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Rodney K. Smith

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ARTICLES

ESTABLISHMENT CLAUSE ANALYSIS: A LIBERTY MAXIMIZING PROPOSAL

RODNEY K. SMITH*

As we approach the two hundredth anniversaries of the adoption and ratification of the first amendment, we continue to grapple with the meaning or legal import of the religion provision of the first amendment. That provision provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof" ¹ Those sixteen words, which were framed to evidence an intent to aid in securing some form of religious liberty, present an interpretive challenge that has intensified rather than abated over the years.

Much has been written of late regarding the difficulty of interpreting the language of the Constitution, which is naturally ambiguous. ² James Madison, the author of the first

* Dean and Professor of Law, Capital University Law and Graduate Center; J.D. 1977, J. Reuben Clark Law School, Brigham Young University; LL.M. 1982 and S.J.D. 1989, University of Pennsylvania.

In addition to his presentation of this paper at the Notre Dame Law School, the author also presented portions of this article at Drake University and at the University of San Diego and acknowledges the helpful comments he received from members of those law school faculties.

1. U.S. CONST. amend I.

2. See, e.g., J. GARVEY & T. ALEINIKOFF, *MODERN CONSTITUTIONAL THEORY: A READER* 28-84 (1989); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *STAN. L. REV.* 843 (1978); Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 *CALIF. L. REV.* 1482 (1985). Even Judge Bork recognized this fact in his statement before the Senate Judiciary Committee, when he noted:

When the words [of the Constitution] are general, as is the case with some of the most profound protections of our liberties in the Bill of Rights and the Civil War amendments, the task is far more complex—it is to find the principle or value that was intended to be protected and see that it is protected.

Nomination of Robert H. Bork: Hearings Before the Committee on the Judiciary, 100th Cong., 1st Sess. 107 (1987).

amendment,³ recognized this difficulty. In acknowledging the challenge the members of the constitutional convention faced in "delineating the boundary between federal and State jurisdictions," Madison noted:

All new laws, though penned with the greatest skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.⁴

If the ideas that were to give our federal and state jurisdictions meaning presented such a perplexing interpretive challenge, it is clear that the sixteen words used to delineate the contours of the idea of religious liberty in the new republic must have been acknowledged to present a challenge of virtually unprecedented magnitude. The interpretive odyssey of the Supreme Court, in giving meaning to the religion provision, has rendered Madison's words prophetic. Involved as we are in con-

3. On June 7, 1789, James Madison introduced the Bill of Rights, including the first amendment, in the First Congress. 1 ANNALS OF CONG. 451 (J. Gales ed. 1789). While the text of the first amendment was altered after its introduction, Madison continues to be considered the "author" of the amendment. See, e.g., R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS: 1776-1791*, 196-200 (1969).

4. THE FEDERALIST No. 37, at 229 (J. Madison) (C. Rossiter ed. 1961).

tinuing to "liquidate and ascertain" the meaning of the religion clauses through "discussions and adjudications," I recognize that each contribution to this symposium at most can be but a contribution to the dialogue or discussion that has imbued the religion provision with meaning since its penning some two hundred years ago.

Recognizing the limits of language, and having been humbled in my own pursuit of the ideas that give meaning to the framers' call for religious liberty,⁵ I offer my present contribution to the dialogue regarding the meaning of the establishment clause of the first amendment. My contribution to the dialogue, in the form of this article, will be divided into three major parts.

In part I, I challenge what has come to be the predominant view regarding original intent analysis.⁶ The proponents of this view essentially argue that when the text of the Constitution, coupled with contemporaneous indicia of intent,⁷ are unclear or ambiguous, the Court should defer to the judgments or decisions of the legislature and the executive—the democratically elected branches of our government—in order to ascertain the scope and meaning of provisions of the Constitution, including the religion provision.⁸ Proponents of this

5. As one begins to delve into the historical record to ascertain the intentions of the framers and ratifiers of the first amendment, it becomes evident that their intentions were often broad and vaguely expressed. For my own effort to glean the historical intent of the framers and ratifiers of the religion clauses, see R. SMITH, *PUBLIC PRAYER AND THE CONSTITUTION: A CASE STUDY IN CONSTITUTIONAL INTERPRETATION* (1987).

6. The "originalist" views of deferentialists like Robert Bork, Edwin Meese, Lino Graglia, Henry Monaghan and Raoul Berger have tended to dominate, and even preempt, what has come to be considered interpretivism or originalism.

7. By contemporaneous indicia of intent, they generally refer to specific policy choices made by political bodies or officers during the era contemporaneous with the framing and ratification of the constitutional provision at issue. For example, they might well ask whether the framers and ratifiers permitted a certain public prayer practice during the era contemporaneous with the framing and ratifying of the first amendment.

8. When evidence of intent, either in the form of explicit language that clearly resolves a specific problem or evidence of specific actions or contemporaneous indicia of intent that demonstrate how the framers and ratifiers actually resolved a particular issue, is lacking, these originalists urge judicial restraint and deference to the democratic branches of government in resolving constitutional issues. See, e.g., Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 10-11 (1971); Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 699 (1976). In his confirmation hearings, Judge Bork backed off from this very deferential position somewhat by recognizing that, particularly in the case of the Bill of Rights, the Court

largely deferential view of original intent claim that it properly restrains the Court, and thereby constitutes the most legitimate and restrained mode of judicial review. In responding to that position, I will argue that such a view either reflects a misunderstanding or a misrepresentation of the intent of the framers and ratifiers. Securing liberty, while insuring a modicum of order, was primary among the hierarchy of values or ideas that the framers sought to enshrine in the Constitution. The deferential originalist view disregards the framers' and ratifiers' desire to maximize liberty.

In part II, I delineate the views of the framers regarding the establishment clause. In doing so, I rely on, without repeating in detail, the results and conclusions I have drawn in a previous work.⁹ In part II, I also examine each of those views to ascertain which one, or which combination of views, maximizes religious liberty. Part III is a brief summary and conclusion.

I. ORIGINAL INTENT — EFFECTUATING THE LIBERTARIAN ASPIRATIONS OF THE FRAMERS

Originalists, those who attribute dispositive force to the intent of the framers and ratifiers in interpreting constitutional provisions, necessarily take the constitutional text, history contemporaneous with the framing and ratification of the Constitution, and the structure of our government very seriously for the purposes of constitutional analysis.¹⁰ Originalists examine objective, public indicia of intent, but they disregard undisclosed, subjective intentions in determining the likely meaning of a constitutional provision. Undisclosed, subjective intentions are largely irrelevant in originalist analysis, because those undisclosed intentions were not used to influence the ratification of the constitutional provision. Since no constitutional provision is effective without being ratified, only those statements or indicia of intent that influence the ratification process

must often seek to ascertain what broad principles the framers were trying to effectuate in drafting, adopting and ratifying a general provision. Bork, *supra* note 2, at 106-11. Nevertheless, when a judge is unable to ascertain what broad principle the framers and ratifiers intended or when such historical analysis discloses various views, deferential originalists, including Bork, defer to democratic institutions in giving meaning and effect to those provisions. This, as I will argue in this article, is contrary to the overriding libertarian aspirations of the framers and ratifiers.

9. R. SMITH, *supra* note 5, at 15-120.

10. See, e.g., Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COL. L. REV. 723, 723-27 (1988).

should be considered. Public statements made during the adoption process, however, are significant, because it may be assumed that those statements or similar ones influenced the public debate and the ratification process. The text of the provision itself, and its fit in our constitutional structure, coupled with public statements made to influence the debate over and ratification of the provision at issue and actual contemporaneous actions related to the issues covered by a given provision, are critical in ascertaining the meaning of the provision.¹¹ Undisclosed intentions are not.

I believe all originalists, myself included, agree that text, objective, contemporaneous history and constitutional structure are necessary ingredients in originalist analysis. However, the analysis of those sources often produces an equivocal record at best. Text, history and structure are rarely dispositive of specific issues. Indeed, along with others, I have noted that these sources generally yield little more than the perimeters within which the interpretive endeavor must operate to maintain fidelity to the original intent.¹² As such, originalism seldom yields specific answers to concrete questions, and one must acknowledge that there is a need to interpose or apply a second theory of constitutional interpretation in order to select from among the interpretive choices or possibilities that fall within the perimeter delineated by an originalist examination of text, history and structure.

This insight, that originalists need a second theory to enable them to decide among the various interpretive choices yielded as a result of their examination of text, history and structure, should hardly be surprising to anyone who has been

11. *Id.* at 725.

12. I believe Professor Van Alstyne said it well when he noted: Ordinary judicial conscientiousness in respect to interpretations of our Constitution cuts both ways. It certainly does mean that the boundaries are to be respected, but there is no reason to take this as counsel of despair. The words of the Constitution are instructive. They do impose constraints, equally upon courts as upon other agencies of the government. Yet one's own reading ought not to be close-minded or premature. History, moreover, is germane in a more confining way. Quite frequently what it yields is heavily dependent upon the premises of its users—which may be far too narrow or widened, rather than too wishful. More often than one might suppose, one may be surprised that what was first doubtful in respect to the manner in which a given clause or combination of clauses might be applicable to a particular case, is not a puzzle after all.

Van Alstyne, *Interpreting the Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209, 234 (1984).

involved in the legislative enterprise. As the quote from Madison in the introduction to this article indicates, language is necessarily ambiguous, in that it often necessarily reflects complex ideas incompletely. Furthermore, legislators frequently use this very ambiguity of language to mask or compromise their disagreement regarding the underlying issues or ideas covered by the text of their legislation. The very ambiguity of language often serves as a weapon in the hands of a legislator—by using ambiguous language, the legislator is able to reach a compromise with those with whom she is not in full agreement. The particularly able legislator can reach a compromise by using general, somewhat ambiguous language, while recognizing that such language offers interpretive flexibility. Such flexibility affords future executive or judicial implementors of the legislation the opportunity to make choices from among an array of legitimate interpretive possibilities. Indeed, I would argue that many of the framers, including Madison, understood this principle and used it effectively.¹³ Madison and the framers were children of the Enlightenment, and believed that the Constitution-making process was one of setting ideas in motion—ideas in embryo, the fruition of which was to come through future “discussion and adjudication.”¹⁴ For them, the Constitution-making process was a process in which they captured their ideas in words that offered sufficient latitude for future, fuller development of those ideas. Similarly, they recognized, as Hamilton noted in *Federalist* No. 84, in which he argued against including a written Bill of Rights in the Constitution, that words could be read or interpreted and applied in a constraining manner as well.¹⁵ This interpretive dilemma or

13. In introducing and shepherding the Bill of Rights through the First Congress, Madison understood the urgency of getting the Bill of Rights adopted promptly to avoid antifederalist efforts to dismantle the Constitution. See R. SMITH, *supra* note 5, at 74-79. Given Madison's recognition of this urgency, it would seem fair to conclude that Madison was willing to use and accept broad language to compromise or otherwise mask specific disagreements among the framers.

14. See *supra* note 4 and accompanying text.

15. In this regard, in opposing the inclusion of a Bill of Rights in the Constitution on the ground that language necessarily serves a limiting function, Hamilton noted:

I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted: and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be

paradox regarding language - that language could give developing life to an idea or could be used to constrain that very idea - was one the framers no doubt were painfully aware of. My disagreement with deferential originalists—Judge Bork, former Attorney General Meese and Professors Monaghan, Gaglia, and Berger, among others—reflects this dilemma facing the framers in their effort to put their ideas regarding liberty into written form.

Deferential originalists use the ambiguity of the text and the history of the Bill of Rights to constrain the vision or aspiration of liberty held by many of the framers. Deferential originalists examine the text, history and structure of the Bill of Rights to ascertain whether those sources resolve specific issues. Not surprisingly, it is exceedingly rare to find that those sources yield specific interpretive answers to specific questions. The framers of the Constitution, the Bill of Rights and the Civil Rights Amendments largely were natural lawyers, who espoused broad principles and often eschewed the call to resolve specific issues in a specific manner within the Constitution.¹⁶ Rather than seeking to find and apply broad principles, however, deferential originalists use the ambiguity that appears in the text, history and structure of the Constitution to warrant recourse to their second, non-originalist theory, that of deference to the legislative and executive branches. When deferential originalists are unable to discover specific evidence sufficient to resolve clearly the particular issue before them, they provide the elected branches of government with license to effectuate policies adopted in the democratic process. In doing so, they minimize constitutional constraints on the actions of the legislative and executive branches.

said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be composed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and the provision against restraining the liberty of the press afforded a clear implication that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights,

THE FEDERALIST NO. 84, *supra* note 4, at 513-14.

16. See Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

Deferential originalists contend further that such deference to the majoritarian branches legitimizes their methodology. In essence, they argue that when their originalist analysis yields specific answers, it is supported by the force of a super-majoritarian agreement, as evidenced in the ratification process. In other words, they assert that since the constitutional provision at issue was adopted and ratified by a super-majority, their specific findings relative to that intent are likewise supported by a super-majority. As such, absent an amendment, their specific interpretation should not be overruled by a mere legislative or executive majority. However, when their originalist analysis fails to yield a clear-cut, specific answer, they assert that they should exercise restraint and permit existing legislative or executive majorities, at the state or federal level, to decide the issue, without judicial intervention.

There are numerous problems with such a deferential originalist theory. On its own terms, such a theory fails to command super-majority support. The framers and ratifiers seldom, if ever, thought in terms of sufficient specificity to yield clear-cut, specific answers. For example, during the course of debates over the religion clauses, the framers and ratifiers did not discuss whether their language was susceptible to an interpretation that would permit the government to compose prayers for public recitation. Certainly they did talk of principles that might assist one in deciding such issues, but those principles were broad and somewhat ambiguous.¹⁷ Indeed, what the super-majority agreed to was a broad principle or set of sometimes competing principles, reflected in necessarily ambiguous language.¹⁸ Thus, when deferential originalists limit their originalist enterprise to the discovery of specific answers to specific questions, they disregard the broad intent of the framers and ratifiers. Therefore, their second, nonoriginalist theory of deference to legislative and executive majorities overrides their originalist theory or methodology as to virtually every significant constitutional issue. Their theory is predominantly a theory of deference to the democratic branches of government, not a theory of original intent.

While the deferential originalists' theory of democratic government has much to commend it, as a theory that restrains the nonelected judiciary, it is not really originalist in its emphasis nor is it in keeping with the intent and aspirations of the framers and ratifiers. As noted previously, the framers and

17. R. SMITH, *supra* note 5, at 73-106.

18. *Id.*

ratifiers were largely natural lawyers, thinking in terms of broad and sometimes competing natural law principles. Thus, when deferential originalists examine the text, history and structure of the Constitution in what I might refer to as a piecemeal, positivistic manner,¹⁹ they impose a twentieth century mindset on a document penned in a different era. Certainly, any time we attempt to analyze a different era, we can fall prey to the urge to filter that history through our own lens or mindset. However, deferential originalists seemingly fail to recognize this fact, or simply choose to ignore it, recognizing (I suspect) that their view is not so much an originalist theory as it is a theory of democratic government and judicial restraint.

Even more significantly, however, deferential originalists disregard the libertarian aspirations of the framers and ratifiers in their rush to impose their second, deferential theory of judicial restraint. My research regarding the framing era reveals that the framers largely sought to maximize liberty, while providing for a modicum of order.²⁰ I am not alone in reaching

19. The framers thought in terms of broad principles. Contemporary positivists, on the other hand, believe that the law performs the function of providing specific answers to specific questions. See Soper, *Making Sense of Modern Jurisprudence: The Paradox of Positivism and the Challenge for Natural Law*, 22 CREIGHTON L. REV. 67 (1989).

20. For example, Madison's proposal for dealing with religious freedom, which he introduced to be considered for possible inclusion in the Virginia Declaration of Rights, provided:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, being under the direction of reason and conviction only, not of violence, or compulsion, all men are entitled to the full and free exercise of it according to the dictates of conscience; and therefore no man or class of men ought on account of religion be invested with particular emoluments or privileges, nor subjected to any penalties or disabilities, unless under the color of religion the preservation of equal liberty, and *the existence of the State be manifestly endangered*.

Quoted in R. SMITH, *supra* note 5, at 39 (emphasis added). Indeed, my research regarding the intent of the framers relative to the religion clauses largely revealed a sensitivity for liberty on the part of the framers, subject only to a desire to preserve the equal liberty of others and the public good or order. In FEDERALIST No. 37 Madison recognized the tension between liberty, which he noted was "inviolable," and "stability and energy in government," which he opined to be "essential to that security against external and internal danger." THE FEDERALIST, No. 37, *supra* note 4, at 226. Madison went on to argue that energy and stability in government were essential to maintain and protect republican liberty. *Id.* at 226-27. Indeed, Hamilton argued that, "the vigor of government is essential to the security of liberty; that, in the contemplation of a sound and well-informed judgment, their interests can never be separated. . . ." THE FEDERALIST, No. 1, *supra* note 4, at 35. Thus, vigor in government itself existed to secure liberty.

such a conclusion. Forrest McDonald probably said it best, when he noted that the Constitution "is a body of law, designed to govern not people, but government itself."²¹ Differential originalists effectively turn this notion on its head, using the generality and breadth of the historical record as an excuse to expand the power of government in the area of civil liberties.

The framers and ratifiers sought to maximize liberty on every front, enshrining liberty as the primary value in their hierarchy of values. The primacy of liberty found its way into their conception of the institutions and structures of government, as well as into the Bill of Rights itself.

For example, even the nationalization of power under the Constitution was intended as a means of limiting the power of government overall, and of increasing or maintaining liberty in the process. In the words of Forrest McDonald:

The members of the Great Convention sought to reestablish limits upon government and restore it to the rule of law. Fully twenty percent of the body of the Constitution is devoted to specifying things that government (state and/or federal) may not do. By contrast, only eleven percent of the text is concerned with positive grants of power. Of the powers granted, most were already vested in the old Confederation Congress, and of the ten new powers, all had previously been exercised by the states. Consequently, the sum total of powers that could thenceforth be legitimately exercised was reduced, not enlarged.²²

Thus, the framers' concern with regard to the rule of law and the preservation of liberty was manifested in a document that lessened the power of government as a whole.

Even the national democracy, our democratic republic, was founded less as a means of effectuating democracy and more as a means of securing liberty. Conceding that participation in our democracy is itself a species of liberty²³ which helps to protect liberty as a whole, it should be remembered that demo-

21. F. McDONALD, *THE INTELLECTUAL WORLD OF THE FOUNDING FATHERS*, at 19, 16th Jefferson Lecture in the Humanities, National Endowment for the Humanities, May 6, 1987.

22. *Id.*

23. Some commentators and historians have argued that participation in our democratic institutions is the primary or even exclusive constitutional protection of liberty. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* (1980); W. NELSON AND R. PALMER, *LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC* (1987).

cratic participation is not the end in itself—liberty is. In Federalist No. 10, Madison argued that, despite the fact that liberty gives rise to faction, faction is essential to political life.²⁴ He asserted that the threat of a single faction commanding a continuing majority such that it might tyrannize minorities is significantly lessened at the national level. He added that a national democratic republic has the further virtue of restraining the excesses of faction without limiting liberty. He concluded by asserting that:

[I]t clearly appears that the same advantage which a republic has over a democracy in controlling the effects of faction is enjoyed by a large over a small republic—is enjoyed by the Union over the States composing it. Does this advantage consist in the substitution of representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and to schemes of injustice? It will not be denied that the representation of the Union will be most likely to possess these requisite endowments. Does it consist in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest? In an equal degree does the increased variety of parties comprised within the Union increase this security? Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority? Here again the extent of the Union gives it the most palpable advantage.²⁵

Deferential originalists are content to use democracy, at the state and national levels, to limit liberty. Ironically, they assert that they must exercise restraint because our representative democracy is the primary protector of individual liberty, even when the representative branches of government limit liberty in an individual case. As such, their theory is much more one of judicial restraint than one of liberty. In arguing for the ratification of the Constitution, Madison, on the other hand, clearly noted that our democratic republic was designed to serve liberty, not vice versa, as the deferential originalists contend.

A close reading of Federalist Nos. 47, 51, 62 and 63 illustrates, for example, that the purpose of bicameralism and the separation of powers was to help secure liberty. The framers

24. THE FEDERALIST No. 10, *supra* note 4, at 77-84.

25. *Id.* at 83-84.

built inefficiency into our political structure to inhibit the power of transitory majorities to tyrannize minorities. In *Federalist* No. 47, responding to the claim that shared powers among the branches of the federal government might expand governmental power and restrict liberty, Madison opined that:

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be apparent to everyone that the charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied.²⁶

Again, in *Federalist* No. 51, introducing a brief discussion of bicameralism, and writing generally about divided powers, Madison stressed that:

The policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distribution of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.²⁷

Fear of tyranny, particularly legislative tyranny, predominated in the writings of the proponents of the Constitution. Deferential originalists have turned this proposition on its head. They take the general, broad language of the Constitution and use it as a means to increase legislative power, such that the public interest prevails over individual interests and rights.

26. THE FEDERALIST No. 47, *supra* note 4, at 301.

27. THE FEDERALIST No. 51, *supra* note 4, at 322.

Even federalism, the division of power between the national and state governments, was designed to limit governmental power and preserve liberty. In this regard, in *Federalist* No. 55, Madison again argued that he was "unable to conceive that the State legislatures, which must feel so many motives to watch and which possess so many means of counteracting the federal legislature, would fail either to detect or to defeat a conspiracy of the latter against the liberties of their common constituents."²⁸

Finally, even if one were disposed to argue that the institutions and structure of the government provided for in the Constitution either were sufficient to protect liberty without judicial intervention or were not created to protect liberty, but were created to further democracy and other values apart from liberty, the existence of a Bill of Rights stands as significant evidence that the framers and ratifiers ultimately were concerned with the issue of preserving and extending liberty. The argument that liberty predominated in the constitutional fabric was made by James Wilson and James Madison, and is strengthened further by Alexander Hamilton's comments in *Federalist* No. 84, where he asserted: "The truth is, after all the declamations we have heard, that the Constitution is itself in every rational sense, and to every useful purpose, a BILL OF RIGHTS."²⁹ Indeed, Hamilton feared that the very ambiguity that would attend the drafting of a Bill of Rights might imply that the elected government had powers not granted to it—powers that would enable it to infringe upon individual liberty. In Hamilton's words:

I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things should not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?³⁰

Despite these protestations on the part of Hamilton and others, the people through their representatives in the state

28. THE FEDERALIST No. 55, *supra* note 4, at 344.

29. THE FEDERALIST No. 84, *supra* note 4, at 515.

30. *Id.* at 513-14.

ratifying conventions insisted that a Bill of Rights be added to the Constitution.³¹ In fact, despite having made arguments similar to those offered in Federalist No. 84 by Hamilton, Madison changed his mind and agreed to sponsor a Bill of Rights if he was elected to the House of Representatives.³² Thus, for example, the ninth amendment must be read in light of Madison's and Hamilton's fear that putting a Bill of Rights into writing might somehow be viewed as giving elected officials the power to limit such rights, by reading them restrictively.³³

Given the clear natural law and libertarian intentions or aspirations of the framers, deferential originalists are more true to their political philosophy of judicial restraint and deference to democratic institutions than they are to the intentions or aspirations of the framers. They unduly constrain constitutional principles, which were intended to constitute broad articulations of liberty, in order that they might defer to legislative and executive power. In this process, deferential originalists disregard history and disparage the libertarian aspirations of the framers and ratifiers.

Given the errors of deferential originalists, what is an originalist to do? Does the very breadth of constitutional principles and the indeterminacy of the concept of liberty render originalist analysis meaningless? I think not. But one must rehabilitate originalism in light of the breadth of constitutional principles and the generality of language used by the framers and in light of the somewhat indeterminate concept of liberty³⁴

31. See R. SMITH, *supra* note 5, at 73-75.

32. See *id.* at 75 and R. RUTLAND, *supra* note 3, at 196-200.

33. See Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 238-59 (1983). The Ninth Amendment provides that: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

34. It is conceded that the term "liberty" itself is indeterminate and difficult to define. Indeed, much has been written regarding what may have been intended by the framers and those of their generation when they referred to "liberty" and "rights." See, e.g., J.P. REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* (1986); W. NELSON & R. PALMER, *supra* note 23. However, I would assert that such "liberty" is twofold: (1) It consists of the "political privileges of the citizens in the structure and administration of the government." See *THE FEDERALIST*, No. 84, *supra* note 4, at 515 (This facet of liberty encompasses the right of citizens to participate in the institutions of their democratic republic); and (2) it also consists of "immunities" - the right of the people to be free from government intrusion in matters of "personal and private concern. . . ." *Id.* (this immunity of individuals from government intrusion into matter of private or personal concern arguably is the focus of the Bill of Rights—a

that imbued those principles with an overriding sense of purpose.

With such limitations in mind, I offer a less deferential theory of originalism. My reading of the history of the religion clauses in particular leads me to believe that the framers and ratifiers used and accepted broad language both to mask or minimize existing disagreement and to set in motion broad principles of religious liberty. Elsewhere, I have argued that the perimeters of religious liberty that were established when the framing of the religion clauses occurred are set by what I have referred to as the Madisonian and Story views.³⁵ While these views differ and are occasionally competing, they are not limitless. The perimeters, to borrow an image suggested by Professor Schauer, provide one with a canvas upon which to paint, or interpret.³⁶ There are matters that are, in my view, plainly off the canvas. For example, at the one extreme, it is clear that the intent of the framers and ratifiers of the first amendment precludes the establishment of a national religion. At the other extreme, it is also clear that this intent precludes a strict or complete separation of church and state.³⁷ Nevertheless, while some matters are clearly outside the perimeters gleaned from a comprehensive originalist analysis, the choices within the perimeters are numerous and occasionally conflicting. How, then, is one to choose, in the interpretive endeavor, from among tenable alternatives?

In my view, rather than deferring to the legislature, or to democratic institutions, in deciding among the various alternatives derived in an originalist analysis, a judge should seek to maximize liberty where possible. Under such a theory, the

document penned to ensure that the government would not intrude into such areas). Thus, for the purposes of this article, much of the focus will be on the right of individuals and groups to be free from government regulation in the area of religious liberty, the focus of the religion provision of the first amendment. Deferential originalists seem to ignore or severely limit the role of the judiciary in maintaining such community and liberty, despite Hamilton's statement that, "courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments [encroachments by democratic institutions on personal or private rights]. . . ." THE FEDERALIST, No. 78, *supra* note 4. In Federalist No. 78, Hamilton goes on to argue that the members of judiciary need to be independent and to hold life tenure. Independence and life tenure were deemed to be "essential to the faithful performance of so arduous a duty [the duty of securing personal and private liberty]." *Id.*

35. See R. SMITH, *supra* note 5, at 37-120.

36. Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 828 (1982).

37. See R. SMITH, *supra* note 5, at 73-132.

courts may expand individual liberty, where to do so does not otherwise unduly jeopardize the equal liberty of another.³⁸ But the judiciary may not restrict efforts by the legislature or democratic institutions to maximize or facilitate liberty unless those legislative efforts are clearly outside the perimeters disclosed by originalist analysis. Such a view is consistent both with the framers' and ratifiers' intentions (in that one accepts the perimeters established by conventional originalist analysis) and their broad, overriding libertarian aspirations (in that in selecting from among various interpretive possibilities disclosed through originalist analysis the judiciary remains true to the aspirations of the framers when it engages in a liberty-maximizing analysis).

Nevertheless, there are numerous problems with such an analytical framework. For the most part, I will leave my articulation of and response to those criticisms to another article, but I will deal at this juncture with one that is central to the thesis of this article. It has been argued that "liberty," like "equality," is a word that is so indeterminate that it is meaningless as an independent guide in judicial decisionmaking.³⁹ While I acknowledge this is an insight with some force, I reject the notion that it renders my analysis meaningless. To begin with, emphasizing liberty channels arguments into a particular, and I believe salutary, form. Furthermore, not every argument can be cast in an equally effective or persuasive liberty-maximizing form. A particularly adept lawyer might be capable of constructing liberty-based arguments in many surprising contexts, but the capacity of even the best lawyer to do so in a persuasive manner in every case is doubtful. Second, in the context of the first amendment, we have other constraints provided by the history and the language of the amendment itself. In that light, we are able to focus on more specific notions of religious liberty, rather than upon "liberty" in a general sense. In the following sections of this article, I argue that such a liberty-maximizing analysis is challenging, yet viable.

38. As noted previously, Madison proposed that religious liberty be protected unless: (1) the equal liberty of another would be limited by such an expansion of religious liberty, or (2) the interest of the state were manifestly endangered. See *supra* note 21.

39. See *supra* note 35 for citations regarding the ambiguous nature of the term "liberty."

II. MAXIMIZING LIBERTY UNDER THE ESTABLISHMENT CLAUSE

This section of this article has two subsections. Part A sets forth the various views regarding the establishment clause of the first amendment that are obtained through an originalist analysis. Part B examines each of those views to ascertain which one, or which combination, best maximizes liberty. In Part B, I also discuss the basic elements or components of religious liberty.

A. *The Establishment Clause: The Originalist Perimeter*

Elsewhere, I have analyzed the text, history and structure of the religion clauses of the first amendment in an originalist manner and argued that two views set the outside perimeter or establish the end points of a continuum of views espoused by the framers and ratifiers of the first amendment.⁴⁰ In that work, I concluded that Justice Story summarized one such view in his *Commentaries on the Constitution* and Madison articulated the other view.

I have summarized the Story view as follows: "(1) the people (generally, if not universally) believed that, in adopting the first amendment, Christianity could be encouraged by the state, provided only that such encouragement was not incompatible with rights of worship of non-Christians; and (2) any attempt 'to level *all* religions, and to make it a matter of state policy to hold *all* in utter indifference' would have met with '*universal disapprobation.*'"⁴¹ I also added that "Story apparently believed that the promotion of a generalized or nondenominational Christianity, provided it did not coerce another in the exercise of her religious rights or rights of conscience, would receive major support from within the states and not from the national government."⁴²

At the other end of the continuum was Madison's view. For Madison, the first amendment was intended to protect equal rights of conscience.⁴³ Nevertheless, while "no single religion or group of religions should be aided or established to the exclusion of less orthodox religions,"⁴⁴ Madison seemed to support nonpreferential aid to or accommodation of religion, so long as such accommodation did not deny another the equal right of conscience and so long as it did not constitute adoption

40. See R. SMITH, *supra* note 5, at 37-120.

41. *Id.* at 108.

42. *Id.* at 108-09.

43. *Id.* at 45-62, 81-111.

44. *Id.* at 56.

by the government of a given mode or form of worship.⁴⁵ For Madison, the liberty interest, or the right of conscience,⁴⁶ was preeminent in the framing of the religion clauses, and the government could not inhibit the exercise of one's right of conscience unless "the preservation of equal liberty [be infringed], and the existence of the State be manifestly endangered."⁴⁷

The perimeters, therefore, extend from the Story view, which would permit the State to recognize nondenominational Christianity so long as it did so in a tolerant manner, to the Madisonian view, which would permit the State to accommodate or facilitate the free exercise of conscience, only if it did so without infringing on another's equal liberty or placing its imprimatur on a particular form or mode of worship.

Since writing *Public Prayer and the Constitution*, in which I discussed the history of the adoption and ratification of the religion clauses in detail, it has occurred to me that Madison's view regarding nonpreferential aid can be broken down into three subcategories: (1) the government may accommodate or facilitate religion, so long as it does so in a nonpreferential manner (i.e., so long as it refrains from preferring one religion over another); (2) the government may accommodate or facilitate the exercise of conscience (as opposed to the more restrictive term "religion"), so long as it does not prefer one form of conscience over another; and (3) the government may accommodate or facilitate religion when to fail to do so would constitute preferring nonreligion or irreligion over religion or conscience (i.e., nonpreference between religion and nonreligion). Madison himself seems to have vacillated over the course of his lifetime as to which of these nonpreferentialist views he espoused. With the rise in public favor of the Story view during the early nineteenth century, which permitted the govern-

45. *Id.* at 66, 89-95.

46. Madison's provision regarding religions liberty, which he submitted to the First Congress with his draft of a Bill of Rights, provided that:

The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed. No state shall violate the equal rights of conscience.

1 ANNALS OF CONG. 451 (J. Gales ed. 1789), cited in R. SMITH, *supra* note 5, at 75. Madison no doubt emphasized the broader term "conscience" rather than "religion" or "religious exercise" for fear that restricting such protection to "religion" might limit such liberty due to constrained interpretations as to what is or is not religion or religious exercise for first amendment purposes.

47. See R. SMITH, *supra* note 5, at 39.

ment to accommodate nondenominational Christianity, Madison seemed to react by gravitating from the nonpreference as to religion view to either the nonpreference as to matters of conscience or nonpreference between religion and nonreligion views.⁴⁸ It is clear that the latter view, that of nonpreference between religion and nonreligion, comes closest to being a strict separationist position, but even it falls short of calling for a nonreligious or irreligious public sector.

B. *Maximizing Liberty: An Analysis of Possible Views*

In this section, I examine each of the major views regarding the religion clauses: strict separation, nonpreference between religion and nonreligion, nonpreference as to matters of conscience, nonpreference among religions, the Story view, and the view that government may promote a particular religion. While I have argued elsewhere that neither strict separation nor the governmental promotion of a specific religion are consistent with the intent of the framers and ratifiers, I will nevertheless include them in my analysis for the purpose of determining whether or not they are better suited to promote religious liberty (the aspiration of the framers and ratifiers) than the other views. Before examining the various viewpoints, however, I will set forth the nature of the liberty interests typically involved in delineating or defining religious liberty.

1. The Liberty Interests

There are four general liberty interests or areas of doctrine that relate to the issue of religious liberty. They include the right of religious speech or expression, the right of religious association, the right to exercise one's religion freely, and the right to be free from governmental establishment of religion. Though each of these doctrinal areas have distinct conceptual bases, it is clear that they often interrelate and may even sometimes conflict. A brief examination of each doctrinal area will serve to highlight conceptual differences, as well as drawing attention to some of the interrelationships.

48. Early in life, at the time he penned the *Memorial and Remonstrance*, Madison seemed to opt for the view permitting nonpreferential aid of religion. See R. SMITH, *supra* note 5, at 51-59. By 1820, however, when he penned his *Detached Memoranda*, Madison seems to have vacillated by coming to espouse a view very close to the nonpreference between religion and nonreligion view. *Id.* at 100-03.

a. *Religious Speech or Expression*

The right of religious speech or expression has been recognized in various cases. There are those who have argued that an aggressive use of the doctrine of free expression, including religious expression, would go a long way toward relaxing the evident tension between the free exercise and establishment rights.⁴⁹ Essentially, the right of religious speech or expression protects religious liberty, by restraining the government when it acts to limit or infringe religious speech and expression.

Dean Choper, however, recently used the *Yoder* case as an illustration of his point that the protection of religion or religious liberty from government regulation and intrusion is not coextensive with the protection of religious speech and expression.⁵⁰ Professor Stone agrees that the Court "extends . . . greater protection to religious choice than to expressive choice."⁵¹

While it is evident that, as a doctrinal matter, religious liberty consists of more than protection of religious speech and expression, it is also arguable that not all religious speech or expression should receive the same degree of solicitude or protection afforded other forms of speech and expression. There are times when the establishment clause liberty interest would limit solicitude for religious speech or expression, in ways that other nonreligious forms of expression need not be limited. On occasion, governmental protection of religious expression could be construed as giving a particular religion protection not afforded other religions or as placing the imprimatur of the state on that form of religious speech. For example, while a court might recognize a limited public forum in the public elementary or secondary school context, it is certainly conceivable that the court would not permit similar access for religious speech or expression where recognizing that such speech or expression would give impressionable students the sense that government supported that religious speech. Similarly, where permitting such religious expression gave rise to an environment of coercion in which student religious speakers used the public forum as a means of coercing their fellow, nonbelieving

49. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983).

50. Choper, *The Free Exercise Clause: A Structural Overview and An Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 944-50 (1986).

51. Stone, *Constitutionally Compelled Exemptions and the Free Exercise Clause*, 27 WM. & MARY L. REV. 985, 993-96 (1986).

students, recognizing such expressions might not maximize liberty.

Thus, while the protection of religious speech or expression is an element of religious liberty, it is both over- and under-inclusive as a doctrinal matter. In other words, there are additional elements to religious liberty that would cause religious expression to be more expansive than nonreligious expression in some instances, and less expansive in other instances, as a doctrinal matter. To delineate the nature of that over- and under-inclusiveness, one must examine the other elements of religious liberty.

b. The Right of Religious Association

The first amendment recognizes a general right of assembly and an implied right of association.⁵² That associational right has particular force in the area of religion. Professor Gedicks has recently made a strong case for recognizing a vibrant right of religious association.⁵³ In that article, Gedicks argues that religious liberty often finds its fruition in the formation of an independent, autonomous group or community, a group or community that should be protected from undue governmental regulation. He argues that "when religious group membership is genuinely voluntary, the need for government intervention to protect individual autonomy upon an individual's rejection or expulsion from membership is substantially

52. "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . ." U.S. CONST. amend. I. Of course, the language of the first amendment expressly provides for a right of assembly, as opposed to a right of association, but the right of assembly together with the other express rights included in the first amendment imply a right of association for the purpose of exercising those other specific rights. In his opinion for the Court in *Roberts v. United States Jaycees*, 468 U.S. 609, at 623, Justice Brennan acknowledged the existence of an independent associational right, when he noted:

There can be no clearer example of an intrusion into the internal structure or affairs of an association than the regulation that forces the groups to accept members it does not desire. Freedom of association therefore plainly presupposes a freedom not to associate.

However, Justice Brennan added that, like other first amendment rights, the right to associate for expressive purposes is not "absolute." *Id.* As such, "[i]nfringements in [the right to associate] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.*

53. Gedicks, *Towards a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99.

diminished. Individual autonomy is adequately protected by religious pluralism."⁵⁴ In a different context, Professor Watson recently argued that the emphasis of the western legal tradition on individual liberty can have a deleterious effect on the formation of a meaningful sense of community on the part of individuals who do not share in that tradition.⁵⁵ Care must be taken, in such a context, to assure that the private, community-forming aspect of the religious right of association is not wholly overridden by the emphasis in our western legal tradition on individual rights and interests.

The right of religious association seems to protect the liberty of individuals to maximize their religious identity and liberty by affiliating with groups of common believers. While such an emphasis on or need for a sense of community occurs in other contexts, it seems clear that the communal, associational aspect of religious groups is particularly powerful and deserving of protection in the interest of maximizing religious liberty. It is precisely this associational interest that seemed to be determinative with regard to the Court's recent decision in *Amos*,⁵⁶ in which the Court upheld the right of the Church of Jesus Christ of Latter-day Saints to place religious qualifications or limitations on their employees.

As is the case with regard to the free speech and expression interest, however, the right of religious association is not and should not be without limit. Given the proliferation of the public sector and the growth of the regulatory state, conflicts between religious associations and the government have been and no doubt will continue to be exacerbated. This exacerbation, in turn, has contributed to the need to delineate more clearly between the proper role and sphere of influence of both the religious community as it comes into contact with or seeks to influence the public sector and the government as it directly or indirectly regulates the religious community. The need for noncoercion, both on the part of the government and on the part of the religious community as they interact, and the need for equality of treatment among religious and, perhaps, non-religious groups or communities is heightened in the contemporary context.

54. *Id.* at 153.

55. Watson, *The Justice of the U.S. Constitution*, 1 INTER. J. MORAL & SOCIAL STUDIES 21 (1986).

56. *The Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987).

c. *The Right of Free Exercise*

In addition to the right of association and the right of free speech or expression, the first amendment expressly provides for a right of free exercise. The right to exercise one's religion free from governmental infringement is perhaps the most critical element of religious liberty. Most commonly, when the Court recognizes the right of free exercise, it does so by exempting a religious individual or group from a governmental regulation. Such a regulation may be expressly or directly addressed to religious exercise. In that case, the governmental intrusion or infringement is subjected to very strict scrutiny.⁵⁷ In other instances, the infringement is indirect or incidental,⁵⁸ and it is in these cases that the most significant problems arise in deciding free exercise cases and fashioning legal doctrine.

This is not surprising, because exempting a person on religious grounds from the coverage of a law or regulation of general scope not directed expressly, by its terms, to a religious exercise creates a tension or preference that seemingly goes to the heart of religious liberty. Judge Arlin Adams recently recognized this tension when he noted that "[i]f the government (through the courts or otherwise) grants an exemption to a believer under the free exercise clause, while requiring all others to obey the law, the government effectively prefers the religion of that individual over the religion of those individuals who adhere to other religious beliefs"⁵⁹ Relatedly, Professor Stone has argued that there are two difficulties that arise when, under the free exercise clause or some other provision, a constitutionally compelled exemption is recognized: (1) it "may create preferences that directly undermine the very constitutional guarantees that [such exemptions are] designed to protect,"⁶⁰ and (2) it "may necessitate inquiries (into matters such as sincerity) that may themselves undermine the very constitutional guarantees that the exemptions are designed to protect."⁶¹

Thus, with the free exercise clause, as with the rights of expression and association, we are faced with a dilemma, perhaps even a catch-22. On the one hand, recognizing the right

57. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 1250-53 (2d ed. 1988).

58. *Id.* at 1254-55, 1262-75.

59. Adams & Gordon, *The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses*, 37 DE PAUL L. REV. 317, 328 (1988).

60. Stone, *supra* note 51, at 987.

61. *Id.* at 988.

of free exercise requires that individuals be exempted from general legislation when that legislation infringes on their right of free exercise. On the other hand, however, when government acts to exempt an individual from a law of general application it seemingly prefers that religion. This preference may generate an establishment clause issue.

d. The Right to Be Free From Governmental Establishment of Religion

The right to be free from laws or regulations "respecting an establishment of religion"⁶² is expressly included in the first amendment as well. Given the potential excesses, upon application, of each of the other rights, as related to religious liberty, it is not surprising that the framers saw fit to include a right to be free from governmental establishment of religion. Allowed to proceed without limit, the rights of free exercise, association and expression, as applied, would themselves undermine the very religious liberty they were designed to further. The establishment clause was intended, therefore, to perform a liberty-maximizing function, by limiting the excesses of each of the other first amendment doctrines applicable in the religious liberty context. Potentially, it also helps secure liberty by limiting the power of the state to coerce or influence religious choices, to otherwise show preference for one religion over another, or to place its imprimatur on a particular religion or group of religions. The need for a clause to perform such a function is all the more acute in contemporary America, which is characterized by a pervasive regulatory structure unimagined by the framers.

However, the challenges are even subtler than those just enumerated. The establishment clause must do more than check the excesses of the other elements of religious liberty. It must also deal with the problem of governmental coercion and largesse. During the framing era, the major concerns of the framers and ratifiers focused on their fear that government might intrude unduly into matters of religious expression, association and exercise by preferring one religion or group of religions over others. They were also concerned that the new government might use its purse in a way that unduly influenced religious choice. Today, however, with the growth of governmental power and regulation, and the pervasiveness of various governmental programs and institutions—perhaps most notably the taxing, spending and commerce powers—government

62. U.S. CONST. amend. I.

has a capacity to influence religious choice in a manner inconceivable to the framers. In this context, the establishment clause must function not merely to limit government excesses by assuring that the judiciary does not carve out exemptions or doctrinal preferences that hinder religion; it must also be used to create doctrines that enhance religious liberty, both of individuals and churches, in an era of burgeoning government. The government, particularly through the legislative and executive branches, has the power to accommodate or facilitate religious exercise by creating legislative and administrative exemptions of varying breadth. It also has the power to use its largesse to accommodate religious exercise, through tax and budgetary benefits, although in this area it confronts strong, institutional disincentives. Each such exemption or allocation has the effect of creating budgetary and related costs and inefficiencies for the government. This is particularly true when a minority religion is the potential beneficiary, because in addition to the inefficient and sometimes costly nature of creating and maintaining religious budgetary or related exemptions, such minorities have little political clout. Thus, over the course of our history, the Court, which has assumed the primary role in formulating constitutional doctrine, either by default or otherwise, must formulate an establishment clause doctrine that maximizes liberty and minimizes the costs attendant with the vindication of that liberty.⁶³

Accordingly, in our examination of each proffered doctrinal framework in the establishment clause area, we must be attentive to the need to address the excesses of each of the other elements of religious liberty (expression, association and exercise) and their potential for limiting the very liberty they are intended to effectuate. As trying and unsettling as this task may be, it is compounded by the fact that the doctrine must be fine-tuned in an environment dominated by an ever-increasing regulatory state, a state inclined to take all that comes in its way into its vortex. It is precisely this problem that I believe Dallin Oaks was referring to when he argued that, as the regulatory state has grown, it has been forced to accommodate religious exercise, but paradoxically, with each new accommodation, it

63. In *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), the Court recognized that the judiciary - an independent and nonelected branch of government - has a peculiar role in protecting the constitutional rights of minorities that might be restricted from giving redress from the majoritarian, democratic political processes. The framers certainly recognized this principle as well. See, e.g., *THE FEDERALIST*, Nos. 78 and 80, *supra* note 4, at 469-70, 478.

has widened its regulatory vortex and limited free exercise.⁶⁴ A viable and vibrant establishment clause must address this threat to religious liberty as well. In doing so, it must be sensitive to the role of the judiciary and the legislative and executive branches⁶⁵ of government, and it must be sensitive to transaction costs, as it allocates burdens among individuals and the state in formulating its doctrine.

2. A Liberty-Maximizing Analysis of Various Establishment Clause Doctrines

With the foregoing, formidable challenges to any viable and vibrant establishment clause doctrine in mind, I will examine each of the theoretical bases for establishment clause doctrine. I will begin from one end of the continuum and work my way to the other end. To this end, I will examine each of the following views: the view that government may promote a national religion; the Story view that government may promote or accommodate nondenominational Christianity (or Judeo-Christian religion); the nonpreferentialist view that government may accommodate or facilitate religious exercise in a nonpreferential manner; and the strict separationist view that government must maintain a nonreligious public sector. Concluding as I do that the general nonpreferentialist view has the greatest potential for maximizing religious liberty, I then turn to an examination of each of the three nonpreferentialist views, to ascertain which one of them has the greatest likelihood of minimizing the problems attendant with nonpreferentialist theory and of maximizing liberty in the process.

a. *Promoting a National Religion*

From a liberty-maximizing standpoint, the view that government may selectively promote religion has little to commend it. It is outside the perimeters set by the intent of the

64. Oaks, *Separation, Accommodation and the Future of Church and State*, 35 DEPAUL L. REV. 1 (1985).

65. It should never be forgotten that there are costs that attend pursuing litigation. Such costs must be taken into account when the Court is allocating burdens of proof and establishing doctrinal standards in the first amendment area. If the Court places heavy burdens or creates unclear doctrine, it may well inhibit the religious rights of individuals, because such individuals may find themselves unable to initiate and maintain a suit against the government to vindicate their rights. In addition to economic costs, such unclear or ill-defined doctrinal matters may also give courts discretion to limit the rights of disfavored, minority religions. See L. TRIBE, *supra* note 57, at 1244-46.

framers and ratifiers precisely because they believed that the religion clauses were necessary to avoid the infringement on liberty caused by such a state of affairs. The Anglican Church had been the established Church in Britain, at the time of the Revolution, and had, in the eyes of the framers, been an instrument of oppression by virtue of that status. English history was filled with violence and intolerance as the result of such an establishment and its impact on those who refused to accept the doctrine or faith of the established church.

However, despite this history and the clear sense that a specific religious establishment, by its very nature, demeans the liberty of those who do not accept it, there are some possible liberty-enhancing arguments favoring such a view. If such a religion were to hold as a major article of its faith the belief that all should be free to choose in religious matters and that the government should do nothing to inhibit that choice, such an establishment might not intrude unduly on religious liberty (at least in theory). If such a religion were established, it might have little tendency to infringe on religious liberty, and by its very doctrine might encourage the government in its effort to afford a breadth of religious liberty and toleration to its citizenry. However, conceived as such, the established religion would have little reason for being established or preferred by the government, and its contribution to religious liberty would be merely derivative. It would be derivative in the sense that government would be encouraged to promote religious liberty, precisely because it had as its established religion a liberty-minded church.

If the benefit of such an established religion is purely derivative, however, it would have little to commend it, other than the fortuity of the doctrine of the established church, and it would be the doctrine that ensured liberty not the fact that the church was established. A proponent of such an establishment might respond, however, that a liberty-minded established church would promote liberty by its force of presence and by its contribution to order. In that sense, the existence of such an established church would facilitate the state in its efforts to ensure religious liberty, by contributing to the doctrinal basis for such liberty and by eliminating the rush of religious sects to gain political power and promote their religion by obtaining the imprimatur of the state.

Even cast in its most appealing form, however, such an establishment has within it the very seeds of its demise as a liberty-maximizing device. On the one hand, it is hard to imagine that even such a liberty-minded church would not use the

power and prestige of the state, at least subtly, to encourage the citizenry to accept its theology or modes of worship, as well as its doctrine regarding religious liberty. As such, the very appeal of its doctrine regarding religious liberty, coupled with its establishment, might have the tendency subtly to incline the populous to accept the rest of its theology. Its appeal in terms of order is also questionable. Having created the precedent of an establishment, and coupling that precedent with a doctrine of religious liberty that would permit other churches free reign, it is quite conceivable that the liberty-minded church would one day be displaced by a church more bent on overtly using the government to promote its doctrine. Given these objections, it would seem that the framers were right: an established church has little to commend it in terms of its capacity to maximize liberty.

b. The Story View

Professor Esbeck, without directly referring to the Story view, has summarized it effectively in his definition of "restorationists": "[R]estorationists have no intention of engaging in religious persecution in the sense of coercion of conscience. They recognize that conversion to Christianity, if it is to be sincere, must be wholly voluntary. Accordingly, the state [may] prefer the Christian faith, which they believe would subtly encourage conversion, while refraining from acts of intolerance toward dissenters."⁶⁶ The Story view—that the government may promote nondenominational Christianity in a tolerant manner—like the view that the government may prefer a specific religion, has little to commend it as a liberty-maximizing theory. Its strengths lie in other areas.

Like the view that government may establish a specific religion, the Story view seemingly would promote order, by limiting controversy among Christian groups, which is common in our society, and by promoting "tolerance" toward other groups. With such order and tolerance, so the argument goes, liberty would be promoted, because the principal reasons for religious strife, particularly among major religions, would be removed. The appeal of such a position, like the appeal of Oscar Wilde's suggestion that the best way to cope with temptation is to give in to it, is facetious at best and pernicious at worst.⁶⁷

66. Esbeck, *Five Views of Church-State Relations in Contemporary American Thought*, 1986 B.Y.U. L. REV. 371, 401.

67. O. WILDE, *THE PICTURE OF DORIAN GRAY* (1974).

Tolerance is hardly liberty. Indeed, tolerance by its very nature is a notion that recognizes insiders and outsiders, winners and losers. Those who tolerate are insiders, winners if you will. Those who are tolerated are outsiders, the losers. The message to outsiders is none too veiled: their views are paternalistically tolerated by those in power, much as a parent accepts momentary indiscretions on the part of their children as a cost of growing up.

Moreover, the concept of "nondenominational Christianity" is hardly productive of the order it promises. Groups that call themselves "Christian" often disagree as to what constitutes true "Christianity." There is some similarity of doctrine and belief among Christian denominations, but disagreement runs deep. There is disagreement even as to what scriptures are acceptable as a source of theological doctrine.⁶⁸ And the interpretation of those scriptural sources, even when these are agreed upon, invites disagreement. Furthermore, if one discounts such differences, by creating a nondenominational least common denominator, religion is stripped of much of its vitality. Thus, under the Story view, the government is left, at best, to promote a trivialized religion, a religion of the least common denominator—a religion that no group really accepts, and whose only redeeming virtues are that it allows the government to keep the people at peace and keep religious groups away from the public trough. Thus defined, the Story view has every appearance of being a device to trivialize religion, and may well permit the government to legitimize its unwillingness to recognize religious expression, association and exercise when these interests come in conflict with governmental ends. Religion is trivialized as a doctrinal matter under such a view, and religious exercise, expression and association are liable to be minimized by a sort of "I gave at the office" rationale, in which government, having recognized, albeit in a trivial way, the minimalist trappings of Christianity, need not concern itself with other-

68. For example, in discussing *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), I have previously noted that

The school districts [in *Schempp*] had encouraged Bible reading and recitation, but difficulties arose over what version of the Bible should be used. Catholics prefer the Douay version, Jews reject the New Testament, and even Protestants split as to which of many translations of the Bible is preferable. Given these differences, which are themselves often rooted in doctrine, the Bible reading involved in *Schempp* raised problems of a theological nature. The Bible is not easily susceptible to nondenominational use in a Christian or Judeo-Christian sense.

R. SMITH, *supra* note 5, at 183.

wise accommodating specific religions or individual religious exercise.

c. The Nonpreferential View

By its terms, the nonpreferential view—the view that government may accommodate religious exercise or matters of conscience, so long as it does so in a nonpreferential manner—is less prone to the creation of outsiders than are the Story and established national religion views previously analyzed. Nonpreferentialists would permit all to share equally in government accommodations or facilitations of religion and religious exercise. They would also seemingly eschew any efforts by government to adopt a given mode, form or article of worship as the government's own, or to coerce individuals or groups in their religious beliefs.

Furthermore, on the surface, the nonpreferential theory resolves the excesses of the expression, association and exercise elements of religious liberty, because it would limit their application by requiring that all be treated equally or nonpreferentially. Exemptions from governmental regulations, sharing of governmental largesse, religious expression and association would all be subject to the restriction that government could not act in a preferential manner.

At least in theory, the nonpreferentialists also would be able to deal with the issue of growth in government and its capacity and perhaps even propensity to regulate religion into oblivion or obsequiousness. Nonpreferentialism would permit and perhaps even mandate accommodation, as a means of dealing with government coercion. Professor Tushnet has referred to institutional coercion as a form of coercion that must be dealt with under a religion clause analysis. For Professor Tushnet, institutional coercion—the kind of coercion most common in our regulatory state—occurs when “the government creates a set of institutions, none of which individually have a religious purpose but all of which together create incentives that influence or, more strongly, coerce choice in religious matters.”⁶⁹ The nonpreferentialist would argue that her equality principle, the principle of governmental nonpreference in

69. Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997, 999 (1986). Recognizing such institutional coercion and its impact on religious exercise, Professor Tushnet goes on to note that, “[u]nfortunately, an analysis of institutional coercion shows how difficult it is to link the coercion of tax payments to restrictions on religious liberty.” *Id.*

matters of religion, would limit institutional coercion by requiring the government to treat all religions alike and to coerce none in the process. Relatedly, since all religious sects would understand that they were to be treated equally, religious strife would lessen—what one received, all would be eligible to receive.

While there is appeal in each of these arguments, problems do arise. As one reflects on the equality aspect of the nonpreference principle that would imbue establishment clause doctrine with its meaning under the nonpreferentialist view, it becomes evident that Professor Westen's insight that the equality principle standing alone is empty or devoid of doctrinal meaning has some force in this area.⁷⁰ For example, rather than leading to more accommodation, particularly in the free exercise area, an unfettered nonpreferentialist doctrine could be interpreted in such a manner that its use might lead to less liberty, as applied. Under such an interpretation, an individual seeking to be freed from the strictures of a regulation that offended her religion would be precluded from obtaining such freedom, because to permit that individual to be exempt from such a law, unless the law was directed specifically at her religion, would be to prefer that individual's religion over another's or over nonreligion generally. Since the nonpreference doctrine prohibits governmental preference in matters of religion, no such exemption could be recognized. Similarly, a church seeking to protect its associational rights, as did the Church of Jesus Christ of Latter-day Saints in the *Amos* case (under which it sought exemption from personnel regulations of the Civil Rights Act), would be precluded from doing so, because not all religions would need such an exemption. Furthermore, even as to sharing in the governmental largesse, problems would arise. For example, if legislation were devised whereby religious institutions were permitted to obtain governmental support for their sectarian schools, two difficulties would have to be faced. First, religions that do not have schools or lack the resources to develop them would be able to argue, with some force, that they were being discriminated against—that the legislation was designed to prefer those religious groups that have or can afford to maintain such schools. Second, since public money could not be used to further one religion's mission over another's, the government would need

70. Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982); but see, Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 573 (1983).

either to ensure that the funds were being spent for secular purposes or would need to give similar amounts to all religious groups for the furtherance of aspects of their religion. On the other hand, however, in an effort to maximize religious liberty, the nonpreference or equality principle might be interpreted, as it most often is,⁷¹ to permit religions to have nonpreferential access to governmental accommodations or benefits, even though not every religion is equally situated to share in those benefits. On the whole, it would seem that such a view would do more to promote religious liberty, but its excesses, in terms of preference for more politically astute and powerful religions, remain troublesome and would necessitate some limiting doctrines. At any rate, it is clear from the preceding definitional analysis, that nonpreferentialism is not self-effectuating. Rather it derives meaning as it is interpreted. Nevertheless, I remain convinced that nonpreferentialism is not meaningless, particularly when the interpreter focuses on the liberty-maximizing purpose of the theory.

In addition to the argument that the broad concept of nonpreference is without substantive meaning, it should also be noted that the use of the notion of "religion" in nonpreferentialism is potentially exclusionary in two senses. It excludes the nonbeliever, and it has the potential of excluding religions that are less conventional. Less conventional and certainly many nonwestern religions do not share the common indicia of most mainline or mainstream western religions, and the judge or decisionmaker given the responsibility of insuring against nonpreference might be inclined by her own religious bias or by acceptance of a western definitional framework to limit the ambit of such a nonpreferential treatment to conventional religions which share common and familiar indicia of what it means to be a "religion." The decisionmaker also might get involved in determinations of sincerity and might be inclined to find participation in less conventional religions to be less sincere and therefore less deserving of protection. In summary, the term "nonpreference" is so broad that it lacks self-effectuating meaning, without more qualification, and use of the term "religion" to limit such a broad reading may incline toward exclusion. The theoretical trick thus seems to be to find a form

71. See, e.g., *Mueller v. Allen*, 463 U.S. 388 (1981), in which the Court held that a facially neutral tax deduction was not unconstitutional on establishment clause grounds merely because its financial benefits flowed principally to families of parochial school children.

of nonpreference that is neither so broad as to be devoid of meaning nor so narrow as to be exclusionary.

Finally, if nonpreferential doctrine is used as a means of expanding government accommodation of religion, in terms of the sharing of the government's largesse, it might open new areas of regulation of religion, thereby restricting rather than enhancing religious liberty. Governmental sharing of its largesse is often conditional, and such conditions may well coerce religions and religious exercise.

Thus, while of all the doctrines discussed so far the non-preferentialist doctrine has the most appeal as a liberty-maximizing doctrine, it needs to be clarified in a definitional sense. It also must be designed to deal with the problem of providing exemptions under free exercise and associational principles to some but not all religions, because not all religions and individual religionists are similarly affected by various governmental regulations.

The definitional problem may be solved by getting clearer about what is meant by "nonpreference"—nonpreference among religions, nonpreference as to matters of conscience, or nonpreference between religion and nonreligion. The problem regarding exemptions might be resolved, in part, by recognizing that while all religions do not qualify for or stand in need of the same exemptions, they all are better off, in terms of a liberty-maximizing analysis, by the recognition of specific exemptions, whether or not they qualify for each such exemption, at least to the extent that the government is not involved in creating such exemptions for improper, preferential reasons. Under such reasoning, specific exemptions would be acceptable unless it could be established that the creation of the exemption by the government was tainted by improper motives (much like the discriminatory purpose analysis extant in disparate impact cases in equal protection analysis in the racial context⁷²).

While it is clear that nonpreferential theory has appeal as a libertarian theoretical basis for establishment clause doctrine, it needs embellishment or development as a theory. However, before endeavoring to salvage nonpreferential theory, by embellishing on its theoretical underpinnings, I will examine the strict separationist theory to ascertain whether it has lib-

72. For example, in *Washington v. Davis*, 426 U.S. 229, 240 (1976), the Court asserted that, "the basic equal protection principles that the invidious quality of a law claimed to be racially discriminating must ultimately be traced to a racially discriminatory purpose."

erty-maximizing virtues that render rehabilitation or clarification of nonpreferentialist theory unnecessary.

d. The Strict Separation View

Strict separationists have long argued that their view — that government and religion should be entirely separate — enhances individual freedom.⁷³ In essence, they argue that voluntarism and separatism imbue their strict separationist view with a liberty-maximizing effect or meaning. Professor Kurland has argued that his version of strict separation, which he labels “neutrality,”⁷⁴ insures that each individual may make religious and nonreligious choices without interference from government.⁷⁵ As Professor Van Alstyne notes in a similar regard, “Voluntarism [is] the principle of personal choice.”⁷⁶ Both Professors Kurland and Van Alstyne add that the establishment clause includes a notion of separatism, as well. Professor Van Alstyne refers to such separatism as “the principle of non-entanglement [between government and religion],”⁷⁷ and Professor Kurland refers to it as the avoidance of the “havoc that religious conflicts ha[ve] imposed on mankind throughout history.”⁷⁸ Thus, voluntarism (the right to choose free from government coercion or influence) and separatism (the right to be free from government entanglement) are related principles adhered to by most strict separationists. As such, it is argued that a strict separation of church and state facilitates liberty by

73. See, e.g., Dorsen, *The Religion Clauses and Nonbelievers*, 27 WM. & MARY L. REV. 865 (1986), and the discussion of strict separationist theory in Esbeck, *supra* note 66, at 379-85.

74. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961). In this seminal article, Professor Kurland sets forth his theory of governmental “neutrality” as to matters of religion.

75. *Id.* See also, Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839 (1986) [hereinafter *Origins*].

76. Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall - A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 779.

77. *Id.*

78. Kurland, *Origins*, *supra* note 76, at 860. In this regard, Professor Kurland stated:

I think I can confidently say that the intended direction of the First Amendment was the enhancement of individual freedom. I am also confident that the objectives were to establish an equality among persons, so that each individual could choose without interference how to commune with God, and to avoid the havoc that religious conflicts had imposed on mankind throughout history.

Id. While I generally agree with each of these preliminary points raised by Professor Kurland, I do not share his historical and theoretical conclusion that strict neutrality or separation was intended by the framers.

insuring that choices in the religious context are both voluntary and privatized. Strict separationists argue that such voluntary, privatized choice protects believer and non-believer alike, and maximizes the liberty of all in the process. They add that the merger of religion with the state trivializes or "profanes" religion.

Such a theory, however, does not survive scrutiny on either voluntarism or separatism grounds. Strict separation does not facilitate voluntarism in a libertarian sense. Given the massive growth of the public sector, to limit free exercise or the exercise of one's voluntary right of conscience to the private sector is to constrain the right and liberty itself. Under conventional free exercise analysis, an analysis many strict separationists purport to be in agreement with, an individual may argue that her free exercise right has been violated by a government regulation. The regulation may be direct, in that by its express terms it regulates specific religious activity, or indirect, in that its terms are general in application but have the effect of infringing on or limiting one's free exercise right. Strict separationists, like nonpreferentialists, have no problem with regard to direct, express governmental limitations on free exercise, because government has no business promulgating regulations that directly infringe the right of free exercise. However, with regard to regulations that are general in application but have the incidental effect of infringing an individual's free exercise, strict separationists have conceptual difficulties with accommodating an individual's free exercise right. If a strict separationist were to recognize such a voluntary right, she would carve out an exemption, on religious grounds, to a general regulation, and in the process would arguably result in governmental favoritism toward religion. Such favoritism may effectuate voluntarism, but it violates the principle of separatism. Thus, separatism conflicts with voluntarism, unless voluntarism is read restrictively to include only express, specific governmental denials of religious liberty. Such a limited voluntarism is hardly liberty-maximizing in our contemporary regulatory state. This limited voluntarism also would restrict carving out exemptions in furtherance of the free expression and associational rights or elements of religious liberty, because to carve out such an exemption would cause government to cease to remain strictly separated from religion.

Apart from the conflict between the voluntarism and separatist principles that inheres in strict separationist theory, the separatist ideal itself is impractical or unobtainable. Professor Tushnet recognizes this when he points out that "institutional

coercion" arises whenever "government creates a set of institutions, none of which individually have a religious purpose but all of which together create incentives that influence or, more strongly, coerce choice in religious matters."⁷⁹ Tushnet goes on to note that governmental subsidization of secular education constitutes just such institutional coercion.⁸⁰ Professor Gelfand has made a somewhat similar point with regard to the teaching of creation science or evolution in public schools.⁸¹ With the expansion of the public sector, to demand that the public realm remain free from religious activity and from the accommodation of religious exercise within the sector, is to disparage or limit voluntary religious exercise on the ground that it should be privatized. Again, while such separatism may be supported by various values independent of individual liberty, it is clear that separatism, particularly in late twentieth century America, does not maximize religious liberty.

Indeed, the limited voluntarism required by the separatist value espoused by strict separationists, together with the tendency of separatism to limit the ambit of free exercise to a shrinking private sector, indicate that the strict separation view is less libertarian, in terms of maximizing religious liberty, than the nonpreferentialist and possibly even the Story views. The call for "irreligion in the public sector" is a call for minimizing religious exercise, expression and association by privatizing it. Neither the Story view nor the nonpreferentialist view limit exercise, expression and association in this way; rather, both seek to effectuate a less restrictive alternative, in terms of limiting the liberty interests involved. They seek a balance in this regard by regulating the excesses of public accommodation, either by imposing a tolerance or an equality limitation on such an accommodation principle.

It should be added that the strict separationist view, like the nonpreferentialist view, has definitional problems with regard to determining what is "religion" for strict separationist purposes. If some exercise or act is religious, then it must be purged from the public sector; but it is not clear, as has been noted, whether "religion" should be read broadly or restrictively. Indeed, for her theory to remain viable at all today, I would argue that the strict separationist must define "religion" restrictively so as to accommodate and permit actions in the

79. Tushnet, *supra* note 69, at 999.

80. *Id.* at 999-1000.

81. Gelfand, *Of Monkeys and Men: An Atheist's Heretical View of the Constitutionality of Teaching the Disproof of a Religion in the Public Schools*, 16 J.L. & EDUC. 271 (1987).

public realm that might otherwise be considered to be religious.⁸² Of course, if this were the case, that which is most clearly religious and at the heart of religious exercise would be restricted, while more trivial and less important religious acts would be accommodated by reading "religion" restrictively. In this way the strict separationist view may tend to trivialize religion.

In summary, while each of the theories proffered as an underpinning for establishment theory has problems in terms of maximizing religious liberty, the nonpreferentialist theory seems to be the most likely candidate for elaboration. In the following section, I will analyze nonpreferentialist theory by examining three derivations of such a theory—nonpreference as to religion, nonpreference as to conscience, and nonpreference between religion and nonreligion—to determine which of those derivations best maximizes liberty. In this regard, it is interesting to note that the three theories of nonpreference also fall on a continuum between the Story and the strict separationist views: the nonpreference among religions view is closest to the Story view, the nonpreference between religion and nonreligion view is closest to the strict separationist position, and the nonpreference as to matters of conscience view is in the middle. In fact, in his taxonomy of strict separationist views, Professor Esbeck has created a category, which he labels "pluralistic separationism," which comes quite close to defining the view that government may not prefer religion over nonreligion.⁸³

e. Rehabilitating the Nonpreferential View: Three Possibilities

As previously noted, nonpreferentialism, like equality, can be fairly devoid of meaning without doctrinal or theoretical limitation from some other source. Nevertheless, some limitation occurs in the first amendment context, because the equality notion is limited by its reference to religion, conscience, or

82. *Id.* Professor Gelfand makes an interesting argument to the effect that neither evolutionary theory nor creationist theory may be taught in the public schools, because the teaching of either one prefers one religion over another. As an atheist, Professor Gelfand asserts that his religion (or at least the disproof of religion) is furthered when evolution is taught. While I have argued that Professor Gelfand inappropriately arrogates scientific theory to his religion, I would concede that his thesis is troublesome. Indeed, his argument illustrates the need to define "religion" restrictively under strict separationist theory to avoid purging the teaching or support of doctrines like evolution from the public sector.

83. Esbeck, *supra* note 66, at 385-89.

religion and nonreligion. However, as will be shown, the third category, nonpreference between religion and nonreligion, is the least susceptible to definitional limitation, because using religion and nonreligion as one's frame of reference does little to reduce the notion of equality from its generalized and fairly meaningless status.

1. Nonpreference Among Religions

While "religion" itself is not susceptible of easy definition, it arguably is a less expansive category than either "conscience" or "religion and nonreligion." It therefore, may be asserted that using nonpreference as to religion as one's category helps to secure religious liberty by giving one a manageable concept, one that lends more meaning to a largely empty equality or nonpreference notion. Proponents of the nonpreference as to religion view argue as well that retaining a theistic meaning or basis for categorization is both in keeping with the language of the first amendment and is more likely to create an equilibrium between the free exercise and establishment provisions of the first amendment and thereby maximize religious liberty. It may be argued, in this regard, that if one broadens the accommodationist aspect of establishment clause analysis to include conscience or religion and nonreligion, it is more likely that with each expansion of liberty through accommodation under the establishment clause, there will be a concomitant reduction in free exercise. This reduction in free exercise will presumably occur because the sphere of governmental regulation of religion will expand with each new accommodation, and with each such expansion of the regulatory domain the opportunity for government regulation of religion increases.⁸⁴ It also may be argued that with an expansive definition of nonpreference legislators may be less willing to accommodate such exercise, because they will have to include less desirable groups in their beneficiary pool and because the cost to government of the accommodation will rise with regard to each new exemption granted.

84. See Oaks, *supra* note 64. Oaks asserts in this regard that: The problem with a definition of religion that includes almost everything is that the practical effect of inclusion comes to mean almost nothing. Free exercise protections become diluted as their scope becomes more diffuse. When religion has no more right to free exercise than irreligion or any other secular philosophy, the whole newly expanded category of "religion" is likely to diminish in significance. This has already happened.

Id. at 8.

I am inclined to believe that such a theory of equilibrium is faulty, because it does not necessarily follow that a more expansive definition of the category of recipient of accommodation, whether in the legislative or judicial form, leads to a reduction in free exercise. Nevertheless, some case law under the establishment clause seems to support the view that expansion under an accommodationist establishment doctrine leads to reduction in free exercise, expression and association rights.⁸⁵

Whatever its virtues may be, there are serious problems from a liberty-maximizing viewpoint with the nonpreference as to religion view. The foremost problem centers on the fact that the term "religion" has the potential of being under-inclusive and discriminatory in its application. Judge Arlin Adams, who has tried his judicial hand at defining "religion,"⁸⁶ argues that permitting the government broad power to accommodate religion, so long as such religious accommodation is applied in a nonpreferential manner, "might increase the accommodation of mainstream religions, but would compromise the rights of minority religions and add dramatically to the government's involvement in religious affairs."⁸⁷ Giving governmental officials the job of defining what is or is not a religion for accommodation or aid purposes is troublesome, precisely because government officials tend to represent mainstream religious views and might well be inclined to spurn minority religions. The government officials may do so by simply deciding that the doctrine is so unconventional that it cannot be termed "religious." The power to define, is, as such, the power to limit. The threat to the liberty of believers and nonbelievers from a restrictive definition is evident.

85. Two recent free exercise cases that come readily to mind in this regard are *United States v. Lee*, 455 U.S. 252 (1982), in which the Court rejected an Amish's claim that his free exercise right required that he be exempted from social security taxes, and *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) in which the Court held that the free exercise clause does not prohibit the federal government from permitting the building of a road and commercial harvesting of timber on a portion of the National Forest traditionally used for religious purposes by American Indians.

In both of these cases, the Court evidenced a reluctance to recognize significant free exercise claims, in part, I believe, because they felt that they might open Pandora's Box, in the sense that every plausible religion (and some not so plausible religions) might seek exemption from government regulations or decisions on free exercise grounds.

86. *Malnak v. Yogi*, 592 F.2d 197, 208-10 (3d Cir. 1979) (Adams, J., concurring).

87. Adams and Gordon, *supra* note 59, at 320.

Relatedly, the likelihood of coercion increases when government officials are given discretion in providing substance to a legal definition of "religion." Consciously or subconsciously, decisionmakers may bring their own subjective sense of what is right into the definition-making enterprise. As such, the government may place its imprimatur on one religion and not another, albeit in the guise of treating all "religions" equally. The likelihood of such coercion is exacerbated in the legislative and executive context, because elected officials will be inclined to aid or accommodate majority religions, religions that constitute a larger number of their constituents, rather than minority, disfavored or unpopular religions. If the judiciary defers to legislative and executive definitions of "religion," infringement of minority religious exercise and association will increase.

Finally, taking funds from nonbelievers or nonreligionists, in the form of tax dollars, to accommodate religions hardly advances the liberty of those from whom such funds are taken. Their views—even views central to their very being—are discounted or disregarded. Furthermore, it would seem that the potential for acrimony and political strife would be intensified with each such taking or taxing.

Each of these preceding problems, however, is moderated in some measure under the two remaining nonpreference theories: nonpreference as to conscience and nonpreference between religion and nonreligion.

2. *Nonpreference as to Matters of Conscience*

The nonpreference as to matters of conscience view, the view that government may accommodate religion when it does so in a manner that does not prefer one form of exercise of conscience over another, is less likely to restrict the liberty of minority religionists. This is so because "conscience" is sufficiently over-inclusive as a term, and thus would include less conventional religions within its ambit. Such a view may well have its precedential foundation in Justice Harlan's concurring opinion in the *Welsh* case,⁸⁸ a case in which the Court read a statutory reference to "religion" to include "conscience" in determining who may be included in the conscientious objector category for draft exemption purposes. Justice Harlan went further than the majority and asserted that the establishment clause itself required such a broader reading.⁸⁹ For Justice

88. *Welsh v. United States*, 398 U.S. 333 (1970) (Harlan, J., concurring).

89. In *Welsh*, Justice Harlan asserted that,

Harlan, the establishment clause mandates accommodation based on conscience not merely on the basis of religion.

Such a broader reading of the category of those forms of exercise, expression and association that must be included in a nonpreferential theory has the virtue of creating fewer outsiders than the nonpreference as to religion view and of being more meaningful and less broad than the theory that religion and nonreligion must be treated nonpreferentially, in a definitional sense. As such, the nonpreference as to conscience view has many of the virtues and fewer of the vices of the nonpreference as to religion view. It would increase religious liberty by accommodating it, even in the public sector, in an expansive manner. In doing so, it would limit the capacity of government to show preference for one form of religious exercise or exercise of conscience over another. However, it potentially presents problems that are not present under the nonpreference as to religion view. First, it creates an equilibrium problem; since application of such a doctrine would expand the area in which government could accommodate religion, it could arguably increase the extent to which government could regulate free exercise of religion. Second, it could create disincentives for elected governmental officials to accommodate religion, because it would widen the class of recipients of such aid or accommodation.

There is a response to each of these objections, however. The equilibrium objection, or the notion that the state may expand its regulatory authority to the same degree that it accommodates a right of conscience for establishment purposes, is countered by noting that if the free exercise right were expanded to include a wider right of conscience, together with the establishment clause, the government could be limited in its efforts to expand its regulatory domain as to matters of conscience. Such a limitation on regulatory authority would, at least theoretically, expand rather than contract the free exercise right. In other words, rather than maintaining a constant equilibrium in terms of the combined amount of exercise and accommodation that may exist in our system at any point in time, a broader definition could expand both exercise and accommodation, thereby increasing religious liberty as a whole.

having chosen to exempt, [Congress] cannot draw the line between theistic and nontheistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not, in my view compatible with the Establishment Clause of the First Amendment.

Id. at 356. For a discussion of Harlan's opinion, see Dorsen, *supra* note 73, at 869-71.

One is therefore left to inquire whether, as a practical matter, such expansion of the free exercise right under the broader matters of "conscience" view would increase the likelihood that government officials would decline to accommodate such exercise, by invoking the establishment clause or simply by refusing to legislate such broad accommodation. It might be argued, in this regard, that government officials would be disinclined to expand a free exercise or related right, if they had to include a broader class of recipients for establishment purposes. It is perhaps likely that they would be less inclined to accommodate such a larger class, but if that were the case, it may merely evidence the propensity of government officials to support only recipients that they find themselves in agreement with or who constitute a significant electoral constituency. As such, their refusal to offer such accommodation may constitute evidence of an underlying desire to act preferentially in this sensitive area. If that is the case, restraint is preferable to a thinly veiled preference, particularly in a system that values protecting the liberty of minorities and the unpopular. Relatedly, even if, in fact, the equilibrium argument carries any weight, such accommodationist restraint in the establishment context might widen the ambit of the free exercise clause, because as accommodation of majority religions decreases, infringement on free exercise might also decrease.⁹⁰

A more significant problem arises, however, with regard to implementing a nonpreference as to matters of conscience theory. That problem centers on the fact that the term "conscience" is broader than "religion," and thus more uncertain. Who, for example, would be entitled to nonpreference, or, put otherwise, equal treatment, under a legislative or statutory accommodation of "conscience"? Would a tax exemption statute have to be applied so broadly that it would include an almost limitless number of organizations and individuals? If not, how would one limit the concept "conscience," and would such a limitation invite discrimination? Finally, would a "con-

90. If Dallin Oaks and others are correct in asserting that the broadening of accommodation or exemptions under the establishment clause has the effect of limiting free exercise, then a nonpreferentialism as to matters of conscience reading of the establishment clause might broaden free exercise, because fewer legislative accommodations would occur or would be permitted. As I have asserted previously, I doubt such an equilibrium theory, but even if it is an accurate description of reality in the political context, the worst that can be said is that as accommodations under the establishment clause are limited (by a broad reading of conscience), free exercise rights may be expanded.

science" theory require a closer examination of the sincerity of one's views than a nonpreference as to "religion" view?

Analyses of "sincerity" invite extensive discretion by the decisionmaker. Inquiries regarding "sincerity" may be less important or necessary where one merely relies on a definition of religion that is based on conventional indicia of what constitutes a "religion," without getting into issues of sincerity. However, the trade-off between the nonpreference as to conscience and the nonpreference as to religion theories in this regard is two-sided: on the one hand, conscience is more inclusive and therefore potentially less discriminatory than the "religion" view; on the other hand, nonpreference as to religion may demand less evaluation regarding sincerity. In the trade-off, it would seem that the nonpreference as to conscience side has the better of the argument. The nonpreference as to conscience view has less likelihood of being used in a discriminatory manner, because the term "conscience" is more inclusive than the term "religion." Furthermore, even to the extent that sincerity becomes an issue, it is preferable to combine nondiscrimination or less discrimination with a sincerity analysis than to combine the added potential for discrimination inherent in defining "religion" with a refusal to analyze sincerity. However, I would acknowledge that this may be less true where sincerity is a fact issue, and subject to the flights of fancy and discriminatory potential of a jury, and the issue of what is a "religion" remains a question of law, left for the judiciary and elaboration by rule of law. As such, I would suggest that the issue of sincerity, at a minimum, be treated as a mixed issue of fact and law. If this were the case, a party would be able to have, so to speak, two bites at the sincerity apple, persuading either the jury or the judge that their views were sincerely held.⁹¹ At any rate, decisionmakers at all levels should be sensitive to the potential for abuse inherent in a sincerity analysis.

However, while the nonpreference as to conscience view limits the discrimination problem inherent in the nonpreference as to religion view, the proponents of the nonpreference between religion and nonreligion view would argue that their view entirely eliminates the potential for discrimination that is present in differing degrees in both of the other nonpreference views, as well as the need for a sincerity analysis. There simply is no need to evaluate sincerity when the class is widened to include both religion and nonreligion for accommodation pur-

91. For a thoughtful discussion of this and related issues, see L. TRIBE, *supra* note 57, at 1181-88.

poses. Given this fact, absent other debilitating problems, it would seem that the nonpreference as to religion and nonreligion view is a more promising theoretical candidate in terms of maximizing liberty than are either of the other nonpreferentialist views.

3. *Nonpreference Between Religion and Nonreligion*

In addition to avoiding the problems of discrimination and the need for a sincerity analysis inherent in both of the other nonpreference views, there are other justifications for the nonpreference between religion and nonreligion view. Foremost among these is the fact that such a view seemingly protects the liberty of outsiders and minorities more extensively than other views, without placing religion at a disadvantage vis-a-vis nonreligion. Professor Dorsen made this point when he asserted:

[T]he core purpose of the religion clauses applies to nonbelievers as well as to believers. The key objective in both situations is to safeguard minorities and outsiders with respect to religious beliefs—an obligation consonant with the overriding goal of the Bill of Rights to protect vulnerable groups in American society, thereby assuring that there are no outsiders in our polity.⁹²

Arguing for a similar view, Professor Conkle recently elaborated on this point, noting that:

[A]n identification with the American political community “comes easily, even automatically,” for most American citizens. By contrast, “identification with America is a choice that entails costs” for members of cultural minorities, including religious minorities. This suggests that in the issuance of religious or irreligious messages, the political community should not be overly concerned with the effect of these messages on those who are part of America’s religious mainstream. The community ties of these citizens tend to be strong already, as well as resilient. Attention should be focused instead on those who stand closer to the edge of society, those who hold unconventional views that may make them reluctant to attach themselves to the American political community. The community bond of these individuals is more likely to be weak and malleable. Thus, messages of embrace-

92. Dorsen, *supra* note 73, at 868.

ment may significantly strengthen their community bond; messages of exclusion may destroy it altogether.⁹³

Proponents of the nonpreference between religion and nonreligion view contend that their view is optimal in terms of securing liberty to outsiders and minorities, because it forbids distinctions based on conscience or religion, thereby widening the class of nonpreference to all groups and individuals, religious and nonreligious alike.

However, those espousing either a nonpreference as to conscience or a nonpreference as to religion view could respond that, even on Professor Conkle's own terms, the best that can be said for the nonpreference between religion and nonreligion view is that it eliminates particularized accommodation for religion or conscience. While such a neutralization of religion or conscience appears to eliminate the potential for exclusion of some minorities or outsiders, it does little to "strengthen their community bond" through "embracement" or accommodation. Furthermore, the nonpreference between religion and nonreligion view may not even succeed in its goal of avoiding a sense of exclusion from the polity on the part of religious and nonreligious minorities. If "nonreligion" is read broadly and inclusively, it has the effect of simply eliminating both legislative and judicial exemptions on religious or matters of conscience grounds. In effect, it emphasizes a secular state, and would apply all general legislative regulations in an even-handed manner, refusing to provide for exemptions. If all religious and nonreligious groups were to be exempted from a given legislative act, the act itself would be without force or effect. In other words, everyone could be exempted from the act, if any one was, and thus, no exemptions or accommodations could be made. Furthermore, given that such general laws or regulations would be promulgated by the majority in the polity, and applied to everyone (minority and majority alike), it would not be surprising to find that such general laws were particularly pernicious in terms of their potential for institutional coercion of minorities. Since it is unimaginable that all religious influence could be eliminated from the political process, given the subtle and sometimes subconscious influence of religion or conscience on our actions, it would simply be impossible to purge the public sector and the legislative process of all such influence. Under the nonpreference as to religion or nonreligion view, it might also be impossible to exempt

93. Conkle, *Toward a General Theory of the Establishment Clause*, 82 Nw. U.L. REV. 1113, 1178 (1988).

minority religionists or groups from a general law or regulation even if it were possible to discover such subtle religious influences or motives in the legislative process, because to create such an exemption would be to prefer a religion, albeit a minority one. The entire legislative scheme or program would have to be eliminated. Such massive elimination of legislative programs on the ground that they were in part religiously motivated might well subject the judiciary to the wrath of the other branches of government and might, in the process, first isolate and later render the judiciary wholly ineffectual.

Perhaps, however, the nonpreference as to religion and nonreligion view could be rehabilitated in this area by simply permitting minority religions and nonreligions to be exempted from laws and regulations promulgated under a democratic process naturally tainted by majoritarian religious influences. Such an effort at rehabilitation is subject to three objections: (1) the influence of religion or similar matters on the legislative process is arguably both subtle and pervasive and, as such, is hardly susceptible to management by exemption; (2) ascertaining which groups are minorities for such purposes would not be an easy task, unless one simply excluded all those who did not agree with the legislation or regulation or who refused to support it; and (3) given the transitory nature of minorities in our pluralistic society, such exemptions would be of little precedential weight, at least with regard to particular minorities, and would require case-by-case analysis, with all the transaction costs that would be incurred as a result of such an ad hoc process.

Additionally, the nonpreference as to religion and nonreligion view falls prey to many of the same objections that can be leveled against the strict separationist view. The nonpreference between religion and nonreligion view does little to promote religious association as an element of religious liberty, because it would not recognize exemptions from general legislation of the sort mandated in the *Amos* case. Exempting a religious association from general legislation, regardless of the intensity of the religious group's opposition to such regulation, would not be permitted, unless nonreligious groups were similarly exempted. Such a broad exemption would, as I noted earlier, render the legislation impotent. Religious exercise or free exercise as to matters of conscience could not be exempted either, and such exercise would be greatly circumscribed with the growth of the regulatory state. Arguably, religious expression could be salvaged by simply recognizing an open forum that equally respected all viewpoints. However, such a conclu-

sion would be hard to sustain, particularly in light of the current state of first amendment free expression law, which treats various categories of speech (e.g., commercial speech, defamatory speech, obscene or indecent speech, etc.) in significantly different ways. First amendment scholars argue that such categorization is necessary to protect the core of free speech and expression from a doctrinal weakening that would occur if such categories were jettisoned in favor of a single doctrinal formulation.⁹⁴ The most that could be said, therefore, is that such categories of speech could not be made on grounds which discriminate between religion and nonreligion.

In summary, while upon cursory reflection, the nonpreference between religion and nonreligion view seems capable of limiting the discrimination in application and sincerity analysis problems inherent in the other nonpreference views, its very generality renders it ineffectual. Thus, in this less than perfect doctrinal world we live in, the nonpreference as to matters of conscience view seems to be preferable in that it moderates both the strengths and weaknesses of the other two nonpreference views, although some amalgam of the three views may also be viable and may maximize liberty on a case-by-case basis.⁹⁵

III. SUMMARY AND CONCLUSION

In the first part of this article, I discussed my theory of originalism, a theory that takes both the intentions and the aspirations of the framers and ratifiers of the first amendment seriously. In that portion of the article, I generally challenged conventional theories of originalism on their own historical grounds, and then sought to articulate my own theory.

In applying my theory of constitutional interpretation to the establishment clause of the first amendment, I summarized conclusions that I have reached elsewhere, to the effect that

94. See, e.g., BeVieu, *The Free Exercise Clause: A View From the Public Forum*, 27 WM. & MARY L. REV. 963 (1986).

95. The problem with creating a doctrinal framework based on an amalgam of the nonpreferential views is that such a framework would be less clear and more ad hoc in its application. Doctrinal incoherence of this sort may well contribute to increased discrimination because it affords the court too much discretion in deciding which nonpreferential theory applies in a given case and because uncertainty increases the cost of vindicating rights. If one is uncertain as to whether or not her alleged right will be legally recognized, then it is more likely that she will have to litigate. Litigation is costly and may not even be possible for those who lack the time or resources to pursue it.

there were two legitimate substantive theories that can be derived from an originalist analysis of the history—the Madisonian and Story views. In this article, after summarizing those prior findings, I addressed the task of determining which view should prevail.

Determining which view should prevail as a matter of constitutional interpretation requires imposition of a second theory of constitutional analysis on the material or viewpoints disclosed by an originalist analysis. No originalist theory can avoid the necessity of imposing a second theory of judicial review on an historical record that is often both ambiguous and reflective of legislative compromise. Such compromises sometimes provided for intentional ambiguity to mask disagreement, leaving resolution of existing disagreements to future “discussions and adjudications.”⁹⁶ At the same time, they also served as a sufficiently broad basis for the expansion of the framers’ and ratifiers’ aspiration toward liberty and other constitutional values.

Most contemporary originalists impose a secondary theory of deference to majoritarian institutions of government in the face of an incomplete and ambiguous originalist record. In my view, such a theory is inconsistent with the libertarian aspirations of the framers and ratifiers, who were actuated in major part by a fear of tyranny, an important form of which was the tyranny of the majority as expressed in the workings of democratic institutions of government. Believing as I do in the libertarian aspirations of the framers, I seek to determine which position disclosed by an originalist analysis best maximizes religious liberty. Such a secondary theory is in keeping with both the intentions and aspirations of the framers and ratifiers of the Bill of Rights.

Before examining the various theoretical underpinnings that have been proffered for establishment clause analysis, I briefly examined each of the elements of religious liberty—the free exercise, free expression and free association aspects of such liberty. I then turned to an examination of the views propounded in originalist accounts of the history of the establishment clause and in the cases and commentary. These included: the view that government may establish a religion (a view that virtually everyone concedes was outside the intent of the framers and ratifiers of the first amendment, at least with regard to the power of the national government); the view summarized

96. Again I utilize a phrase from Madison. See *supra* note 4 and accompanying text.

by Justice Story in his *Commentaries to the Constitution* that government may prefer nondenominational Christianity, provided it does so in a tolerant manner; the three nonpreferentialist views—nonpreference as to religion, nonpreference as to matters of conscience, and nonpreference between religion and nonreligion; and the strict separationist view (a view which, in its extreme form of advocating irreligion in the public sector, was also outside the intent of the framers and ratifiers). Upon examining each of these theories for the purpose of ascertaining which of them best maximizes religious liberty, I tentatively concluded that the nonpreference theories are preferable. In selecting from among the three nonpreferential views, I noted that each has its respective strengths and weaknesses, but I generally concluded that nonpreference as to matters of conscience is preferable.

Throughout the article, I have recognized the limitations that necessarily attend such analysis. I am painfully aware of the hermeneutical and semantic insights that have pervaded contemporary legal literature and have aided in the deconstruction of constitutional doctrine. However, I hope that in some manner I have given the concept of religious liberty additional meaning, because I firmly believe it is susceptible of a sufficient level of doctrinal determinacy. Relatedly, and finally, I hope that in the future analysis of both the establishment and free exercise clauses will focus a bit more on the liberty-maximizing potential of underlying theories. Such an effort would be an apt means of celebrating the upcoming bicentennial of the Bill of Rights and of furthering the aspirations of the framers and ratifiers of the first amendment.

