* at 1026–30.

159. *Springmoor*, 348 N.C. at 11, 498 S.E.2d at 183–84.

North Carolina courts have also lockstepped in adopting more specific, specialized areas of federal Establishment Clause law. One example is federal church autonomy jurisprudence, which prohibits federal courts from deciding matters that "turn on questions of religious doctrine and practice."[160] North Carolina courts have incorporated this line of reasoning as the state's ecclesiastical entanglement doctrine, under which state courts cannot adjudicate issues that concern "doctrine, creed, or form of worship."[161] North Carolina courts have under this doctrine refused to hear cases involving the proper expenditure of church funds[162] and limited their role in deciding disputes between splintered religious congregations.[163] The state Court of Appeals has made clear that these decisions are based on U.S. Supreme Court interpretations of federal constitutional law, which gives meaning to both the First Amendment and North Carolina's Free Conscience Clause.[164]

On other occasions, the state's Supreme Court has avoided deciding state constitutional issues altogether because federal law is comparatively so

160. Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 501 (2013). Professor Helfand's article provides a comprehensive overview of the church autonomy or "religious question" doctrine. *See generally id*.

161. Lippard v. Holleman, 271 N.C. App. 401, 408, 844 S.E.2d 591, 598 (2020), *review denied*, 375 N.C. 492, 847 S.E.2d 882 (N.C. 2020), *cert. denied*, 141 S. Ct. 2853 (2021) (quoting Doe v. Diocese of Raleigh, 242 N.C. App. 42, 47, 776 S.E.2d 29, 35 (2015)).

162. *See* Harris v. Matthews, 361 N.C. 265, 273, 643 S.E.2d 566, 571 (2007).

163. *See* Atkins v. Walker, 284 N.C. 306, 318–21, 200 S.E.2d 641, 649–51 (1973) (refusing to decide which group constituted the true congregation of a Baptist church, but agreeing to decide whether the church body had adhered to rules regarding meeting notice and quorum to vote). There is a long history of such disputes in state civil courts. For an older version of the doctrine, including an overview of past-decided cases from throughout the country, see *Reid v. Johnston*, 241 N.C. 201, 205, 85 S.E.2d 114, 118 (1954).

164. *See Lippard*, 271 N.C. App. at 433–34, 844 S.E.2d at 613 (McGee, C.J., concurring in part and dissenting in part) (discussing the North Carolina Supreme Court's application, in Atkins v. Walker, 284 N.C. 306, 200 S.E.2d 641 (1793), of the U.S. Supreme Court's holding in Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969), to determine the scope of the First Amendment to the U.S. Constitution "*and* Article I, Section 13 of the Constitution of North Carolina") (emphasis added); *see also Harris*, 361 N.C. at 272, 643 S.E.2d at 570-71 (also discussing *Atkins* and *Presbyterian Church*). Interestingly, the Supreme Court's ecclesiastical entanglement doctrine may itself be based on state law. *See* Utter, *supra* note 158, at 1036–37 (discussing the state-court origins of Watson v. Jones, 80 U.S. 679 (1871), one of the earliest federal examples of this doctrine).

well developed.[165] In one such case the Court held that North Carolina's provision of police power to Campbell University, a private Baptist institution, so clearly violated the federal Establishment Clause that the Court did not need to consider whether the State Constitution also prohibited the act.[166] The Court suggested that the "best course" might ordinarily require looking to state law first.[167] Nevertheless—or perhaps as additional evidence of the Court's routine reliance on the lockstep approach to constitutional analysis—the Court concluded that deciding the case on state constitutional grounds would have been "unnecessary and dilatory" because it had been presented with a "manifest violation" of federal law.[168] That decision aligns with the federal courts' approach to resolving *Lund v. Rowan County*, the lawsuit that opened this paper, as well.[169] In *Lund*, the United States District Court for the Middle District of North Carolina set aside a claim that Rowan County's legislative prayer practices violated the North Carolina Constitution, seemingly because the federal Establishment Clause claim was comparatively so easy to decide.[170]

These examples demonstrate that North Carolina courts hearing religious establishment-type claims premised on the North Carolina Constitution have determined that the state charter prohibits no more and no less than the First Amendment to the United States Constitution.[171] Yet in

165. *See* State v. Pendleton, 339 N.C. 379, 383–84, 451 S.E.2d 274, 277 (1994).

166. *Id.* at 384, 390, 451 S.E.2d at 281.

167. *Id.* at 383, 451 S.E.2d at 277, 281.

168. *Id*. North Carolina courts have also taken a related but inverted approach, deciding that a law does not violate the U.S. Constitution's Establishment Clause and that the law is therefore constitutional, avoiding entirely the issue of North Carolina constitutional law. *See* State v. Yencer, 365 N.C. 292, 304, 718 S.E.2d 615, 623 (2011) (upholding the provision of police protection to Davidson College, a religious institution, under the Campus Police Act, which was passed after *Pendleton* to address Establishment Clause violations, as consistent with the First Amendment). The case had originally included state constitutional claims, which were "abandoned" at the intermediate appellate level. State v. Yencer, 206 N.C. App. 552, 554 n.5, 696 S.E.2d 875, 877, *rev'd on other grounds*, 365 N.C. 292, 718 S.E.2d 615 (2011).

169. Lund v. Rowan Cnty., 863 F.3d 268 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 2564 (2018).

170. *See supra* note 7 (describing the state constitutional claim and the district court's disposal of it by footnote).

171. *See supra* this Part and notes 24–25 and accompanying text; *see also* Hewett v. City of King, 29 F. Supp. 3d 584, 642 (M.D.N.C. 2014) (noting in a religious display case that, despite raising state constitutional claims, "neither party meaningfully cites to North Carolina law as to the constitutionality of the issues raised, with the exception of stating that

addition to differences in the wording of the federal and state charters already recognized by the courts,[172] Part II of this article suggests that the history of the two constitutions' religion clauses are more dissimilar than alike. A critique of this tension is presented next in Part IV.

IV. THE CRITIQUE

As this essay has shown, North Carolina's Free Conscience Clause and other state constitutional provisions touching on religion are unique. Despite borrowing language and concepts from the federal and other state constitutions, Part II of this paper demonstrates that North Carolina's charter reflects "in its wording and protections" concerns specific to this State and its people.[173]

As Part III shows, however, the North Carolina judiciary has traditionally interpreted the state's religion clauses in lockstep with the First Amendment to the United States Constitution, holding that the state's Free Conscience and Equal Protection Clauses guarantee the same secular neutrality toward religion as is promised by the federal Establishment Clause.[174] Employing this "non-approach to state constitutional interpretation" has resulted in "deferential conformity to the Supreme Court of the United States."[175] North Carolina courts might therefore be subject to many critiques of lockstep constitutional adjudication: privileging federal over state law; abdicating their duties as agents of an independent, sovereign state; abandoning models of federalism; even forsaking the original intent of the state charter, which was meant to provide the primary source of protection for North Carolinians' civil rights and liberties.[176]

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violation of the religious clauses under the North Carolina Constitution is interpreted in the same manner as a similar violation under the Establishment Clause of the federal Constitution").

172. *See In re* Springmoor, Inc., 348 N.C. 1, 5, 498 S.E.2d 177, 180; *Hewett*, 29 F. Supp. 3d at 642.

173. Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 636 (1987) (discussing these issues in terms of Indiana law); *see also supra* Part II.

174. *See supra* Parts I and III.

175. Buckner, *supra* note 20, at 147 (internal quotations omitted); *see also* Anderson & Oseid, *supra* note 155, at 880.

176. *See* Anderson & Oseid, *supra* note 155, at 881 (outlining common critiques of the lockstep approach); Utter & Pitler, *supra* note 173, at 636 (same, more loosely).

The lockstep approach also leaves contemporary North Carolinians vulnerable to previously unthinkable affronts to their civil rights. As the United States Supreme Court's interpretations of the federal charter shift, the very landscape of First Amendment freedoms and protections are altered. Will state constitutional provisions traditionally interpreted as guaranteeing the same liberties as the federal charter continue to be interpreted in lockstep with the Supreme Court's jurisprudence? And if lockstep interpretation of the state's religion clauses is unwarranted or inappropriate, how *should* we understand North Carolina's constitutional guarantees?

Three broad approaches present possible answers. For ease of organization and in hopes of sparking additional conversation, scholarship, and insights, I refer to these alternatives as the "Federalism Thesis," the "Redundancy Thesis," and the "Living Constitution Thesis." The general contours of each are outlined below.

A. *The Federalism Thesis*

One natural reading of North Carolina's religion clauses that accounts for the state Constitution's unique text and history is that the North Carolina Constitution proscribes nothing whatsoever on the separation of church and state. The state charter might simply not prohibit the establishment of religion by the state or its subsidiaries, leaving disestablishment solely a matter of federal law. As the state Supreme Court has itself recognized, there is no requirement that the state charter be more protective than that of the United States.[177] North Carolina and its state actors cannot legally violate the federal Constitution, of course. But the state Constitution may well provide less protection than the federal charter guarantees.[178]

There is abundant evidence that this federalist explanation, which emphasizes both difference and interplay between North Carolina as a sovereign state and as a member of the United States, is appropriate in church-state separation and entanglement law. Most straightforwardly, the

177. The North Carolina Supreme Court has suggested that it has authority to construe the state charter "differently from the construction by the United States Supreme Court of the Federal Constitution, *as long as our citizens are thereby accorded no lesser rights than they are guaranteed by [a] parallel federal provision*." State v. Carter, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988) (emphasis added).

178. *See id*.; *see also, e.g.*, Liu, *supra* note 12, at 1325 & n. 117 (noting this insight in Judge Jeffrey S. Sutton's 51 IMPERFECT SOLUTIONS (2018) and providing examples from Utah and Montana).

North Carolina Constitution simply does not in plain language prohibit the State from endorsing a particular church, ministry, or mode of worship. The "plain language" of the charter is not dispositive, but it must be considered when determining the Constitution's reach.[179] Constitutions protect only those rights "explicitly or implicitly guaranteed" by the charter.[180] An issue may be of central importance to an individual or even an entire populace and yet not give rise to a protected constitutional right.[181]

The Federalism Thesis is also supported by the history and structure of the North Carolina Constitution. The explicit Disestablishment Clause in the Constitution of 1776 suggests the Revolutionary founders understood separation between church and state to be an important feature of the new state government.[182] Responding to concerns among the colonial period's religious minorities, the framers of the 1776 charter specifically addressed church establishment, the levying of taxes to support ministers and ministries, and civilly-mandated ecclesiastical law.[183] Significantly, they also located the Disestablishment Clause in the heart of the Constitution itself, not in the prefatory Declaration of Rights that detailed individuals' natural rights and civil liberties.[184] The Free Conscience Clause and the Disestablishment Clause were thus split in the state's earliest charter, suggesting religious liberty was understood as an individual right while church-state separation was a structural feature of North Carolina's new form of government. The state Supreme Court has suggested that the passage of the 1776 Declaration of Rights "the day before the Constitution itself was adopted" manifests the "primacy" of those rights to our constitutional order.[185] In line with that interpretation, the Free Conscience Clause might be understood as more

179. *See, e.g.*, Baker v. Martin, 330 N.C. 331, 335, 410 S.E.2d 887, 889 (1991) (discussing the "plain words" of the Constitution in order to interpret N.C. CONST. art. VI, § 6).

180. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

181. *Id.* (providing examples involving housing and welfare benefits for the impoverished in holding that the federal constitution protects no fundamental right to education). Although *Rodriguez* interprets the federal constitution, it does not diminish the underlying point that a matter may be extremely important to individual flourishing and yet not a subject governed by constitutional law.

182. The historical assessment in this section is based on the facts and sources cited in Part II, *supra*.

183. *See supra* Part II.A.

184. *See supra* Part II.A.

185. Tully v. City of Wilmington, 370 N.C. 527, 533, 810 S.E.2d 208, 213 (2018) (quoting Corum v. Univ. of N.C., 330 N.C. 761, 782–83, 413 S.E.2d 276, 289–90 (1992)).

closely keyed to our individual rights than the first charter's Disestablishment Clause.

History also shows that the state's Reconstruction-era framers retained the full text of the earlier charter's Free Conscience Clause while abandoning entirely the Disestablishment Clause. The omission may have been accidental. But it may also have been deliberate, as the 1868 framers retained other features of the 1776 Constitution that touched on religion, modifying them to fit the changing times.[186] Both the Free Conscience and Religious Test Clauses, for instance, were expanded and reinscribed.[187] The Disestablishment Clause was meanwhile discarded. Constitutional provisions are often construed in light of what they do *not* say as well as what they do; evidence that the document reflects its framers' intentional choice to omit a clause rather than a drafting oversight only strengthens the inference.[188]

Historical significance might also be assigned to the precise language selected to expand the Free Conscience Clause in 1868. As described above, the expanded text appears to be modeled after the rights declarations of Kentucky, Pennsylvania, and Tennessee.[189] If the 1868 framers in fact borrowed language from other states, it is significant that North Carolina's Reconstruction-era framers adopted only two of their sister-states' four religion clauses. Those touching on religious liberty were written into the North Carolina charter, while those explicitly touching on the structural relationship between church and state were not.[190]

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186. *See supra* Part II.B.

187. *See supra* Part II.B.

188. *See, e.g.*, Leandro v. State, 346 N.C. 336, 360, 488 S.E. 2d 249, 262 (1997) (Orr, J., dissenting in part and concurring in part) (noting that the framers decided to "remove[] existing language from" an earlier version of the state constitution, and reasoning that both removal and rewriting of constitutional language is important for construing the current constitution's meaning); *see also* Adoptive Couple v. Baby Girl, 570 U.S. 637, 663 (Thomas, J., concurring) (describing the significance of the federal framers' decision to grant Congress powers over Indian "commerce" and not the broader category of Indian "affairs," because in his estimation, the Court should presume that the framers were "alert to the difference" between those alternative constructions and intentionally chose one meaning by omitting another).

189. *See supra* Part II.B.

190. As with the other history recapped in this section, this assessment is based on the facts and sources cited in Part II, *supra*. Appendix B, *infra*, also provides a side-by-side comparison of the North Carolina, Kansas, Pennsylvania, and Tennessee Constitutions referenced here.

Constitutional interpretation has long been influenced by this sort of historical analysis, and this has been exceptionally true in the area of disestablishment law. At the federal level, "[n]o aspect of constitutional law has been dominated more by 'originalism' than [the] First Amendment Establishment Clause," and historical explanations play an important role in originalist thought.[191] It would not be unreasonable to look to legal history to understand our state's mandate on the relationship between church and state—especially because the state's charter has to date been interpreted in such close conjunction with the federal Establishment Clause.[192]

Finally, the Federalism Thesis is supported by the structure of state governmental power itself, and particularly the ways in which the state's power is distinct from the powers of the federal government. The drafters of the modern North Carolina Constitution of 1971 took particular pains to emphasize that the General Assembly is presumed to have plenary powers "unless in the state constitution itself or in the federal constitution some denial of that power can be found."[193] In keeping with this focus and understanding, the drafters attempted to frame the Constitution's provisions as limits on the legislature's otherwise unlimited authority, *not* as grants of power to the General Assembly.[194] The opposite structure is true at the federal level, as the United States is a government of enumerated powers only.[195] The

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191. *See* Muñoz, *supra* note 146, at 585–86. Explanations premised on "history" — including the claims in this essay—should themselves be assessed using the tools of critical historical analysis. Most jurists and legal scholars are not trained historians.

192. For a discussion of the way North Carolina courts have interpreted the state's disestablishment guarantees, *see supra* Part III.

193. 1968 COMMISSION REPORT, *supra* note 124, at 2.

194. *See id.* ("It is essential to keep this point in mind in interpreting state constitutions, for what may appear in form to be a grant of authority to the General Assembly to act on a particular matter normally is in legal effect a limitation, not a grant . . . . From this it follows that in drafting or amending state constitutions, it is desirable to avoid expressions that purport to grant authority to the General Assembly, since they lead at best to confusion and at worst to a serious misconception of the function of a state constitution and especially of the authority of the legislature."); *see also id.* at 72 (noting the decision to alter "expressions that appear to be grants of power to the General Assembly but in fact are limitations on its authority, so that the nature of those provisions will not be mistaken").

195. *See* U.S. CONST. amend. X; *see also* United States v. Darby, 312 U.S. 100, 124 (1941) ("The [Tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to

distinct structure of the state and federal governments suggests that we should presume the General Assembly has the power to accomplish its reasonable legislative goals—including, if the people's representatives find it necessary, the establishment of religion—unless there is good evidence the power has been confined by the state Constitution.

B. *The Redundancy Thesis*

The Federalism Thesis is not the only plausible interpretation of North Carolina's constitutional religion clauses. A second interpretation that takes seriously the Constitution's unique text and history, but that does not conclude that the State lacks any disestablishment guarantees, might be called the Redundancy Thesis. This alternative explanation operates on the theory that the 1776 Disestablishment Clause was omitted from the Reconstruction Constitution of 1868, not because the 1868 framers wished to return to the General Assembly power to meddle in ecclesiastical affairs, but because disestablishment is already mandated by North Carolina's guarantee of individual religious autonomy in the Free Conscience Clause and other related provisions of the state Constitution. The framers might have eliminated explicit disestablishment provisions, in other words, because they were redundant: The General Assembly already lacked the power to enact establishment-type laws as a result of other constitutional commands.

The Redundancy Thesis is consistent with the unique text and history of the North Carolina Constitution. First, it accounts for the fact that North Carolina's Free Conscience Clause does not precisely mirror the federal Free Exercise provision.[196] If the two texts were identical, and North Carolina guaranteed religious liberty while omitting the language touching on establishment, it might be clear that North Carolina's free exercise provision was limited to what the federal Free Exercise Clause guarantees. But North Carolina's charter uses distinct and significantly broader language. Instead of commanding that no law may "*prohibit*" the free exercise of religion, the Free Conscience Clause limits the state's ability to "*interfere* with the rights of

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allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.").

196. James Madison approached the First Congress with a "rights of conscience" clause similar to North Carolina's to include in the Bill of Rights, but it was rejected it in favor of the now-familiar language of free exercise. *See* Lee v. Weisman, 505 U.S. 577, 612–13 (1992) (Souter, J., concurring).

conscience."[197] Interference suggests a lower threshold of permissible obstruction or hindrance than prohibition, and may accordingly limit the state's actions more robustly.[198]

The Free Conscience Clause has historically also been interpreted differently than the federal Free Exercise Clause. In 1796, North Carolina's General Assembly enacted a law imposing strict limits on churches' ability to hold property.[199] Twice over the next thirty years the state Supreme Court applied that law to invalidate conveyances of enslaved people to churches, because the churches could legally hold property only for their "own use and benefit."[200] The Court determined that the churches had instead attempted to emancipate enslaved persons transferred into their care, and so voided the transactions.[201] These cases, which stripped the property rights of churches specifically because of their status as religious corporations, would be unthinkable under modern Free Exercise Clause jurisprudence.[202] Yet they were upheld under North Carolina's Free Conscience Clause, suggesting at a minimum that the state charter protects a different scope of rights than the federal First Amendment.

Additional evidence for the Redundancy Thesis is that the State of North Carolina has not, and does not appear ever to have tried, to establish a state religion.[203] Both the General Assembly and local municipalities have

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197. U.S. CONST. amend. I (emphasis added); N.C. CONST. art. I, § 13 (emphasis added).

198. Consider, for example, the definitions of "prohibit" and "interference" in BLACK'S LAW DICTIONARY (11th ed. 2019). To "prohibit" is to "forbid by law" or "prevent, preclude, or severely hinder." *Id*. "Interference" is "[t]he act or process of obstructing normal operations or intervening or meddling in the affairs of others" or "an obstruction or hindrance." *Id*.

199. Act of 1796, 2 N.C. PUB. ACTS ch. 11, at 93 (Martin 1804). This law and litigation surrounding it are detailed in Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307, 326–28 (2014).

200. Gordon, *supra* note 199, at 326–28 (discussing Huckaby v. Jones, 9 N.C. (2 Hawks) 120 (1822) and Trs. of the Quaker Soc'y of Contentnea v. Dickenson, 12 N.C. (1 Dev.) 189 (1827)).

201. *See id.*

202. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017) (holding that a law that "expressly discriminates against" a church "solely because of [its] religious character . . . imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny").

203. The lawsuit that opened this essay, which challenged legislative prayer practices in Rowan County, makes clear on the other hand that *subsidiaries* of the state have attempted to establish a state religion—at least as "establishment" has been traditionally understood

passed laws and ordinances influenced by religious sentiments, no doubt.[204] But by the close of the Civil War, no state in the Union maintained an established religion.[205] Even hold-out Northeastern states like Connecticut, New Hampshire, and Massachusetts had ended the practice by the mid-1830s.[206] Notably, this wave of disestablishment occurred before the passage of the Fourteenth Amendment to the United States Constitution, suggesting the states did so as a matter of state and not federal law.[207]

The Redundancy Thesis is also consistent with legal and political conceptions of religious tolerance. North Carolina's Reconstruction-era framers would not have been alone in perceiving disestablishment as a necessary element of religious freedom, and therefore already guaranteed by the Free Conscience Clause. As Professor Vincent Phillip Muñoz explains, many states including Virginia "ended their establishments on account of their perceived abridgment of the principle of religious freedom."[208] North Carolina's Free Conscience Clause differs from the religious liberty provision cited in Muñoz's study.[209] Yet the fact remains that individual religious autonomy would be significantly complicated—and potentially impossible—in a state that levied taxes for the support of churches or clergy,

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under the First Amendment to the United States Constitution. *See* Lund v. Rowan Cnty., 863 F.3d 268 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 2564 (mem.) (2018). The lawmakers who sponsored the proposed 2013 joint resolution declaring that North Carolina *could* establish a state religion thought the law was "more of a demonstration of support" than an attempt to actually establish a state religion. *Lawmakers Seek Defense of Religion Act*, SALISBURY POST (Apr. 3, 2013, 12:00 AM), https://www.salisburypost.com/2013/04/03/lawmakers-seek-defense-of-religion-act/ (quoting Harry Warren, representative for Rowan County and a sponsor of the 2013 Rowan County Defense of Religion Act).

204. *See, e.g.*, *supra* notes 152–53 and accompanying text (describing litigation challenging Raleigh's 1960s era Sunday closing ordinance and its likely—albeit indirect—purpose to "aid the observance of Sunday as a day of Christian worship"); *see also supra* notes 3, 6 (describing litigation over legislative prayer practices in Rowan County).

205. Muñoz, *supra* note 146, at 601 n.104 (citing Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1457–58 (2004)).

206. *Id.*

207. The Fourteenth Amendment, ratified in July 1868, has been interpreted to incorporate the guarantees of the federal religion clauses to the states. Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 13-15 (1947).

208. Muñoz, *supra* note 146, at 601.

209. *Compare* N.C. CONST. art. I, § 13, *with* Virginia's Act for Establishing Religious Freedom (Va. 1785), *reprinted in* THE FOUNDERS' CONSTITUTION, VOL. 5, *supra* note 60.

mandated some form of worship or religious service, permitted its courts to adjudicate disputes on theological grounds, or authorized the legislature to pen officially-sanctioned prayers. This difficulty was not lost on late-eighteenth century North Carolinians.[210] Additional studies may reveal that mid-nineteenth century North Carolinians held similar views, as well.

C. *The Living Constitution Thesis*

A third possibility is that North Carolina's religion clauses prohibit the establishment of religion by the state, not as a matter of strict textual interpretation, original meaning, or the framers' or ratifiers' original intent(s) (to the extent such meaning or intent is discoverable at all), but as a matter of our contemporary understanding of the state's organic law. The North Carolina Supreme Court is "the ultimate interpreter of our State Constitution,"[211] and the Court has declared that the state Constitution guarantees secular neutrality and the separation of church and state.[212] I call this theory the "Living Constitution Thesis" because it recognizes that the history and text of the North Carolina Constitution are not self-explanatory, will always ultimately require contemporary interpretation, and cannot on their own dictate the charter's meaning.[213] Similar to other living things, the State's fundamental law can be recognized as dynamic and vital, adapting to the contemporary challenges of our twenty-first-century state.[214]

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210. THE FOUNDERS' CONSTITUTION, VOL. 5, *supra* note 60, at 90 (statement by James Iredell) (reasoning in the context of the federal Constitution that, without "any power given to Congress in matters of religion," Congress could not "act to impair our religious liberties"); *id.* at 92 (statement by Samuel Spencer) (suggesting that rights of conscience would be secured by ensuring that "no one particular religion should be established").

211. Corum v. Univ. of N.C., 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) (citing Bayard v. Singleton, 1 N.C. (Mart.) 5 (1787)).

212. *See supra* notes 24–25 and accompanying text; *see also supra* Part III.

213. For two classic articulations of the "Living Constitution" theory, *see* Charles A. Beard, *The Living Constitution*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 29, 31 (1936); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 735–36 (1963).

214. Important figures in American legal history have also espoused living constitutionalist ideals, including Thomas Jefferson, who wrote the influential Virginia Statute for Religious Freedom. Jefferson's words to Samuel Kercheval, now inscribed on the Southeast Portico of the Jefferson Memorial in Washington, D.C., make the sentiment clear: "I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes

Taking the state Supreme Court's word on matters of church-state separation is not simply a concession to the lockstep approach of constitutional interpretation. The North Carolina Constitution commands that "frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty."[215] That statement of principle is consistent with the central premise of Living Constitutionalism—that government charters are intentionally cast in terms of broad principles, necessitating interpretation by particular individuals at particular moments in time.[216] A more vivid description was provided by the late Justice Brennan, who wrote that the "genius of our Constitution" resides:

> not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with the problems of a developing America. A principle to be vital must be of wider application than the mischief that gave it birth. Constitutions are not ephemeral documents, designed to meet passing occasions. The future is their care, and therefore, in their application, our contemplation cannot be only of what has been but of what may be.[217]

Consistent with this theory, the North Carolina Constitution may properly be interpreted in light of both what has been and what may be.[218] Disestablishment in particular may be guaranteed by the North Carolina Constitution's core, fundamental promises of rational government, religious liberty, and equal protection of the law.[219]

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more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as a civilized society to remain ever under the regimen of their barbarous ancestors." *Thomas Jefferson Memorial: Quotations*, NAT'L PARK SERV., https://www.nps.gov/thje/learn/photosmultimedia/quotations.htm (last updated Mar. 1, 2023).

215. N.C. CONST. art. I, § 35. This provision has been retained, unchanged, from the state's earliest Constitution. *See* N.C. CONST. of 1776, Decl. of Rts., § 21.

216. *See generally* Beard, *supra* note 213; Reich, *supra* note 213.

217. Brennan, *supra* note 8, at 495.

218. *Compare id. with* N.C. CONST. art. I, § 35.

219. *See, e.g.*, N.C. CONST. art. I, § 2 (requiring the government to operate "for the good of the whole"); *id.* § 13 (guaranteeing freedom of conscience); *id.* at § 19 (providing for equal protection under the law).

The state Supreme Court's current church-state separation jurisprudence is already implicitly aligned with this Living Constitution Thesis. The broadest contemporary statements about North Carolina's "singular guarantee" of a religiously-neutral state were made in the context of interpreting both the Free Conscience and Equal Protection Clauses, which did not exist together before the Constitution of 1971.[220] Thus, while the text or history of the Free Conscience clause alone might point in one direction, the 1971 Constitution involves interplay between two distinct yet fundamental civil rights. Without a secular government, the guarantees of free conscience and equal protection would be far less secure; their combined presence in the Constitution might therefore warrant disestablishment as matter of practical effect.

Reading the state Constitution in this manner is also consistent with the expansive language of North Carolina's modern Equal Protection Clause. When North Carolinians adopted the provision in 1971, the state's Equal Protection Clause was meant to "augment" the "ancient guarantee[] of liberty" protected by the Law of the Land Clause; yet North Carolina's twentieth-century framers did not simply incorporate the language of the federal Equal Protection Clause into the State's updated organic law.[221] Instead, the familiar language of federal equal protection was enhanced with an antidiscrimination provision that no person can be "subjected to discrimination by the State because of . . . religion."[222] Thus even if the state's 1776 Disestablishment Clause was deliberately omitted in the Reconstruction-era charter, and even if the 1971 Equal Protection Clause was not originally inserted in order to ensure the separation of church and state, the modern Constitution's broad equal protection and antidiscrimination guarantees may nevertheless work alongside the more ancient Free Conscience Clause to prohibit religious establishment and entanglement today.

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220. Heritage Vill. Church and Missionary Fellowship, Inc. v. State, 299 N.C. 399, 406, 263 S.E.2d 726, 730 (1980) ("*Taken together*, these provisions may be said to *coalesce* into a singular guarantee . . . of separation of church and state." (emphasis added)); *see also supra* Part II.

221. *See* 1968 COMMISSION REPORT, *supra* note 124, at 73–75.

222. N.C. CONST. of 1971, art. I, § 19.

CONCLUSION

State courts "no less than federal are and ought to be the guardians of our liberties."[223] As this paper illustrates, North Carolina legislators, jurists, and legal thinkers have paid too scant attention to the substance, text, and history of the State's constitutional religion clauses. As a result, while contemporary church-state separation jurisprudence suggests that the North Carolina Constitution prohibits the establishment of religion by the State, local governments, and other state entities like public schools, there is currently little explanation for why that is so as a matter of North Carolina law. As the United States Supreme Court continues to shift our understanding of the federal Free Exercise and Establishment Clauses, North Carolinians deserve and must develop our own understanding of the state's protections for religious diversity and against sectarian government and governmental action. The three interpretations presented in this essay are an introduction to the issue, not its resolution. If lawmakers find the Federalism Thesis convincing but distressing, I hope this essay invites debate on a constitutional amendment. If jurists find the Redundancy or Living Constitution theses intriguing but underdeveloped, additional analysis will strengthen their contours. The themes identified here are also not limited to North Carolina's religion clauses, inviting additional scholarship on other undertheorized areas of North Carolina law.

223. Brennan, *supra* note 8, at 491.

APPENDIX A

The text of North Carolina's modern Free Conscience Clause has eighteenth-century roots but has changed over the course of the state's history. For ease of comparison, the state's historical constitutional provisions regarding the freedom of conscience are compiled here.

North Carolina Declaration of Rights of 1776 (Declaration § 34):

> That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own Consciences and Understandings.[224]

North Carolina Constitution of 1868 (Article I, § 26):

> All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority should, in any case whatever, control or interfere with the rights of conscience.

North Carolina Constitution of 1971 (Article I, § 13):

> All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.

224. The final words "and Understandings" are present in some versions of this text and absent from others. For additional information and citations, *see supra* note 42.

APPENDIX B

The text of other state constitutions are important contextual sources for understanding North Carolina's religion clauses. Compiled here are relevant constitutional provisions from Kentucky, Pennsylvania, and Tennessee, each discussed above in Part II.B. They are presented alongside North Carolina's main religion clause in the Constitution of 1868. Matching language is presented in regular typeface. Language not mirrored in North Carolina's charter is presented in italicized font to aid the reader's comparison.

Kentucky Constitutions of 1792 (Article XII, § 3) & 1799 (Article X, § 3):

> *That* all men have a natural and *indefeasible* right to worship Almighty God according to the dictates of their own conscience[s][225]; *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*.

North Carolina Constitution of 1868 (Article I, § 26):

> All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority should, in any case whatever, control or interfere with the rights of conscience.

Pennsylvania Constitution of 1790 (Article IX, § 3):

> *That* all men have a natural and *indefeasible* right to worship Almighty God according to the dictates of their own consciences; *that no man can of right be compelled to attend, erect, or support any place of worship, or maintain any ministry, against his consent;* that no human authority *can*, in any case

225. "Conscience" was pluralized in Kentucky's 1792 Constitution. The word was made singular in the 1799 document. *See* RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE, *supra* note 117, at 90.

> whatever, control or interfere with their rights of conscience*; and that no preference shall ever be given, by law, to any religious establishment or modes of worship*.

Tennessee Constitution of 1796 (Article XI, § 3):

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