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The Religion Clauses in Constitutional Scholarship

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THE RELIGION CLAUSES IN CONSTITUTIONAL SCHOLARSHIP

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Professor Steinberg's book review is both an argument about the meaning of the religion clauses and an example of the type of literature that we know as historical constitutional scholarship. Readers of law reviews will typically take the second quality for granted and will focus on the specific argument. But I think we will be able to appreciate that argument more fully—both its strengths and its limitations—if we pause to reflect on the sort of literature this is.[1]

I. CONSTITUTIONAL HISTORY IN THE LAW REVIEWS

Historical constitutional scholarship is a genre unto itself. Measured against the product of professional historians, it often seems a bit shabby. The reason, I think, is not just that law professors typically have more training in and instinct for advocacy than historical research. More importantly, the genre's special character—and its frequent deficiency *as scholarship*—reflects the fact that it is *not* merely academic scholarship; almost invariably it is in service of a different, more practical, perhaps nobler purpose. Constitutional scholarship serves to construct and maintain the constitutive stories that serve to guide a community by providing it with a sense of its identity and character.

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* Robert and Marion Short Professor, Notre Dame Law School. I thank Professor Steinberg both for his thoughtful book review and for his suggestion that I write a response to it.

1 Although he briefly addresses the "anti-theory" part of my book, Professor Steinberg indicates that he is primarily interested in the historical argument; consequently, I will limit this response to the historical debate. I have expanded on the "anti-theory" argument elsewhere, for example, Steven D. Smith, *Is a Coherent Theory of Religious Freedom Possible?*, 15 CONST. COMM. 73 (1998), and have, I hope, avoided some misconceptions that the book seems to have generated. For example, I do not claim—and never understood myself to have claimed—that there can be an "infinite number" of "equally plausible" interpretations of religious freedom; nor do I think that the inevitable reliance on background premises in itself makes a theory a "bad theory."

More specifically, constitutional law professors are usually in the business of fashioning historical accounts that will generate prescriptions to courts on central or culture-defining matters. In the current jurisprudential climate, this prescriptive purpose means that history will be useful to constitutional scholars only if it culminates in "principles" that can be applied by courts to produce results that are attractive under current views and values. A constitutional story without a principle is like a joke without a punch line, or a Sunday School lesson without a moral. Not surprisingly, when law professors (or historians writing for similar purposes) recount our nation's history, the stories they tell almost always wind their way to some very attractive principle.[2]

It's not that anyone is out to fabricate nice stories out of nothing. Professors usually have more integrity than that, or more commitment to "the facts." And in any case, a purely concocted story would be vulnerable, because in order to serve its function as guiding authority, a story needs to be . . . well, not *true*, exactly, but close enough to truth that it can be counted as true for practical and public purposes. So all in all, the effect of law professors' community-constituting purpose on the history they write is complicated and subtle. Tacit presumptions work their way into the enterprise. Standards of proof are accordingly relaxed or, conversely, for scholarship that *subverts* an attractive story or principle, tightened. Arguments that might seem puzzling or simply pointless if we were merely trying to figure out "what really happened" acquire a commanding respectability. The familiar "level of generality" phenomenon is exploited to craft grand principles that can be attributed to framers who are not in any position to protest.[3]

Through this process, exhilarating fictions may be elevated into fact. If a story *could be* and *should be* true, that may be good enough. Hence the authority of Justice Brandeis's celebrated concurrence in *Whitney v. California*,[4] with its reverberating rhetoric ascribing to "[t]hose who won our independence" lofty liberal commitments that historians have found hard to corroborate. Hence the continuing appeal in some quarters of the story told in *Everson v. Board of Education*.[5]

2 To avoid misunderstanding, let me quickly acknowledge that the study and writing of history will always be done for *some* purpose, just as it will always be done from some perspective. *See infra* note 12. But some purposes will be best served by achieving as accurate an understanding as we can of what happened in the past, while other purposes will not necessarily be best served in that way.

3 In the course of this essay I will mention more concrete instances of these features.

4 274 U.S. 357 (1927).

5 330 U.S. 1 (1947).

Professor Steinberg's book review has all the marks of the genre. His concern to develop a historical interpretation that will guide courts to desirable results is manifest throughout the review. And he explicitly assumes that in order to perform this function history must yield a "principle" of religious freedom, because without such a principle judicial action would be "illegitimate."[6] These constraints powerfully shape Steinberg's historical analysis.

The overall logic of the argument combines a *could have* with a *must have* to produce a *did*. Americans of the founding generation, Professor Steinberg argues, could have agreed on a principle of "religious choice."[7] They must have agreed on *some* substantive principle of religious freedom (though the necessity generating the "must," it will turn out, is more ours than theirs). Therefore the founders *did* adopt a constitutional principle of religious choice. Statements made at the time by people like Madison—statements expressing a different and much more limited understanding of what the religion clauses were supposed to do[8]—are relegated to the background (as they nearly always are in modern legal scholarship or judicial opinions). Also relegated to the background are the circumstances of the time—I will discuss them shortly—that would have made it eminently sensible for the First Congress simply to put a widely accepted jurisdictional arrangement in writing, and that would have made it next to impossible for Congress to attempt a sort of deliberative conference culminating in a statement of the best principle or the true meaning of religious freedom.

The necessity-driven quality of Professor Steinberg's account is strikingly manifest in his eloquent conclusion. There Steinberg acknowledges that the "religious choice" principle for which he has so strenuously argued might not have been adopted by the framers after all; even so, he immediately adds, we must believe that "the religion clauses enacted some substantive principle or set of principles."[9] His insistence on the point is intriguing. After all, Steinberg's argument is

6 David E. Steinberg, *Gardening at Night: Religion and Choice*, 74 N.D. L. REV. 987, 989 (1999) (reviewing STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995)). The same assumption leads Professor Steinberg to assert that my argument against the possibility of a satisfactory principle leads "inexorably" to judicial withdrawal from the field, even if I disclaim that conclusion. *See id.* at 1012. For myself, I doubt this inexorability because I am not persuaded of the axiom that judicial review must be "principled." *See, e.g.*, Steven D. Smith, *Unprincipled Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 497 (1996).

7 Steinberg, *supra* note 6, at 989.

8 *See, e.g.*, text accompanying *infra* note 17.

9 Steinberg, *supra* note 6, at 1031.

in support of a single principle of religious freedom; "religious choice" is the only principle he identifies on which the founding generation ostensibly could have agreed amidst what he admits were substantial differences of opinion. So if it turns out that the argument is unpersuasive and that the framers did not adopt that principle, *why* must we nonetheless suppose that they adopted some other principle? Steinberg promptly explains: we must believe this because "[c]ourts are like ghosts—they have no life unless you believe in them. Argue convincingly that courts are capable of only arbitrary, subjective, and unprincipled decisions"—did I argue that?—"and that's what courts are likely to give you."[10] *We need* a constitutional principle, it seems, and so history must somehow be made to supply one.

In taking this approach to the history, Professor Steinberg is very much in step with modern jurists and constitutional scholars. For those who are comfortable with the genre, there will be nothing unusual or untoward about Steinberg's interweaving of historical evidence and present need, and his overall account is likely to seem thoroughly plausible—except, perhaps, to those who understand present need in a very different way ("strict separationists," for example) and so would use the historical yarn to weave quite a different pattern.

For myself, I feel some embarrassment in raising objections. I am largely resigned to the fact that law requires this sort of history. Such stories are perhaps just part of a necessary process by which a nation (or at least a profession, or at least one segment of a profession) constructs a story that provides it with a sense of identity and purpose. And I am not a strict separationist; if there is to be a principle of religious freedom, I think that Steinberg's "religious choice" principle is at least as satisfactory as its principal competitors. That principle or something like it has attracted the support of an array of scholars whom I respect.[11] In short, I *like* Steinberg's story better than most of the leading alternatives. Why not leave well enough alone?

But I also think that in an academic context—as opposed, say, to a Fourth of July oration, or a political rally, or perhaps even a judicial opinion—we have the luxury of recognizing the genre for what it is. We may even have a professional obligation to do that. So I want to discuss how constitutional scholarship, as reflected in Professor Steinberg's essay, shapes and transforms history.

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10 *Id.*

11 Terminology differs, of course, but I think that Thomas Berg, Edward Gaffney, Douglas Laycock, and Michael McConnell (to mention just some leading examples) all favor this sort of principle.

II. JUST JURISDICTION: THE MODESTY OF THE FRAMERS

A. 1789 as of 1789[12]

If we want to understand the "original meaning" of the religion clauses, it is natural enough to begin by asking what the framers of those clauses thought about religious freedom; but to begin in that way is to go wrong from the start. The question already cuts away too much of the context that is needed to understand what the framers were doing. So we should begin by remembering some facts that are mostly well known, but that in certain contexts we tend—or even struggle—to overlook.

First, the delegates to the 1787 Constitutional Convention had made a self-conscious decision not to adopt a bill of rights. They made that decision not because they were hostile to rights, but because they had deliberately settled on an entirely different strategy—a more jurisdictional strategy—for preventing the national government from endangering rights. More specifically, the framers insisted that the Constitution they had drafted would create a national government with powers limited to those actually enumerated in the text, and these powers would not be sufficient to threaten basic rights anyway.[13] So, for example, when a proposal surfaced to include a provision protecting freedom of the press, Roger Sherman answered: "It is unnecessary. The power of Congress does not extend to the Press."[14] And most of the delegates had agreed.[15]

The absence of a bill of rights had been a primary object of criticism by the Constitution's opponents in the state ratification debates, but its supporters—the Federalists—adamantly maintained that the enumerated powers doctrine made a bill of rights unnecessary and even dangerous.[16] They took this position specifically with respect to concerns about religion. Thus, Madison insisted in the Virginia convention—*not,* as Professor Steinberg seems to assume, after the reli-

12 To deflect a predictable objection, I should acknowledge that a more complete subheading would be something like "1789 as of 1789 as of 1998." That subheading would still be different than just "1789 as of 1998." To put the point differently, I think there is a difference between trying to understand historical matter in its context and presenting the matter *without* much regard for context, even though our efforts in either case will necessarily be undertaken from within *our* context.

13 For a more careful discussion of the point, see STEVEN D. SMITH, THE CONSTITUTION AND THE PRIDE OF REASON 31–47 (1998).

14 NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 640 (Bicentennial ed. 1966).

15 *See id.*

16 *See, e.g.,* THE FEDERALIST No. 84 (Alexander Hamilton).

gion clauses had been drafted or adopted—that a constitutional provision on the subject was unnecessary because "[t]here is not a shadow of right in the general government to intermeddle with religion."[17] In the same vein, Richard Dobbs Spaight told the North Carolina convention that "[a]s to the subject of religion . . . [n]o power is given to the general government to interfere with it at all. Any act of Congress on this subject would be a usurpation."[18]

Anti-Federalists remained unconvinced by this argument, in part because they feared (with considerable prescience) that Congress would come to exercise powers not expressly given it, perhaps under the Necessary and Proper Clause. So some states ratified the Constitution on condition that a bill of rights be promptly added; opponents continued to agitate for a second constitutional convention that would draft a more satisfactory charter.[19] Partly as a result of these pressures, constitutionalists like Madison eventually saw the wisdom of protecting their achievement by agreeing to put some of the desired restrictions in writing. In particular, Madison argued that the jurisdictional limitations on national power over religion—limitations that both Federalists and Anti-Federalists had favored but that the Anti-Federalists thought insecure under the original Constitution—should be stated explicitly.

An exchange in the House of Representatives is suggestive of what was intended. Roger Sherman objected to any provision on the subject of religion, insisting as he had in the Philadelphia convention

17 Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1477 (1990) (quoting Madison).

18 LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 66 (1986) (quoting Spaight). Professor Steinberg quotes these statements and acknowledges that they may at first seem to support a jurisdictional interpretation. But he argues that the statements are subject to a different interpretation; they might have referred to a substantive constitutional principle of religious freedom, not a jurisdictional limitation. "Madison might have meant that the federal government could not 'intermeddle with' the religious choices of private citizens. In other words, while colonial governments had punished individuals because they had chosen a disfavored religion, the First Amendment prevented the federal government from engaging in similar prosecutions." Steinberg, *supra* note 6, at 1004. The problem with this suggestion is that at the time Madison made the statement, the First Amendment did not exist; indeed, Madison's statement was part of an argument contending that no substantive provision on the subject of religion was needed. In its context, therefore, the statement clearly meant that the national government would have no power or jurisdiction over religion.

19 *See, e.g.*, CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 57–62 (Helen E. Veit et al. eds., 1991) [hereinafter DOCUMENTARY RECORD] (reporting on debate in House of Representatives over Virginia proposal to call second constitutional convention).

that "the amendment [is] altogether unnecessary, inasmuch as congress had no authority whatever delegated to them by the constitution, to make religious establishments . . . ."[20] Madison did not directly disagree, but he explained:

> [W]hether the words were necessary or not he did not mean to say, but they had been required by some of the state conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to congress to make all laws necessary and proper to carry into execution the constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, or establish a national religion, to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of language would admit.[21]

One other circumstance that is usually forgotten needs to be mentioned here. The First Congress—the Congress that drafted the Bill of Rights—was the *first* Congress. It faced the daunting task of taking care of all of the business of setting up a new government—of creating institutions and offices, establishing ways of collecting revenue, figuring out how to run its own internal operations, and so forth. Remembering this fact should reduce our dismay upon discovering that Congress was loath to spend any time considering a bill of rights at all, and was wholly unwilling to address any matters calling for serious substantive reflection and debate.[22] One representative declaimed on "the inexpediency of taking up the subject at the present moment . . . while matters of the greatest importance and of immediate consequence were lying unfinished."[23] Madison tried to mollify such opponents by assuring them that he would offer nothing in any way controversial—specific proposals would be limited to those that would "meet with universal approbation"—so that the whole business of a bill of rights might be taken care of "if congress will devote but one day to this subject."[24]

In this context, it would have been impossible to do what modern scholars sometimes castigate the First Congress for *not* doing;[25] it

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20 *Id.* at 157.

21 *Id.* at 157–58.

22 For a discussion of the point, see DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 226–27, 231–34 (1990).

23 DOCUMENTARY RECORD, *supra* note 19, at 64.

24 *Id.* at 66, 77.

25 *Cf.* LEVY, *supra* note 18, at 79.

> The debate was sometimes irrelevant, usually apathetic and unclear. Ambiguity, brevity, and imprecisions in thought and expression characterize the

would have been impossible, that is, to hold the sort of careful, deliberative conference that academicians are familiar with in order to decide upon and approve the best or truest "principle of religious freedom." The impossibility of adopting a substantive principle on the subject seems all the more obvious given the fact that Americans of that generation fundamentally and passionately disagreed about the proper relation between religion and the state.[26] Conversely, it would have been eminently sensible simply to put in writing the jurisdictional division that all sides had agreed to from the start. Not surprisingly, that is just what Congress did.

Akhil Amar notes how this jurisdictional purpose is reflected in the language:

> The First Amendment intentionally inverted the language of the Necessary and Proper Clause, which stated that "*Congress shall* have Power To . . . *make all Laws* which shall be necessary and proper . . . ." Note how the First Amendment, which read unlike any other, tracked and reversed this language: "*Congress shall make no law . . .*," meaning that Congress simply had no enumerated power over either speech or religion.[27]

It is understandable, of course, that *we* might wish the framers had done something different. Having long since repudiated the jurisdictional arrangement that they settled on,[28] we would naturally find it more useful—and more commensurate with the solemn and immense stature that the Bill of Rights has come to assume in our political culture—if they had deliberated and then adopted some principle of religious freedom profound enough to be worthy of the libraries of historical and theoretical scholarship that have been devoted to searching out its meaning and tracing out its implications.

> comments of the few members who spoke. That the House understood the debate, cared deeply about its outcome, or shared a common understanding of the finished amendment seems doubtful.
>
> Not even Madison himself, dutifully carrying out his pledge to secure amendments, seems to have troubled to do more than was necessary to get something adopted in order to satisfy the popular clamor for a bill of rights. . . .

Id.

26 *See* STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 19–22, 26–27 (1995). I consider Professor Steinberg's argument that Americans had come to agree on a principle of "religious choice" in Part III. *See infra* notes 46–58 and accompanying text.

27 Akhil Reed Amar, *Anti-Federalists,* The Federalist Papers, *and the Big Argument for Union,* 16 HARV. J.L. & PUB. POL'Y 111, 115 (1993) (footnotes omitted).

28 *See* SMITH, *supra* note 26, at 45–50.

But remember for a moment that the members of the First Congress were *politicians*—wiser and more public-spirited than some of that species, perhaps, but politicians nonetheless—working under unusually difficult and fragile circumstances, and faced with an immense amount of urgent practical business. Many of them would have preferred not to consider issues such as religion at all. Their reluctance is hardly surprising: How often do politicians rush to address difficult, volatile issues if there is any way to avoid doing so? To be sure, the insistence of representatives like Madison made it impossible to ignore the subject altogether. But it *was* possible to take care of the issue at hand by simply reaffirming in writing a jurisdictional division that all of the competing factions essentially agreed on. How likely is it that in these circumstances someone would gratuitously volunteer: "Let's not be content to solve the problem in that way. It's too easy. Let's take the bull by the horns, figure out what the best principle of religious freedom is, and then write that principle into the Constitution"? And what sort of response would such a proposal provoke from harried politicians?

Like all accounts of history, the account I have just given simplifies to a degree. For one thing, despite his assurances that the Bill of Rights would include nothing controversial, it would be hard for someone of Madison's strong convictions not to use the opportunity to push the content of the Constitution at least somewhat in the direction of principles he regarded as just and wise. Even while insisting that he was doing nothing controversial, a politician would try to slip in something for his cause, wouldn't he? And in fact Madison *did* try to include in the Bill of Rights a provision dealing with religion and other subjects that *would* have gone beyond merely making explicit the jurisdictional division that all sides had agreed on. So Madison offered a proposal that, as approved by the House, provided: "*No state* shall infringe the right of trial by Jury in criminal cases, *nor the rights of conscience,* nor the freedom of speech, or of the press."[29] He even went so far as to say that he "[c]onceived this to be the most valuable amendment on the whole list. . . ."[30] As against the objection that this measure would interfere with the states' jurisdiction, Madison's insistence was enough to overcome opposition in the House—but not in the Senate, where the proposal was deleted from the Bill of Rights, never to be revived.[31] We cannot know exactly why this more-than-Federalist measure was defeated—any Senate debates on the subject

29 DOCUMENTARY RECORD, *supra* note 19, at 41 (emphasis added).

30 *Id.* at 188.

31 *See id.* at 41, 188–89.

were not reported—but the decision was at least entirely consistent with a jurisdictional interpretation of the First Amendment.

B. Professor Steinberg's Objections

1. Did Congress Have Jurisdiction over Religion?

Professor Steinberg objects to this jurisdictional interpretation by insisting that Congress *did* have some jurisdiction over religion, and that Congress *could not* have assigned all jurisdiction over religion to the states. He gives the example of a draft law, which would affect religious pacifists like Quakers either if they were exempted from military service or if they were *not* exempted.[32] From this observation, Steinberg draws two important implications. First, while agreeing that the First Congress intended to leave the status quo undisturbed (and that the paucity of debate reflects this intention), Steinberg argues that the status quo was one in which Congress had some jurisdiction over religion.[33] Second, Steinberg suggests (if I understand his argument correctly) that we cannot attribute to the framers an intention to do something that could not be done.

Professor Steinberg's premise is right, I think, but his argument is with Madison and the Federalists, not with me. His premise asserts, in essence, that the national government had power that the Federalists repeatedly said it did *not* have, and that the Constitution could not have done what Madison and the Federalists repeatedly said it *did* do. More specifically, the Constitution could not carefully confine the national government under the enumerated powers doctrine because that government would inevitably exercise implied powers, and these implied powers could not be contained by the enumerated powers strategy. The Anti-Federalists had argued this all along, of course, and in retrospect it seems clear that they were right[34] (although the struggle to make the enumerated powers doctrine work continues[35]).

The crucial fact, however, is that Madison and his allies repeatedly *said* that the national government had no power over religion and, more generally, that the enumerated powers strategy would contain national jurisdiction. In saying this they may well have been guilty, as Leonard Levy argues, of "a colossal error of judgment."[36] But right or wrong, this was *their* premise in defending the original

32 *See* Steinberg, *supra* note 6, at 1005.

33 *See id.* at 1003-04.

34 The difficulty is discussed at length in SMITH, *supra* note 13, at 48–69.

35 *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995).

36 LEONARD W. LEVY, CONSTITUTIONAL OPINIONS: ASPECTS OF THE BILL OF RIGHTS 113 (1986).

Constitution, and it was the premise that they sought to shore up and explicitly affirm in the First Amendment. Steinberg's argument seems to assume that since the framers' announced and vociferously defended jurisdictional strategy was destined to prove ineffectual (as we can see with benefit of hindsight), it is permissible not only *for us* to adopt a different strategy more oriented to substantive individual rights (as we have done), but it is also permissible for us to attribute a different strategy *to them.* This assumption would seem extraordinary outside the special genre of constitutional history.

This analysis should probably be qualified in two ways. First, I hasten to note that Madison was not nearly as naive as my discussion to this point may imply. He expressed cogent doubts about the efficacy of the enumerated powers strategy during the Constitutional Convention, during the ratification debates, and afterwards. Indeed, Madison understood that *any* merely human contrivance to limit government and direct history was problematic at best.[37] Despite these misgivings, however, he placed his money, so to speak, on that strategy—and on the general dynamics of a large pluralistic society—as the best way of protecting rights.[38]

Second, there is indeed room to wonder whether the First Congress actually believed that *all* jurisdiction over religion rested with the states, with or without the First Amendment. As noted, much of the talk ("not a shadow of right" to "meddle with religion") was to that effect. But perhaps Congress at least vaguely understood that relinquishing jurisdiction to effect an "establishment of religion" or to prohibit the "free exercise" of it was not precisely equivalent to foreswearing *all* power over religion itself. At one point the House approved a version of the amendment offered by Samuel Livermore that would have provided that "congress shall make no laws *touching religion,* or infringing the rights of conscience."[39] This wording probably sounds *to us* like a total renunciation of jurisdiction over the subject. So the House's later decision to abandon Livermore's version in favor of what seems less sweeping language might indicate a decision to enact only a partial renunciation.

We have to be cautious in our inferences here, I think, because the House was plainly not in a mood to be finicky over language or to provide any lengthy explanations of the wording it ultimately chose.[40]

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37 *See* THE FEDERALIST No. 37 (James Madison).

38 For a lengthier discussion, see SMITH, *supra* note 13, at 65–69.

39 DOCUMENTARY RECORD, *supra* note 19, at 158 (emphasis added).

40 Even in offering his proposal Livermore emphasized that "he did not wish them to dwell long on the subject." *Id.* at 158.

Even if Livermore's language had been retained, it seems quite possible that the Congress would have dismissed the sort of concerns raised by Professor Steinberg with impatience: "It is true that we have no power over religion, but that doesn't mean that we have to draft Quakers—or that we *can't* draft Quakers. A draft law is a draft law, not a law 'touching religion.'" In any case, the language finally adopted does not expressly say that Congress relinquished *all* power over religion, but only the power to make laws "respecting an establishment of religion, or prohibiting the free exercise thereof."[41]

The crucial point, though, is that a partial renunciation of jurisdiction is no less jurisdictional in character—and no more an enactment of a substantive principle or right—than a total renunciation of jurisdiction. So for present purposes nothing hinges on the perhaps undecidable question of whether Congress meant to relinquish literally *all* or only "practically all" jurisdiction over religion to the states. Professor Steinberg seems impatient with this suggestion; he observes that the meaning or scope of a partial renunciation would be uncertain.[42] There seems little to say here except that of course Professor Steinberg is right: a partial renunciation of jurisdiction, like any other enactment (jurisdictional or otherwise), *might* be uncertain, and it almost surely would require construction.[43] Steinberg seems to suppose that since a partial renunciation of jurisdiction might be inconveniently uncertain in its scope, we are therefore entitled to treat it as other than jurisdictional. It is hard to perceive the warrant for that sort of transformation outside—or perhaps even within—the special genre of constitutional history.

2. The Substantive Content of the Religion Clauses

Professor Steinberg also argues, with citations to dictionaries of the time, that the words of the religion clauses had substantive content and imposed substantive limitations on the national government. Again, Steinberg is right, but again his argument seems beside the point. Any disclaimer of jurisdiction *will* necessarily have substantive

41 U.S. CONST. amend. I.

42 *See* Steinberg, *supra* note 6, at 1006 ("I'm not entirely certain what Professor Smith means by the phrase 'partial renunciation of jurisdiction.'").

43 Realistically, one might doubt whether it is ever accurate to describe a provision as a *total* renunciation of jurisdiction. Taken very literally, wouldn't this phrase imply that a government was simply dissolving itself? Even a total renunciation of jurisdiction *over a particular subject* is in a practical sense a partial renunciation that obviously might require construction.

content and will impose substantive limitations.[44] For example, a statute denying the federal courts jurisdiction over a certain category of cases—cases defined by subject matter or amount in controversy, for example—will have to use substantive terms to define which cases the courts are not supposed to adjudicate. But there is a difference between *denying jurisdiction* over a substantive area and imposing a *substantive principle* or creating a *substantive right* restricting government in an area in which it admittedly has jurisdiction. In the judicial context, for example, the first sort of limit is said to mean that a court has no power to hear a case or to reach "the merits," while the second sort of limit guides the court in evaluating the merits. In the First Amendment context, consequently, efforts to discern the substantive meanings of phrases like "establishment of religion" or "free exercise [of religion]" are interesting but not germane to the issue here. The question, once again, is not whether the religion clauses had substantive content—they did, necessarily—but whether they were intended merely to deny the federal government jurisdiction over a substantive area or, instead, affirmatively to adopt a substantive principle of religious freedom. And the phrase in the text relevant to *that* dispute—and indicative of Congress' jurisdictional purpose—is "Congress shall make no law . . . ."[45]

In sum, if we consider the matter while keeping in view the context and constraints of the time, it appears that Congress did not need to, would have been unable to, and *did not* do more than explicitly reaffirm a jurisdictional division that all sides had accepted. The words that Professor Steinberg focuses on—"establishment of religion," "free exercise"—served to define the substantive area over which Congress was disclaiming jurisdiction. The substantive content of those words does nothing to show that Congress' purpose was more than jurisdictional.

Having said this, though, I must also acknowledge two important facts. First, although lawyers routinely distinguish between jurisdictional limits and more purely substantive ones, or between rules regulating jurisdiction and rules "on the merits," the distinction can sometimes be a slippery one. So there is always a risk that a jurisdictional rule might dissolve into a more purely substantive one. Second, the framers of the First Amendment did not actually use the words

44 The issue is discussed at some length in *Foreordained Failure* under the heading of "The Substance of the Religion Clauses' Federalism." *See* SMITH, *supra* note 26, at 22–26.

45 If the modern Supreme Court had embraced a jurisdictional construction of the First Amendment, arguments like the ones Steinberg makes here would of course be relevant to the issue of just what the denial of jurisdiction encompassed.

"no jurisdiction." To be sure, they used other words—"shall make no law"—that in the context seem to have meant the same thing. There is nothing mandatory or magic about *the word* "jurisdiction." Still, divorced from the context and the enactors' intentions, the words actually employed are capable of supporting a different construction—one more amenable to *our* needs and purposes.

These two concessions are perfectly consistent with a jurisdictional interpretation of *what the religion clauses meant* to those who adopted them. But within the genre of constitutional scholarship, they also give the modern constitutional scholar or jurist all he needs to undertake a major remodeling of the amendment.

III. Remodeling the Religion Clauses: The "Religious Choice" Principle

A principal argument for the jurisdictional construction is that at the time of the First Congress, Americans disagreed at a fundamental level about the proper relation between government and religion. Most citizens believed—as their predecessors had done for centuries—that a political community needs a religious base. But some citizens continued to hold the traditional view that government should protect this religious base by affirmatively supporting and reinforcing an approved religion in a variety of ways—monetary subsidies, laws prohibiting blasphemy and Sabbath-breaking, exclusion of the religiously heterodox from public office—while others believed religion could and would flourish better without state support. I cited this disagreement as one reason why the First Congress could not have adopted a substantive principle of religious freedom.[46]

Professor Steinberg makes this claim a focal point of his response. He concedes that considerable disagreement persisted, but he also argues that at about the time of the Revolutionary War Americans generally came to accept a principle—he calls it the principle of "religious choice"—that had previously been controversial. Steinberg believes that the First Congress could have coalesced around this principle. Indeed, he says that Congress *did* adopt the principle—although I see no evidence in his book review indicating that members of Congress understood themselves to have done this.

Even so, if Steinberg is right that Americans of the time—and hence Congress—*could have* agreed on a "religious choice" principle, that would be an important fact. It would at least increase the likelihood that members of Congress *did* consciously decide to incorporate

46 *See* Smith, *supra* note 26, at 19–22, 26–27.

this principle into the Constitution, even if they neglected to say so in any explicit way. Perhaps more importantly, within the special genre of constitutional history, "*could have*" might be good enough. Even in nonconstitutional contexts, scholars and judges occasionally advocate "imaginative reconstruction" as a proper interpretive technique: what *would* the legislature have decided if it had addressed a particular question?[47] So perhaps the appropriate question in this context should go something like this: *if* the First Amendment's framers had had the time and inclination to adopt some sort of principle of religious freedom, what would that principle have been? If Steinberg is right that Americans of that time had come to embrace a principle of "religious choice," then that principle would have been an attractive possibility.

But *did* Americans in the founding period agree on this principle? If we look at our early history in distant, broad-brush terms, we surely sense a general trend toward greater acceptance of religious pluralism, or toward greater "toleration of private religious choices."[48] Professor Steinberg's argument rides on this sense of historical movement. Thus, he recounts instances of severe religious persecution in the seventeenth century (Puritans executed Quakers and jailed or expelled Baptists); but the persecution became milder as independence approached (Baptists were jailed but not executed or expelled in Virginia), and in the Revolutionary and post-Revolutionary periods nearly all states adopted "freedom of conscience" or "free exercise" provisions as part of their state constitutions.

So does this development add up to general acceptance of the "principle" of "religious choice"? Before embracing this pleasing conclusion, we first should notice some contrary evidence—evidence that might seem overwhelming to an investigator with a different purpose (say, a critic inclined to portray the American political system as a product and expression of oppressive "Eurocentric" tendencies) but that the constitutional scholar has a neat way of deflecting. The contrary evidence, of course, is that well into the nineteenth century a number of states continued to impose various legal sanctions on deviant religious beliefs and practices. States still prosecuted people for blasphemy. They still excluded non-Christians, or non-Protestants, from serving in public office. They still compelled citizens by law to contribute money to churches.[49] If such practices occurred today, we

47 *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 526 (2d ed. 1995).

48 Steinberg, *supra* note 6, at 1021.

49 *See* SMITH, *supra* note 26, at 37–39.

would surely regard them as gross violations of any commitment to "religious choice." Steinberg acknowledges the persistence of these "outdated and repressive practices."[50] So then how can he say that by the post-Revolutionary period, Americans almost universally had come to embrace a principle of "religious choice"?

Part of the answer, it seems, is that the trend, or the movement of history, was away from these restrictions on religious choice. In this vein, Professor Steinberg notes that in 1758 nine states still taxed citizens to support religious establishments, but by 1789 only four of those states imposed such taxes, and within less than half-a-century the last of such assessments would be abandoned.[51] I assume that Steinberg accurately reports these facts. We know these things *now*. But why these facts counts as an argument about what nearly all Americans ostensibly agreed to (or could have agreed to) *in 1789* remains a bit mysterious. The presence of arguments of this kind shows, I think, that we are working with a special genre of scholarship.

The more important part of Professor Steinberg's argument, however, rests on the special quality of a constitutional "principle." In constitutional discourse, a "principle" is a wonderfully elastic thing. It can be squeezed small, taking on a size and shape that we can imagine—sufferable to some previous generation of framers; then, once attached to the Constitution, the principle can be stretched almost indefinitely to support a range of conclusions that may go beyond, and even contradict, any specific judgments consciously held by the original enactors.[52] Virtually all constitutional scholars—"conservatives" and "liberals," "originalists" and "nonoriginalists"—use principles in this way. The pervasiveness of this practice makes it seem not only possible but indeed thoroughly unremarkable for Steinberg to say that Americans in the founding period agreed on a principle that is still very useful and appealing to us, even though their specific notions about how government should treat religion plainly differed radically in many particulars from currently prevailing ideas.

As I understand it, the "religious choice" principle that nearly all Americans of the late 1700s are said to have embraced basically held that people should not be punished *merely for holding unpopular or heret-*

50 Steinberg, *supra* note 6, at 1020.

51 *See id.* at 999-1000.

52 Just what sort of thing a constitutional principle is, so as to have these valuable properties, is conveniently unclear. In fact, the practical usefulness of constitutional principles is wholly dependent on their enigmatic ontology. *See* Steven D. Smith, *Idolatry in Constitutional Interpretation*, *in* PAUL F. CAMPOS ET AL., AGAINST THE LAW 157, 180–86 (1996).

ical religious beliefs, or for acting on those beliefs in private.[53] Dissenters might be punished for *expressing* these beliefs in a way likely to cause civil disturbance, as in the blasphemy prosecutions. And the heterodox might suffer deprivations for belief alone in the sense that they could be excluded from serving in public office. But they could not be punished criminally merely for the belief. By describing the "religious choice" principle in these somewhat pinched terms, Professor Steinberg seeks to reconcile it with the apparently contrary behavior of the period—blasphemy prosecutions, religious oath requirements, and so forth. Once the principle achieves constitutional status, of course, such unfortunate applications or "conceptions" can be discarded; indeed, these practices disappear entirely when Steinberg discusses the contemporary meaning of "religious choice."

Having thus sliced and shaped the principle, we can ask the question again: would Americans of the founding period generally have accepted a "religious choice" principle if it were defined in this carefully restricted way? Would they have agreed, in other words, that religious dissenters should not be punished *just for their private beliefs* so long as they did not publicly express or act on those beliefs in objectionable ways? Although there was no George Gallup putting the question to citizens in this form, I believe along with Professor Steinberg that Americans would have said "Amen" to this proposition. But then I also suspect that most Americans a century or a century-and-a-half earlier would likewise have endorsed the proposition. Indeed, I do not believe that this proposition was ever seriously contested in this country. Even in the community that has come to serve as a symbol of stuffy religious intolerance—the Massachusetts Bay colony of John Winthrop and John Cotton—the authorities do not seem to have believed that people should be punished *just for believing* something that was regarded as unorthodox or deviant. Timothy Hall's recent study indicates that the Puritans punished dissenters like Quakers and Baptists only because and only when their views and actions were seen as a threat to public peace and order.[54]

> The Puritans' focus on the public consequences of religious error rather than on the innate perniciousness of that error resulted in

53 *See* Steinberg, *supra* note 6, at 1001 ("Simply put, Americans agreed that it was improper to outlaw a religion, or to punish believers on account of their private religious choices with imprisonment or banishment.").

54 *See* TIMOTHY L. HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY 58–62 (1998). I discuss Hall's interpretation at greater length in Steven D. Smith, *Separation and the Fanatic* (forthcoming Book Review in the 1999 *Virginia Law Review*).

> their generally leaving religious error undisturbed so long as it kept its head low. They launched no inquisition to ferret out heresy from its hiding places in the hearts of Massachusettes inhabitants. Puritans, John Cotton said, had learned the virtue of meekness, which required them to "suffer one another in differences and weakness." The weight of civil authority only came to bear upon deviations from orthodoxy when those deviations took a public form . . . .[55]

Of course, notions of community—and hence of what counts as a threat to the peace of the community—change over time. The Puritans were more prone than, say, we are to regard religious dissent as a threat to community; their attitude reflected a view of community that was both religious and "republican" in character.[56] As our conception of community has grown both more secular and more liberal or individualistic, religion may increasingly come to seem irrelevant to civil or public concerns.[57] But the bare proposition that people should be permitted to believe whatever they choose or feel compelled to believe so long as they do not injure public peace and order is one that almost everyone at all points in our history—Roger Williams and John Cotton, Thomas Jefferson and Patrick Henry, the ACLU and the Christian Coalition—might cheerfully endorse.

In reaching this conclusion, have I inadvertently undermined my own position by conceding that Americans of the founding generation *could have* concurred in approving a "principle of religious choice"? By my account, of course, Professor Steinberg is mistaken in supposing that, as he says repeatedly, the convergence on this principle represented a significant change from the pre-Revolutionary climate of opinion. But perhaps Steinberg does not need to make that claim. Why does he need to ascribe unenlightened views to the Puritans in order to assign enlightened views to the Founders? Shouldn't it be sufficient for his purposes to say that the founding generation *did* accept the principle? Isn't that agreement enough to get the principle on board the Constitution?

The answers to these questions turn, I think, on the same old matter of genre. For one thing, much in the way that a good novel will not have characters doing things without discernible motives, a

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55 HALL, *supra* note 54, at 61 (footnote omitted).

56 Hall's discussion of the point is illuminating. *See id.* at 48–64.

57 Of course, these conceptions of community and harm and the relevance of religion continue to be contested. The role of religion in the public order has generated a vast literature over the last decade or so. *See, e.g.*, RELIGION AND CONTEMPORARY LIBERALISM (Paul J. Weithman ed., 1997); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988).

good constitutional story needs to supply some reason why legislators and "the People" would undertake at some particular point in time to write a particular provision or principle into the Constitution. Consequently, a story that depicts people as writing *newly discovered* principles into the Constitution is more appealing than a story that shows them suddenly constitutionalizing ideas that had gone uncontested for generations. Why legalize what no one would want to challenge? So it makes sense that we would adopt a constitutional provision guaranteeing that women can vote because it had long been supposed that they couldn't. But we would be surprised at a proposal to ensure that left-handed people can vote: the principle is sound enough, and we *could* agree to adopt it, but since no one ever doubted it there seems no reason to engraft it onto the Constitution. In the same way, Steinberg's account, in which Americans decided to constitutionalize a newly accepted (and perhaps still vulnerable) principle of religious choice, makes for a better story than one in which Americans decided to add to the Constitution a principle that had largely been taken for granted from the nation's inception.

In addition, although we are perfectly used to ascribing to constitutional principles a magisterial generality that might have astonished the principle's enactors, there are also tacit limits on our ascent up the ladder of increasing generality. The limits are not so much a function of the historical evidence—a very general principle might be no more foreign to any actual, conscious "framers' intentions" than a less general principle would be—but rather are implicit in the genre itself. That is because as a principle becomes more and more open-ended, the dubious nature of the whole enterprise becomes more conspicuous.

Familiarity normally lets us forget that there *is* after all something very odd about a political system in which constitutional "principles" adopted by one group of people (who may only dimly perceive the meaning or scope of those principles, or who may not quite realize that they are enacting "principles" at all)[58] come to be revered as supreme, judicially enforceable law. The consequence is that, generations later, a small body of unelected officials will have power to override the decisions of more democratic branches on the theory that these decisions somehow offend the reigning "principles" (which by now may have picked up meanings radically different than anything contemplated by their unwitting enactors). Such a system is odd, I say; but the oddity is highlighted when the principles are highly general or open-ended. Thus, we have become accustomed to supposing

58 See SMITH, *supra* note 13, at 31–47, 79–80.

that there is something like a "principle of free speech" that courts properly enforce, even though their decisions might have surprised the people who approved the First Amendment. But we would find it embarrassing or unacceptable to say that some constitutional provision embodies the "principle of general fairness" or the "principle of good sense," thereby authorizing courts to strike down any law that they regard as unfair or not good sense. At that point, the oddity of a system based on constitutional principles would become just too glaring. What sense would it make to have a political system that works in this way?

So a story about religious freedom needs to culminate in a principle that is broad enough to do what we need with it but not so general that it starts to look like a "principle of good sense." At first glance, a "principle of religious choice" probably seems safe enough. But if we were to concede that this principle has been accepted by nearly everyone throughout our nation's history, and that people have thought the principle fully compatible with a variety of measures (executing Quakers, prosecuting blasphemers) that we would now regard as reprehensible, that principle comes to seem more suspect—and much more open-ended than it at first appeared. It comes perilously close to being a "'treat religion appropriately in light of prevailing assumptions and values' principle." Why would we want to give judges that sort of blank check? Conversely, describing the principle as something that Americans only came to accept in the post-Revolutionary period (and that even then they only vaguely understood) is a way of paring the principle down so that it can serve nicely as the motif of an appealing constitutional story.

IV. Conclusion

In my view, the "religious choice" story told by Professor Steinberg (and by many others) is an imposition on our history: it flattens and it simultaneously domesticates and ennobles a set of developments that were in fact complex, messy, and erratic, and that were not understood by the participants in the terms that modern constitutional storytellers use.

In the end, though, I'm not eager to oppose the story for general or public purposes. It's a pretty good story. The historical materials are there to make it acceptable, at least under the special standards of the genre of constitutional scholarship. This is to say that in a rough sense our history *has* moved towards greater acceptance of religious pluralism, and that the words of the First Amendment *can* be read to refer to a principle of religious choice. For constitutional purposes,

that is probably enough. If we must have a constitutional principle of religious freedom, "religious choice" seems at least as appealing as the other leading candidates. And if the "religious choice" principle is one we might want to adopt anyway, then what harm can it do to give that principle a narrative pedigree?

Still, at least in an academic context, I think we might acknowledge one thing: if we choose to tell this story, it will gain its power more from *our* needs and desires than from anything thrust upon us by the events and decisions of 1789.

IN MEMORIAM

JUSTICE LEWIS F. POWELL, JR.—A TRIBUTE

*The Honorable Kenneth F. Ripple**

In remembering Justice Powell, my memory invariably recalls three distinct images from the years I spent at the Supreme Court. Two of these memories are from my own work with him. The other is from my observation of him on the bench. In the days since his death this past autumn, all three have sparked a great deal of reflection about his enduring contribution to our jurisprudence and to our profession.

During my first year at the Court, I presented matters that came before him in his capacity as Circuit Justice for the Fifth Circuit. Busy Justices rarely find applications for interlocutory relief to be a welcome interruption from their regular fare. Circuit work usually comes to the Court on little or no record and the Justices are asked, on short notice, to intervene, sometimes in very definitive ways, in cases about which they have only a modicum of information. This situation is a very uncomfortable one for a Justice habituated to the rhythm of appellate decisionmaking in the rarified atmosphere of the Supreme Court. Although he obviously had a great deal of other work to do, Justice Powell always approached his circuit work in a calm unruffled manner. On the occasions when he requested an oral briefing, his attention was riveted totally on what I had to say; his eyes would never show the slightest hint of distraction as, rocking gently in his desk chair, he listened intently. I cannot recall his ever having interrupted my initial presentation, but as his questions and discussion afterward invariably would evidence, his mind had not only grasped but sifted the facts and the law in search of the essence of the case as I spoke. His decisionmaking was methodical, low key, dispassionate. His grasp of complex factual situations and even more complex regulatory schemes was quick and surefooted. He demonstrated particular care in ensuring that both sides of the matter were fully aired. When he

* Judge, United States Court of Appeals for the Seventh Circuit.

had made his decision, I could count on precise instructions as to the disposition. His demeanor in the privacy of his chambers was not at all dissimilar from that one observed when he was on the bench. In the courtroom, he rarely interrupted counsel, but the intensity of his attention evinced an intellect hard at work. His questions usually came at the end of the argument. Posed in the most polite manner possible, they nevertheless were aimed invariably at the heart of the case.

The second vivid image that inevitably comes to mind whenever I think of the Justice is based on a single encounter one Saturday evening. Having worked all day in my office on the Court's second floor, I set out for home around the dinner hour. The elevator stopped on the first floor, where the Justices had their chambers, and Justice Powell stepped on. He looked tired, very tired. His tie was loosened and he was carrying two large brief cases. Here was one of America's most accomplished lawyers, then in his late sixties, going home for the weekend at six o'clock on a Saturday night after what had obviously been a very full day at the office.

Lastly, I remember him on the bench. During my years at the Court, he sat next to Justice Marshall and the two would do a good deal of low-key talking throughout the oral argument session: two Justices whose paths to the Court had been so different sharing the ultimate responsibility of interpreting the Constitution.

When Justice Powell left us several months ago, the commentators and "talking heads" of the electronic media gave us their "soundbite" assessment of his career as a Justice. He was described as "scholarly," "courtly," and a "Southern gentleman." In some quarters, it was suggested that he was a person of an earlier and quainter time; others suggested that his jurisprudential contribution might not endure because he had not been the leader of an ideological bloc. For me, the memories contained in the three images I have just recounted suggest another and far more positive perspective.

Whether based on a meeting in the privacy of his chambers or in the formal setting of the courtroom, a lawyer left an encounter with Justice Powell with the same dominant impression: the morality of his mind. In every professional situation, great or small, the classical characteristics of the thoughtful judge dominated the process of decision: the precise dissection of the facts, the structured discussion of the law, the care in ensuring that no stone, factual or legal, was left unturned, the deliberate suspension of judgment until the entire case