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TEXT, INTENT, AND THE RELIGION CLAUSES

DOUGLAS LAYCOCK*

I. THE VALAURI THESIS

John Valauri has reminded us of some things that bear frequent repetition.¹ The rhetoric of original intent is a favorite tactic of a large political movement. This movement won the last three Presidential elections, and it will probably appoint a majority of the Supreme Court. Original intent arguments invoke a strong logic and have a strong appeal to many people. So it is worthwhile periodically to remind us of their difficulties and vary the illustrations. Professor Valauri’s paper does that.

But the problems he identifies are hardly new to constitutional lawyers, and I doubt that the jargon of hermeneutics adds much to the conventional legal expression of the same difficulties. Many others have also noted his “horizontal” critique—the difficulties of identifying a single original intent—and his “vertical” critique—the difficulties of applying that intent to new questions and modern conditions.² These are not the only problems with a jurisprudence of original intent, but they are two of the most serious. As Valauri recognizes,³ the arguments on both sides are familiar and well developed.

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3. Valauri, supra note 1, at 662.
The point of his paper is that the richness of the general debate on original intent has not been brought to bear on the use of original intent in debate over the establishment clause. But he notes some exceptions in footnotes; his ultimate claim is that the general debate has had less effect on the establishment clause than on other constitutional issues.

I doubt that religion clause debate is any more or less simplistic or intellectually dishonest than debate over other hotly disputed constitutional issues. I doubt that the quality of debate varies systematically across well-developed areas of constitutional law.

I do think that tactics vary by subject matter, responding to the quantity and quality of evidence. The most common tactical pattern for original intent arguments is that one side says the founders never thought the matter in dispute raised any constitutional question, and certainly did not affirmatively intend to make it unconstitutional, and so the political branches can do what they think is right. The other side responds that the evidence is unclear and times have changed, that it is a Constitution we are expounding and we can’t turn back the clock, and in short, Justice Brennan must do what he thinks is right.

I exaggerate only slightly, and for a purpose. There are equal and opposite dangers here—to pretend that a simplistic account of the founders’ intent solves all our problems, or to pretend that the text and history of the Constitution tell us very little and constrain us not at all. Professor Valauri is plainly alert to one of these dangers. If he is equally alert to the other, then he and I do not disagree.

The typical pattern of argument about original intent has been applied to religion clause issues. This was precisely the argument in the legislative prayer case, where the majority relied principally on the practices of the founders, and the dissenters said those practices were not controlling. A few judges and commentators made similar arguments in the debates over prayer and religious instruction in the public schools.

4. Id.
5. Id. at 662 n.6; 671 n.47.
7. See, e.g., School Dist. v. Schempp, 374 U.S. 203, 236-37 (1963) (Brennan, J., concurring) (“I doubt that [Madison and Jefferson’s] view, even if perfectly clear one way or the other, would supply a dispositive answer to the question presented by these cases. . . . A too literal quest for the advice of the Founding Fathers . . . seems to me futile and misdirected”); Fellman,
But Valauri is right that the main line of establishment clause debate has taken a different course, in which both sides rely on original intent. Because there is an unusual abundance of historical evidence, and because there is ample evidence to support both sides, both sides appeal to history. Those who would invalidate government action abandon their usual argument that original intent is not binding, and instead urge that this time original intent is on their side. That tactical choice tells you something about the perceived legitimacy and persuasive power of original intent arguments. Despite their many problems, they have an almost irresistible appeal.

This tactical choice also creates Valauri's impression that the establishment clause debate has ignored the larger literature on original intent. Because both sides rely on original intent, there is less attention to its difficulties. In the hands of the unsophisticated, the result-oriented, or even those who are honest and know better but are sometimes careless or tempted, those difficulties get less attention than usual. We have all sinned, and come short of full intellectual rigor. But the difficulties with original intent do not disappear from what we know, and they have not disappeared entirely from the debate over religious liberty.

We cannot invoke original intent in the simplistic way that Valauri condemns, but neither can we ignore history. If we are to get beyond broadsides for and against original intent, we must identify criteria for better and worse kinds of historical evidence and better and worse arguments from that evidence.

II. Text or Intent

The persistent appeal of originalist arguments derives from our commitment to the proposition that government officials derive their just powers from the consent of the governed. Where do judges get the power to enforce their conceptions of religious liberty against the political branches, and even against the people legislating directly by referendum? That power derives from critical votes that Americans cast in critical periods—in 1787-88 for Article III and the test oath clause, in

Separation of Church and State: A Summary View, 1950 Wis. L. Rev. 427, 427-28 (it is “futile and pointless to inquire” into original intent); Kauper, Prayer, Public Schools and the Supreme Court, 61 Mich. L. Rev. 1031, 1066 (1963) (defending school prayer decision on ground of policy, and criticizing Court for pretending that either text or intent required the result).

8. Valauri, supra note 1, at 662.
1789-91 for the first amendment, and in 1866-68 for the fourteenth amendment.

But "originalism" is fatally ambiguous at best, affirmatively misleading at worst. It conflates two quite different modes of argument. Textual arguments appeal to the authority of the constitutional text; intentionalist arguments appeal to the authority of the founders' intent. (I use "founders" to include both the framers and the ratifiers.) The founders voted on the text, but each voter had some understanding of what the text meant. Thus, both textual and intentionalist arguments appeal to the authority of the votes that proposed and ratified the Constitution.

Several scholars have elaborated the choice between text and intent, and I will not review that whole analysis here. But a brief excursion into text is prerequisite to anything I might say about intent. The constitutional text has meaning as a matter of language, and that meaning depends only in part on the founders' intent. The text is superior in authority to intent, because only the text was submitted to the vote of the ratifiers. I do not mean to claim that intent is irrelevant, but simply that it is subordinate to the text.

In any event, we cannot directly know the intent of founders who are long dead. We must rely on indirect evidence, and the text itself is the best evidence of intent. Extrinsic evidence of intent is secondary even with respect to intent; it is much more attenuated as evidence of the meaning of the text. We should examine the text first, and mine it for as much meaning as it will yield, before turning to extrinsic evidence of intent.

The most outspoken intentionalists invert these hierarchies of authority. They believe that intent controls text, and that extrinsic evidence of intent controls textual evidence of intent. Justice Scalia's position is especially puzzling; he con-


10. See, e.g., R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 6 (1977) ("the intention
sistenty insists that the Court must construe the statutory text and not Congressional intent, but in constitutional interpretation he apparently reverses himself, demanding exhaustive attention to constitutional history.\(^{12}\)

Interpreters who emphasize extrinsic evidence of the founders' intent tend to ignore the generality of the text and to substitute much narrower conceptions of intent. The founders focused on the specific problems most salient to their lives, but they constitutionalized general principles that seem designed to cover whole classes of similar problems. What they left a record of having specifically and consciously intended is often a small subset of the text they proposed and ratified. Interpretation limited to specific and provable intentions thus tends to be fatally inconsistent with the constitutional text.

This inconsistency is a third reason to be skeptical of straightforward reliance on extrinsic evidence of original intent, and especially of claims about quite specific intentions. In my judgment, this argument is even more important than Professor Valauri's horizontal and vertical critiques.

The primacy of text is relevant to the meaning of the religion clauses. First, the word "exercise" is powerful textual evidence that the protection extends beyond mere belief and reaches religious conduct.

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of the framers being unmistakably expressed, that intention is as good as written into the text"); Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 13 (1971) ("The words are general but surely that would not permit us to escape the framers' intent if it were clear"); Bork, Styles in Constitutional Theory, 26 S. Tex. L.J. 383, 394 (1985) ("the source [of constitutional liberties] was the intent of the framers and ratifiers, and that was to be discerned from text, history, structure, and precedent"); Easterbrook, Substance and Due Process, 1982 Sup. Ct. Rev. 85, 92 ("History lays down the baseline against which other arguments are measured"); Graglia, Do We Have an Unwritten Constitution?—The Privileges or Immunities Clause of the Fourteenth Amendment, 12 Harv. J.L. & Pub. Pol'y 83, 88 (1989) (text of fourteenth amendment conceals its intended purpose, and purpose controls).


12. Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 856-57 (1989) (constitutional interpretation "requires the consideration of an enormous mass of material [and] immersing oneself in the political and intellectual atmosphere of the time").
Second, the text of the religion clauses is absolute. It says "no law," not "no unreasonable law," or "no badly motivated law." We have learned that we cannot literally enforce the absolutism of the first amendment, but neither should we ignore it. Implied exceptions to a textually absolute constitutional right should be an extraordinary thing; the Supreme Court’s recent free exercise jurisprudence implies exceptions far too readily and gives insufficient weight to the absoluteness of the text.\textsuperscript{13}

Third, some of the strongest evidence that the establishment clause precludes nonpreferential aid to religion is partly textual. As I have explained in more detail elsewhere,\textsuperscript{14} the Senate and the Conference Committee considered and rejected four drafts of the establishment clause that were expressly and unambiguously nonpreferentialist. Congress instead proposed to the states one of the most sweeping drafts considered by either House. That draft was ratified. The clause forbids any law respecting an establishment of religion, and the stark contrast with the rejected drafts greatly strengthens the textual inference that the unmodified word "religion" refers to religion generically.

This argument goes beyond the ratified text, but it looks to actual votes on proposed text and not to more remote evidence of what was in the heads of the founders. I will further explore the strengths and weaknesses of this intermediate form of argument in a subsequent paper.\textsuperscript{15}

\section*{III. The Uses of History}

Once we go beyond the text to extrinsic evidence of intent, some evidence is more valuable than other evidence, and there are better and worse ways to argue from it. Intentionalist arguments must be alert to all the dangers highlighted by the vari-

\begin{itemize}
\item \textsuperscript{13} See, e.g., O’Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (upholding prison’s refusal to bring Muslim prisoners to religious service within the same prison); Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding military rules forbidding the wearing of yarmulkes with uniform); Bob Jones Univ. v. United States, 461 U.S. 574, 602-04 (1983) (upholding revocation of tax exemption of pervasively religious university that prohibited interracial dating among its students).
\item \textsuperscript{14} Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 879-83 (1986).
\item \textsuperscript{15} Laycock, Original Intent and the Constitution Today, in \textit{The First Liberty: The Bicentennial of the First Amendment} (J. Wood ed.) (forthcoming). I underestimated the difficulties in my initial elaboration of this argument. \textit{See} Laycock, supra note 14, at 883-84 n.47.
\end{itemize}
ous critiques—to Valauri’s horizontal and vertical critiques and to the gap between broad text and specific intent.

The common search for evidence of what the founders thought about the specific issue before the Court is vulnerable on all three grounds. When we pose the question at that level of specificity, we maximize the horizontal problems of finding evidence of what the founders thought and of summing the thoughts of all the members of the twenty-eight legislative bodies entitled to vote on the first amendment. We maximize the vertical problem of applying their intent to modern conditions, because the focus on the specific practice tends to exclude consideration of changes in context. And we maximize the gap between text and other evidence of intent, because to pose the question in this way conceives intent at a level of generality far narrower than the language of the text.

An intent known to be widely held, or at least widely known, is more important than the isolated quotation so common to law office history. The isolated quotation, even from a Madison or a Hamilton, is maximally vulnerable to Valauri’s horizontal critique.

An intent that was consciously subjected to constitutional scrutiny is more valuable than an intent or a practice that was not so examined. The unexamined continuation of a practice may reflect momentum, oversight, or failure of anyone to raise the issue, and almost certainly does not reflect a considered intent about the meaning of the Constitution. For similar reasons, constitutional scrutiny under the pressure of a real complaint from a significant minority that felt unfairly treated is more valuable than a hypothetical constitutional analysis of a practice that was largely uncontroversial in the social context of the times.

The unexamined intent is especially vulnerable to Valauri’s vertical critique: a practice might have been harmless and therefore unexamined in the founders’ time, but now,

16. These were the two Houses of Congress, the two houses of the bicameral legislatures in twelve of the original thirteen states, and the unicameral legislatures in Pennsylvania and Vermont. For the ratifying states and the dates of ratification, see Historical Notes to U.S. Const., amend. I, in U.S.C.A. Pennsylvania ratified on March 10, 1790. Its Constitution of 1790, creating a bicameral legislature, was adopted on September 2 and took effect on December 7. See R. Branning, Pennsylvania Constitutional Development 19-20 (1960); B. Konkle, George Bryan and the Constitution of Pennsylvania 1731-1791, at 353-54 (1922). Vermont retained its unicameral legislature until 1836. See J. Fordham, The State Legislative Institution 27-28 (1959).
because of changed social conditions, it may cause serious harm of a kind closely analogous to the harms they sought to avoid. An example is government religious observances of generic Protestant theology and liturgy.

The best non-textual evidence of intent is a widely debated social or political problem that a constitutional clause was intended to solve or ameliorate, considered in light of its contemporary social context. We read the equal protection clause in light of the history of slavery and of race relations in the immediate aftermath of emancipation. Similarly, we should read the fourth amendment's protection against unreasonable searches and seizures in light of the pre-revolutionary controversy over general searches and writs of assistance, and the contract clause in light of the controversy over debtor relief legislation in the 1780s.

These controversies were widely known, widely debated, and consciously examined under political pressure that made the debate real and not just academic. They identify the core target of the resulting constitutional right. Interpreters can then search for a coherent principle, consistent with the text and as broad as the text, that centers on the core problem that the text was intended to resolve. An interpretation that would leave the core problem unresolved, or even marginal to the clause, is nearly as indefensible as an interpretation that is inconsistent with the text.

Because the best evidence of intent arises from major controversies, we should not expect to find a consensus that unites both supporters and opponents of a constitutional provision, or even a fully consistent view of all related issues among the supporters. The attitudes that give rise to the losing side of a controversy do not instantly disappear. It would be extraordinarily naive to expect that racist attitudes and racist practices suddenly disappeared in 1868, and it would be mistaken to assume that because they survived, the equal protection clause permits government to act on them. It would be equally naive

18. See, e.g., Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427-28 (1934); id. at 454-65 (Sutherland, J., dissenting); The Federalist, No. 7 (Hamilton) at 65 (C. Rossiter ed. 1961); id. No. 44 (Madison) at 282-83; C. Beard, An Economic Interpretation of the Constitution of the United States 178-81 (1913); R. Morris, The Forging of the Union, 1781-1789, at 154-59 (1987); B. Wright, The Contract Clause of the Constitution 1-6 (1938).
to think that all vestiges of religious establishment and religious intolerance instantly disappeared when the religion clauses were ratified, or that their survival fixes the meaning of the religion clauses.

IV. History and the Religion Clauses

A. The History of Religious Persecution

The religion clauses had two great defining controversies. One was the long history of religious persecution and civil and international religious wars in Western societies. For two hundred years after the Reformation, religious conflict was a major factor in European politics in general and English politics in particular. English highlights included Henry VIII’s break with Rome; the Catholic succession of Mary; the Protestant succession of Elizabeth I; a Catholic heir-apparent through the first thirty years of Elizabeth’s reign, until the execution of Mary Queen of Scots; the unsuccessful invasion of the Spanish Armada; the Civil War among Anglican Royalists, Puritan Parliamentarians, and Presbyterians allied with the Scots; the renewed fears of a Catholic succession, culminating in the Glorious Revolution of 1688, which replaced James II with William of Orange; and the endless problems of English rule in Catholic Ireland.

Religious conflicts were carried to the English colonies in America, and took new form with the growth of new denominations. Minor persecutions of Baptists and Quakers continued sporadically into the political lives of the founders. Catholics were rare outside Maryland, but the virulent anti-Catholicism of post-Reformation England appears to have been alive and well in the founders’ generation.


20. See D. Boorstin, The Americans: The Colonial Experience 136 (1958) (“nearly fifty” Baptist ministers in Virginia jailed between 1768 and 1776); T. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 168 (1986) (seizure of property from Massachusetts Baptists for unpaid church taxes); The Complete Madison 298 (S. Padover, ed. 1953) (Letter from Madison to William Bradford, Jan. 24, 1774, complaining that “5 or 6 well meaning men” were then in jail “for publishing their religious Sentiments which in the main are very orthodox”); see also D. Boorstin, supra, at 35-40 (early colonial persecutions of Quakers).

21. See examples collected in Laycock, supra note 14, at 916, 918. See also D. Bennett, The Party of Fear: From Nativist Movements to the New Right in American History 12-22 (1988) (reviewing efforts to suppress
Despite these remnants, the fight over religious persecution was more historical than contemporary. There was no significant sentiment for persecution among the founders. Everyone subscribed to tolerance, at least for Protestants, and vestiges such as test oaths and tax supported churches were defended as consistent with tolerance. But the history of serious religious conflict was recent and salient, and its broad outlines were widely known. The history of post-Reformation religious conflict was more recent to the founders than the history of slavery is to us. It is surely reasonable to infer that the founders intended the religion clauses of state and federal constitutions to prevent a renewal of these conflicts.

From that point we may reason further about what is necessarily entailed in that intent. What can we learn from the history of these religious conflicts that is relevant to the interpretation of the religion clauses? One thing we learn is that some humans are willing to die for religion, and that some are willing to kill for it. Because most Americans cannot imagine doing either, we find it hard to take seriously the uncompromising beliefs of religious minorities. We find exasperated judges demanding that religious minorities be reasonable. But the religion clauses exist in substantial part because believers are not always reasonable, and may be fanatical. The religion clauses must protect unusually intense religious commitments, just as they protect the rest of us from those who are so committed. Attempts to bend religious conscience to the will of the state can lead to suffering and persecution.

We can describe such an argument as intentionalist, because of its connection to what we have inferred about the intent of the founders. But such arguments come from our overt anti-Catholicism during Revolution, to help unite against common enemy).

22. For an excellent treatment of the test oath controversy, see Gaustad, Religion and Ratification, in J. Wood, supra note 15. For a sampling of the arguments in favor of tax supported churches, see T. Curry, supra note 20, at 131-32, 217.

23. See, e.g., EEOC v. Ithaca Industries, 829 F.2d 519, 521-22 (4th Cir. 1987) (employee’s “uncompromising and adamant refusal to work on Sunday . . . [and] his own absolutist position . . . precluded [employer] from making a reasonable accommodation for his religious practices”), vacated en banc, 849 F.2d 116 (4th Cir.), cert. denied, 109 S. Ct. 306 (1988); In re Reynolds, 83 Bankr. 684, 685 (W.D. Mo. 1988) (unreasonable for debtors in bankruptcy to give more than three percent of gross income to church); In re Gaulker, 63 Bankr. 224, 226 (Bankr. D.N.D. 1986) (“it seems a quite stern and uncaring religion” that would require such large contributions from debtors in bankruptcy).
own heads and not from any surviving record of what was in the heads of the founders. What we get from the founders is the broad contours of principle: do not prohibit the free exercise of religion, do not do anything respecting an establishment of religion, construe these rules in a way that avoids religious persecution and conflict of the sort that followed the Reformation. It is modern Americans, and not the founders, who must draw the lessons from past persecutions and apply those lessons to current conditions. And because it is we who are drawing the lessons, we can also learn from the post-founding persecutions of Mormons, Jehovah’s Witnesses, and contemporary “cults.”

This allocation of responsibility is even clearer when we recognize that the founders’ general intent may require rejection of some of their unexamined but more specific intentions. The persistence of anti-Catholicism through the framing of the religion clauses was like the persistence of racism through the framing of the fourteenth amendment. We cannot reconcile it with any principled understanding of the religion clauses, and we should not try to do so.

Rejection of the founders’ anti-Catholicism is possible only because their intent is subordinate to the text. The founders’ views on slavery were even more inconsistent with the larger purposes of the Constitution than their views on Catholics. But they wrote their views on slavery into the ratified text, and so we were stuck with them until they could be eliminated by constitutional amendment. If they had written their anti-Catholicism into the text, we would be equally stuck. But they did not.

I have suggested elsewhere that we are not bound by the government’s public observance of Protestantism in the founders’ time. That too reflects an intent not written into the text, unexamined because uncontroversial in a nation with hardly any non-Protestants, in tension with the broad principles of the text as applied to our more pluralistic time, and a product of the same causes that fueled more overt anti-Catholicism. The case against overt government anti-Catholicism is obviously stronger than the case against government religious observances, because the tension with principled understandings of the text is so much sharper. But if we conclude that government-sponsored religious observances in our time tend to secularize religion, offend religious minorities and denigrate their status in the polity, and offend many of the most serious believers among the religious majority, then there is ample

basis in textual and other modes of constitutional argument to override the weak argument from unexamined intent.

B. Disestablishment in the States

The second great defining controversy for the religion clauses was the fight over disestablishment in the states. That fight has been chronicled in recent books, and I have examined its implications for the federal establishment clause in my earlier work. It is sufficient here to note two things. First, taxation to support religion is at the core of what the opponents of establishment sought to prevent.

Second, the defenders of establishment everywhere adopted the defensive strategy of nonpreferentialism. In New England, the attempts to be nonpreferential were transparently unsuccessful. The systems favored the Congregationalists, they were the source of bitter religious strife, and they were eliminated shortly after the framing. They were vestiges of the old regime, not models for the new. In Virginia and Maryland, the proposals for a general assessment were as nonpreferential as eighteenth century Americans could conceive, and after much debate, they were voted down.

These state controversies are not part of the legislative history of the federal establishment clause. But they are part of the intellectual and social history of what “establishment” meant to the founders’ generation. And because they are so focused on a theory that continues to be proposed, they are much better evidence of intent than we usually get. We can say with fewer qualifications than usual that the founders rejected nonpreferentialism as the solution to the problem of religious establishment. And we can even more confidently reject the contrary position: whatever else they may have intended, it is historical nonsense to claim that the founders affirmatively and specifically intended to permit government to aid religion on condition that it do so nonpreferentially.

There remains the vertical problem of applying this conclusion to changed conditions and changed questions. In this

27. Compare id. at 895-902 (debates over taxation to support churches) with id. at 913-19 (uncontroversial nonfinancial aid to religion).
28. See id. at 900-02.
29. See id. at 895-99.
case, changed conditions strengthen the case against non-preferentialism. The vast increase in religious pluralism makes non-preferentialism even less practical today than in the eighteenth century.

But changed conditions have also posed new questions, and the answers of the 1780s are nonresponsive. The question in *Everson v. Board of Education* was not whether government can aid religion financially, or whether it can aid religion non-preferentially. The question in *Everson* was whether the bus rides were aid to religion. On that question, the debates of the 1780s have nothing to say. Earmarked taxes to pay ministers and build churches are unquestionably aid. In the modern social welfare state, it is very much harder to decide which government services are forbidden aid and which government services must be given to avoid discriminating against religion.

The most significant evidence of the founders' intent with respect to these questions is that they paid for missionaries to teach the Indians. Thus, despite their hostility to financial aid to churches, they apparently saw no problem in paying churches to deliver educational and social services. Even Jefferson participated in this practice. The practice continued steadily for a hundred years. On the other hand, it was uncontroverted and unexamined, and it was ended when a later generation subjected it to establishment clause scrutiny. This unexamined practice is weak evidence for the claim that the founders specifically intended to permit government to pay churches to deliver educational and social services. But it is strong evidence against the claim that they specifically intended to forbid such payments. The arguments for and against aid to church-run schools, social welfare programs, or chastity counselling do not turn on anything specific in the intent of the founders.

Twice now I have distinguished a proposition from its converse. I said there is strong evidence that the founders opposed nonpreferential establishments, and overwhelming

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32. Id. at 261-63.
evidence that they did not specifically intend to permit them. I said there is weak evidence that the founders intended to permit government to pay for social services delivered through churches, and strong evidence that they did not intend to forbid it.

These distinctions turn on the common understanding that those who assert a claim bear the burden of persuasion. It is always easier to show what the founders did not intend than to show what they intended. Beware of arguments from false alternatives: when someone shows that the founders did not intend \( p \), he has not shown that they did intend not \( p \). There may be a third alternative, in between or simply different, or there might have been such an alternative in 1791, or the founders might have mistakenly thought there was such an alternative. Or the founders might not have thought much about either \( p \) or not \( p \).

In this formulation, \( p \) may be any proposition about the meaning of the Constitution, or about the constitutionality of any government act. For example, consider a state plan to finance education with tuition vouchers that could be used at any public or private school, including religious schools. If I show that the founders did not intend to forbid education vouchers, I have not thereby shown that the founders affirmatively intended to permit them. Similarly, if I show that the founders did not affirmatively intend to permit vouchers, I have not thereby shown that the founders did intend to forbid them. It is entirely possible that the founders never thought about education vouchers, and that they never thought about anything sufficiently analogous to justify an inference of intent one way or the other.

Cases with respect to which the founders had no knowable intent are not merely possible; they are common. They are not a cause for despair. We still have the primary source of constitutional law, which is the constitutional text. We are still capable of elaborating that text in a principled way. The text is primary even when there is secondary evidence of intent. The absence of such secondary evidence is, quite literally, a problem of secondary importance.

**Conclusion**

Constitutional interpretation requires the identification of coherent principles in the constitutional text, reasoned elaboration of the implications of those principles, and application of the principles, including their implications, to current condi-
tions. History can help in that task, but only if it is done right. It is nearly always helpful to ask what problem the founders were trying to solve; it is rarely helpful to ask how the founders would have decided a particular case on today's docket. And all inferences from history must be checked against the primary authority of the text.