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BOOK REVIEW & RESPONSE

GARDENING AT NIGHT: RELIGION AND CHOICE*

David E. Steinberg**

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* The title of this Book Review is from a song by the band R.E.M. See R.E.M., Gardening At Night, on DEAD LETTER OFFICE (I.R.S. 1981).
** Visiting Associate Professor, Thomas Jefferson School of Law. B.A. 1982, Northwestern University; J.D. 1986, Stanford Law School.

I owe special thanks to Professor Steven Smith for his very helpful comments and good-natured response to this Book Review. A number of other fine scholars generously read a draft of this Book Review and contributed a variety of excellent suggestions. Thanks to Peter Brandon Bayer, David Bogen, Jesse H. Choper, Daniel O. Conkle, Robert F. Drinan, S.J., N. Bruce Duthu, John H. Garvey, Eugene Gressman, Timothy L. Hall, Kurt T. Lash, Philip N. Meyer, Marc Rohr, Peter M. Shane, Peter Read Teachout, Mark V. Tushnet, John T. Valauri, James Etienne Viator, Eugene Volokh, and James Boyd White.

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Like other authors presenting historical arguments, I am indebted to Michael McConnell for his superb article on the original understanding of the Free Exercise Clause. See Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990).
INTRODUCTION

In Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom, Professor Steven D. Smith presents the most pessimistic account of judicial attempts to police the boundary between the garden of religious belief and the wilderness of the secular state. Professor Smith concludes that in Free Exercise Clause and Establishment Clause cases, courts cannot develop a principled theory of religious freedom. Professor Smith contends that a review of originalist evidence will not reveal a principled theory, because the framers did not agree on any particular approach to church-state issues. Instead, the framers viewed the religion clauses only as means of assigning all religious liberty issues to the states.

Further, Professor Smith argues that any attempt to find the "proper" or "best" principle of religious freedom without reference to history is doomed to failure. Professor Smith writes that there is "no unitary principle of religious freedom; rather there are numerous versions of religious freedom ... ." Where a judge or scholar elevates

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1 Roger Williams, Mr. Cotton's Letter Lately Printed, Examined and Answered, in 1 The Complete Writings of Roger Williams 392 (1963).
3 The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.
4 See Smith, supra note 2, at 15–16.
5 See id. at 16–17.
6 Id. at 12.
one of these versions of religious freedom to the level of constitutional theory, this decision is predetermined by a particular set of background beliefs, and does not implement some "neutral" principle. Our legal system will adopt a coherent approach to religious freedom only if we treat each church-state issue as a "prudential matter,"7 properly resolved by elected officials working within a "pluralistic political process."8

In his introduction, Professor Smith notes that one reviewer described Foreordained Failure as "revolutionary"—and rightly so.9 Professor Smith's book is bold and original. Professor Smith does not shrink from the implications of his account, and approaches his subject with an engaging writing style.

Part I of this Book Review describes Foreordained Failure as the culmination of a growing pessimism in scholarship on religious liberty. This section discusses the increasing skepticism about whether courts may make any positive contribution to the protection of religious liberty.

Part II describes and analyzes Professor Smith's assertions in Foreordained Failure. First, Professor Smith argues that the framers did not agree on any substantive principle of religious liberty when they adopted the First Amendment. Instead, the religion clauses were "purely jurisdictional in nature."10 Congress adopted the clauses "merely to assign jurisdiction over matters of religion to the states."11 If the framers did not agree on any original understanding that would give content to the religion clauses, Professor Smith argues that an almost infinite number of theories of religious liberty are possible. However, the choice of a particular theory will follow from the theorist's background beliefs, and not from universal or neutral principles. Because any particular theory of religious liberty will be no more or less plausible than competing versions, Professor Smith concludes that the implementation of any one theory will be illegitimate. Religious freedom thus may be best achieved by elected officials "through compromise, cultivated tolerance, mutual forebearances, and strategic silences."12

Professor Smith explicitly disclaims any intent to propose normative conclusions.13 However, his approach strongly suggests "that

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7 See id. at 16.
8 Id. at 126.
9 Id. at v.
10 Id. at 17.
11 Id. at 26.
12 Id. at 117.
13 See id. at vi–vii, 121–22.
courts should simply get out of the business of protecting religious freedom altogether." Such an approach would impose a harsh impact on members of small, unorthodox religious groups. Such groups lack access to legislators, who may be unfamiliar with a group's beliefs and practices.

My primary disagreement with Professor Smith is on originalist grounds. While Professor Smith argues that the framers did not agree on any principle of religious liberty, I believe that the framers found some common ground with respect to church-state issues. And while as an abstract matter a government might derive a "principle of religious freedom" from a variety of norms, many such approaches would clash with our constitutional language and history. Instead, the principle of religious choice is particularly consistent with the language and the history of the First Amendment.

Part III of this Book Review suggests that the framers reached a consensus on the principle of religious choice, and implemented this substantive principle when they adopted the religion clauses of the First Amendment. Historical evidence indicates that by 1791, a consensus had formed in support of the religious choice principle. Part III also sketches a few implications of a law-and-religion jurisprudence based on the principle of religious choice.

I. THE DECLINE OF RELIGIOUS LIBERTY THEORIES: THE ROAD TO FOREORDAINED FAILURE

A. The Golden Age of Religious Liberty Theories

Back in the 1960s, the 1970s, and even into the early 1980s, writing about church and state issues must have been a lot of fun. Judicial opinions and commentaries seem buoyed with a spirit of optimism, a sense that a search for principles would solve all of the complex problems of religious liberty.

In 1961, Professor Philip Kurland published an article that remains the most influential interpretative approach to the religion clauses. Professor Kurland's strict neutrality principle provided: "[R]eligion may not be used as a basis for classification for purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations." After offering a mere five-page justification for this principle, Professor Kur-
land devoted ninety-one pages to an explanation of how his strict neutrality principle would resolve every religious liberty case heard by the United States Supreme Court.¹⁷

During this time period, the Supreme Court Justices were not bashful about invoking the religion clauses of the First Amendment. The Court held that Wisconsin must exempt Amish students from compulsory high school attendance,¹⁸ invalidated laws that governed the teaching of man’s origins in the public schools,¹⁹ and developed a complex body of doctrine that regulated state aid to private, frequently sectarian schools.²⁰

After three decades, enthusiasm for judicial enforcement of the religion clauses has waned. Even the most ardent defenders of judicial review have a difficult time justifying some of the fine fact distinctions offered by the Supreme Court as constitutional principles. A state violates the Establishment Clause if it funds field trips at largely sectarian private schools,²¹ but state funding of textbook “loans” to private school students is permissible.²² A Christmas creche placed on a staircase of the county courthouse in Pittsburgh, Pennsylvania violated the Establishment Clause,²³ but the city probably could place a Chanukah menorah outside of a nearby county office building.²⁴

¹⁷ Id. at 6–96.
¹⁹ Epperson v. Arkansas, 393 U.S. 97, 103–09 (1968) (invalidating an Arkansas law prohibiting anyone employed at a state-supported school or university from teaching “the theory or doctrine that mankind ascended or descended from a lower order of animals”).
²⁰ See, e.g., Wolman v. Walter, 433 U.S. 229, 236–55 (1977) (upholding parts of an Ohio statute that provided books, standardized testing, diagnostic services, therapeutic services, and remedial services to nonpublic school students, while invalidating portions of the statute that funded instructional equipment and field trips for private school students); Meek v. Pittenger, 421 U.S. 349, 359–72 (1975) (holding that Pennsylvania could loan texts to nonpublic school students, but the state could not fund instructional materials, remedial instruction, or accelerated instruction provided at nonpublic schools); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774–98 (1973) (invalidating New York acts that provided grants for the maintenance and repair of nonpublic school facilities, reimbursed low-income parents for up to $100 of each student’s nonpublic school tuition, and provided tax relief to other low-income parents whose children attended nonpublic schools).
²¹ See Wolman, 433 U.S. at 252–55.
²² See id. at 256–38.
²⁴ See id. at 613–21. Although the Justices concluded that the menorah “does not have an effect of endorsing religious faith,” the Court acknowledged that a lower court might determine that the menorah violated the Establishment Clause for another reason. Id. at 620–21.
Scholarly attempts to develop a coherent principle of religious liberty also have seemed to produce some unpalatable results. Consider Jerry Swartzentruber, a Michigan resident and an Amish believer. In order to prevent road accidents, Michigan law requires that any slow-moving vehicle traveling at night must display a bright orange reflector. For Swartzentruber, display of such a symbol on his horse-drawn buggy would prove deeply offensive. The symbol would violate Swartzentruber’s sincere Amish beliefs, which mandate that Swartzentruber must own only goods with a plain appearance. Swartzentruber would not violate his religious convictions if he illuminated the back of his wagon with a lantern.

Now assume that the Michigan legislature recognizes Swartzentruber’s sincere religious belief, and enacts a statutory exemption. Under this law, individuals need not display the bright orange reflector where this symbol would violate a sincere religious belief, and where the individual could propose some alternative display that satisfied the state interest in roadway safety.

Under Professor Kurland’s strict neutrality theory, the statutory exemption would be unconstitutional. The state has excused only individuals invoking a sincere religious belief from the orange reflector requirement. The exemption thus involves a classification on the basis of religion, forbidden by Professor Kurland’s approach.

What is attractive about Professor Kurland’s result? If a court invalidates the reflector exemption, the ruling would seem inconsistent with the original understanding of the religion clauses. Early American governments adopted statutory religious exemptions, including

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25 See John A. Hostetler, Amish Society 237 (4th ed. 1993) (describing the Amish belief in plain dress as “an expression of obedience to God and of ‘protest’ to the proud and disobedient world”); Lee J. Zook, Slow-Moving Vehicles, in The Amish and the State 149 (Donald B. Kraybill ed., 1993) (noting that although many Amish believers display slow-moving vehicle symbols, some church members raise religious objections to such symbols because “they are too ‘loud’ or bright in color”).


the federal law that exempted conscientious objectors from military conscription.\textsuperscript{28}

Nor does invalidating the law seem like a prudent policy decision.\textsuperscript{29} While some commentators have concluded that any statutory religious exemption violates the Establishment Clause,\textsuperscript{30} such arguments are a bit hard to see. Certainly, the reflector exemption does not involve government "establishment" of a particular religion. Michigan residents are not going to run out and join the Amish Church so that they can drive their slow-moving vehicles without reflectors.\textsuperscript{31} In fact, the exemption does not favor religion at all. Instead, the exemption equalizes government treatment of the Amish driver who staunchly opposes the reflector requirement, and the non-Amish driver who views the reflector requirement as trivial.\textsuperscript{32}

\section*{B. The Growing Skepticism}

With judicial doctrine and academic theories producing unsatisfactory results, increasing doubts have surfaced about the ability of courts to facilitate religious liberty.\textsuperscript{33} Consider the writings of Profes-

\begin{itemize}
\item \textsuperscript{28} Resolution of July 18, 1775, \textit{in 2 Journals of the Continental Congress} 1774–1789, at 187, 189 (Worthington C. Ford ed., 1905) [hereinafter JOURNALS].
\item Professor Lupu's approach is precisely the opposite of the Supreme Court's current Free Exercise Clause interpretation. The Court has authorized statutory religious exemptions, but not court-mandated exemptions. \textit{See Smith}, 494 U.S. at 890 (finding that while elected legislators may adopt a "religious-practice exemption," a court may not mandate a religious exemption).
\item \textsuperscript{30} See \textit{e.g.}, Mark Tushnet, \textit{"Of Church and State and the Supreme Court"}: Kurland Revisited, 1989 Sup. Ct. Rev. 373, 386 (arguing that an approach authorizing statutory religious exemptions "seems to deprive the Establishment Clause of meaning independent of the Free Exercise Clause").
\item \textsuperscript{31} See Board of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 732, 740 (1994) (Scalia, J., dissenting) (arguing that a New York law that carved out a separate school district for a village populated entirely by an Orthodox Jewish sect did not violate the Establishment Clause, because the law would not establish the sect's religion and did not involve "religious favoritism").
\item \textsuperscript{32} Professor Steven Smith makes a similar point in a work that predates FOREORDAINED FAILURE. \textit{See} Steven D. Smith, \textit{The Restoration of Tolerance}, 78 Cal. L. Rev. 305, 354 (1990) (stating that court-mandated religious exemptions "are the product of tolerance, not approval").
\item \textsuperscript{33} See Thomas C. Berg, \textit{Religion Clause Anti-Theories}, 72 Notre Dame L. Rev. 693, 693 (1997) ("[A] number of writers have concluded that at least at present, there is
Professor William Marshall, one of the most prolific and thoughtful recent scholars on religious liberty. Professor Marshall and Professor Kurland endorse a similar, narrow reading of the Free Exercise Clause. However, these scholars arrive at a minimalist interpretation by very different routes. Professor Kurland’s reading of the Free Exercise Clause follows inexorably from his strict neutrality principle, which prohibits any distinction between religious and nonreligious conduct. In support of his narrow reading of the Free Exercise Clause, Professor Marshall argues that some types of free exercise cases will be too difficult for courts to adjudicate.

Professor Kurland and Professor Marshall both endorse a relatively activist Establishment Clause doctrine. But again, these scholars arrive at their conclusions by different routes. For Professor Kurland, if a law benefits religion through the use of a religious classification, the law violates the Establishment Clause.

Professor Marshall is far more tentative about judicial enforcement of the Establishment Clause. For Professor Marshall, the Establishment Clause reflects "a concern that government action not symbolize an endorsement of, or an improper relationship with, religion." Professor Marshall writes that government action symbolizing an improper state endorsement of religion "occurs without consistency and is ultimately subjective since symbolic interpretation depends upon the inclinations of those who perceive the symbol." Professor Marshall acknowledges that his symbolic interpretation leads to "the unsettling conclusion" that "establishment is inherently inconsistent."

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34 See U.S. Const. amend. I (providing that Congress shall make no law prohibiting the free exercise of religion).
36 William P. Marshall, "We Know It When We See It": The Supreme Court and Establishment, 59 So. Cal. L. Rev. 495, 513 (1986).
37 Id. at 550.
38 Id. Professor Marshall suggests some guidelines for making Establishment Clause law more predictable. Professor Marshall recommends that courts separate Establishment Clause cases into three distinct categories: cases involving the public schools, cases involving government practices and regulatory programs, and cases involving aid to parochial education. See id. at 540–50. Further, Professor Marshall argues that courts may reduce the subjectivity of Establishment Clause decisions by
Doubts about the wisdom of judicial efforts to protect religious liberty also have crept into judicial opinions. In 1990, the Supreme Court dramatically reduced the significance of the Free Exercise Clause. Today, a plaintiff may allege a Free Exercise Clause violation only in the thankfully rare cases of intentional religious discrimination. The Free Exercise Clause no longer applies in a much more familiar situation, where a law resulting from permissible motivations imposes a disproportionate burden on a particular religion.

Recall Jerry Swartzentruber's opposition to the Michigan reflector law. Prior to 1990, Swartzentruber could have sought a court-mandated exemption from the law. But assuming that the reflector requirement did not result from an intent to discriminate against the Amish, today Swartzentruber would not have a Free Exercise Clause claim.

The Supreme Court has not yet authored a wholesale revision of Establishment Clause law. Nonetheless, some recent cases suggest a judicial retreat in this area as well.

invoking the principle of stare decisis and deferring to previous decisions. See id. at 550.


41 See City of Boerne v. Flores, 117 S. Ct. 2157, 2160-61 (1997) (reaffirming the holding in Employment Division v. Smith, which concluded that plaintiffs could not bring Free Exercise Clause challenges to "neutral laws of general applicability").

42 See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 215-36 (1972) (mandating that Wisconsin must exempt Amish students from the state's compulsory high school attendance law); Sherbert v. Verner, 374 U.S. 398, 402-10 (1963) (holding that South Carolina must exempt a Seventh-Day Adventist from an unemployment compensation law, which required that the claimant must be willing to work on her Saturday Sabbath, or must forego benefits).


II. PROFESSOR SMITH AND THE FUTILITY OF THEORY

Enter Steven Smith. Professor Smith takes the current uneasiness about religious liberty theories to a new level. For Professor Smith, developing a coherent judicial doctrine of religious liberty is not merely illusive or problematic. It's impossible.

Professor Smith writes that the framers did not agree on any substantive principle of religious liberty. Instead, the framers enacted the religion clauses solely to relegate all questions about religious liberty to the states. Given the absence of any original agreement about church-state relationships, current disagreements on a variety of church-state issues foreclose the development of a coherent, principled approach to religious liberty issues. As a result, courts should not attempt to protect religious liberty by relying on the Free Exercise Clause or the Establishment Clause.

A. Professor Smith’s Originalist Account

1. Introduction

Professor Smith argues that when the framers of the Constitution adopted the religion clauses of the First Amendment, the framers did not agree on any substantive principle of religious liberty. Instead, the framers adopted the First Amendment “merely to assign jurisdiction over matters of religion to the states.” Professor Smith bases this conclusion primarily on three historical arguments.

First, Professor Smith contends that the framers “held contradictory positions at a basic level” about the proper relationship between government and religion. As a result of this basic disagreement, the framers could not agree on any substantive principle of religious liberty.

Second, Professor Smith highlights statements made by supporters and opponents of the Constitution. Professor Smith contends that these statements affirmed that the religion clauses were adopted solely to insure that only the states could legislate on matters affecting religion.

Third, Professor Smith argues that the lack of any meaningful debate about the religion clauses either in Congress or in the state ratifying conventions supports the argument that the framers did not

44 See SMITH, supra note 2, at 21 (“If we ask, therefore, what principle or theory of religious liberty the framers and ratifiers of the religion clauses adopted, the most accurate answer is ‘None.’”).
45 Id. at 26.
46 Id.
FOREORDAINED FAILURE

adopt any substantive principle in the religion clauses. Given the level of disagreement about the proper relationship between church and state at the time of the First Amendment, the choice of any particular substantive principle would have evoked considerable controversy. Accordingly, the lack of debate strongly suggests that the religion clauses did not embody any particular conception of church-state relationships. Instead, the clauses merely assigned jurisdiction over religious liberty issues to the states.

Professor Smith's argument seems at odds with the language of the First Amendment, which does not explicitly delegate jurisdiction over religious liberty issues to the states. In his response to this Book Review, Professor Smith acknowledges that "the framers of the First Amendment did not actually use the words 'no jurisdiction.'" 47

This omission is significant because other amendments in the Bill of Rights are so clearly jurisdictional. For example, the Tenth Amendment provides: "The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people." 48 If the framers had wished to assign all jurisdiction over church-state issues to the states, the language of the religion clauses might look something like: "All questions respecting religion are reserved to the states." The language of the First Amendment looks nothing like this.

I am not persuaded by Professor Smith's jurisdictional argument primarily for two additional reasons. Although Professor Smith accurately reports that conceptions of religious liberty varied from state to state in the late eighteenth century, by the time of the Constitution all of the states had reached a consensus on at least one critical point. Specifically, all of the states agreed to accept private religious choices. This tolerance of religious choice departed dramatically from practices prior to the Revolutionary War, when the colonies had punished religious dissenters with imprisonment, banishment, and death. In Part III of this Book Review, I argue that the religion clauses were designed to protect this substantive principle of religious choice. 49

In addition, Professor Smith's argument that the religion clauses assigned exclusive "jurisdiction over matters of religion to the states" 50 was contrary to actual federal practices when Congress adopted the First Amendment. Congress was not shy about passing laws that af-

48 U.S. Const. amend. X.
49 See infra text accompanying notes 145–214.
50 Smith, supra note 2, at 18.
fected church-state relationships, both before and after the adoption of the First Amendment. Further, it would have been virtually impossible for Congress to avoid enacting legislation that affected religious liberty.

Professor Smith also relies on statements about church-state relationships made during the founding period, and on the lack of debate about the religion clauses. I have a similar reaction to both of these arguments. The statements cited by Professor Smith are typically terse and ambiguous. These statements may have advocated Professor Smith's jurisdictional approach, or the substantive principle of voluntary religious choice, or some entirely different approach.

The lack of debate about the religion clauses is similarly unenlightening. At most, the lack of debate probably suggests that the framers did not intend some radical change from existing practices when they adopted the religion clauses. But Professor Smith's jurisdictional interpretation would have involved a fairly dramatic change in the federal approach to religion issues. Therefore, I believe that the lack of debate on the religion clauses actually undercuts rather than supports Professor Smith's jurisdictional argument.

2. Disagreements in Principle About the Relationship Between Government and Religion

Professor Smith accurately observes that with respect to proper church-state relationships, "views in the new nation were of course diverse." Professor Smith then identifies two basic positions that divided Americans—the traditional position and the voluntarist position.

According to Professor Smith, the traditionalists and voluntarists diverged primarily on whether and to what extent government should support religion. In early America, state-mandated religious assessments collected on behalf of the prevailing church provided the most tangible form of such support. Professor Smith writes: "The traditional position regarded governmental support for religion as essen-

51 Id. at 19.
52 Professor Smith also suggests that a significant group of Americans may have embraced a third position, which was hostile to organized churches. Professor Smith describes this position as the "heretical position." SMITH, supra note 2, at 20–21.

However, Professor Smith is uncertain about whether a significant number of Americans ever favored such a position. Even if the heretical position had gained some followers, this view probably had little influence in post-revolutionary America because "its proponents seem to have found it prudent to be discreet about their actual opinions." Id. at 20.
tional to the social order, while the voluntarist position opposed such support.\textsuperscript{53}

Given the controversy that surrounded the question of whether the state directly should support a particular religion, Professor Smith writes that "it is hard to see how the founding generation could have agreed on any substantive answer to the religion question."\textsuperscript{54} So they did not agree. Instead, the religion clauses "were purely jurisdictional in nature."\textsuperscript{55} Congress adopted the religion clauses "merely to assign jurisdiction over matters of religion to the states."\textsuperscript{56}

Although Professor Smith does provide some other examples of the divergent approaches to religion in different states,\textsuperscript{57} Professor Smith's originalist argument rests heavily on the disagreement about government support for religion, or religious assessments.\textsuperscript{58} But even assuming that the propriety of such assessments was the only significant religious liberty issue debated at the time of the passage of the Bill of Rights, the founders did not disagree about religious assessments to the extent suggested by Professor Smith.

In fact, by 1789 a clear trend toward the abolition of religious assessments had developed in the United States. As of 1758, nine of the original thirteen states collected taxes that supported ministries,\textsuperscript{59} with only four states declining to collect assessments.\textsuperscript{60}

\textsuperscript{53} Id. at 21.
\textsuperscript{54} Id. at 26.
\textsuperscript{55} Id. at 17.
\textsuperscript{56} Id. at 26.
\textsuperscript{57} See id. at 37-39.
\textsuperscript{58} See id. at 19-22, 26-27.
\textsuperscript{59} The nine states that collected assessments were Connecticut, Georgia, Maryland, Massachusetts, New Hampshire, New York, North Carolina, South Carolina, and Virginia. See THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 82-83 (1986) (describing the Connecticut law that authorized religious assessments in 1708); id. at 152-53 (noting a 1758 Georgia law providing that liquor tax revenues would support churches); id. at 49 (stating that in 1702, "Maryland law authorized taxes to support Anglican worship"); id. at 82 (the Massachusetts charter of 1691 mandated that citizens must pay assessments to support congregational ministers); id. (describing the New Hampshire practice where each town collected local taxes to support a minister); id. at 62-63 (in 1683, a New York law mandated religious assessments); id. at 60 (in 1715, a North Carolina law mandated that the inhabitants of each parish must support an Anglican minister); id. at 58-59 (in 1706, the South Carolina assembly provided that ministers would draw their salaries from public monies); id. at 29 (by 1624, the practice of collecting assessments was established in Virginia).

\textsuperscript{60} The four states that never collected religious assessments were Delaware, see id. at 106, New Jersey, see id. at 72, 106, Pennsylvania, see id., and Rhode Island, see id. at 91.
Between 1758 and 1789, five states that had collected religious assessments repudiated the practice.\(^6^1\) In 1789, nine states proscribed religious assessments. Such taxes were collected in only four states, located primarily in New England.\(^6^2\)

Professor Smith thus overstates the level of disagreement about government support for religion that existed when the First Amendment was drafted and ratified. Professor Smith correctly observes that some citizens continued to support religious assessments “[y]ears after the adoption of the religion clauses.”\(^6^3\) Massachusetts did not abolish religious assessments until 1833.\(^6^4\) But Professor Smith exaggerates when he writes that in 1789, the founders “held contradictory positions at a basic level” as to whether government directly should support a state-sanctioned religion.\(^6^5\) Without question, by 1789 the United States was moving toward the abolition of such preferential government support.

But even if citizens in the new nation were hopelessly deadlocked on whether government should support a particular religion, that does not mean that Americans failed to reach any consensus on church-state issues. Citizens today clash about whether government should fund sectarian and other private schools.\(^6^6\) Nonetheless, the

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\(^6^3\) *Smith, supra* note 2, at 20.

\(^6^4\) *See Curry, supra* note 59, at 164.

\(^6^5\) *Smith, supra* note 2, at 26.

presence of this controversy does not prove that our society lacks any consensus with respect to all religious liberty issues. To take an obvious example, almost everyone agrees that state governments should not jail non-Christians as heretics. Although the framers regarded the propriety of religious assessments as an important and controversial issue, this controversy does not prove that the framers failed to reach any agreement about religious liberty.

In fact, general agreement did emerge with respect to some issues. During the Revolutionary period, a number of state statutes provided exemptions from testimonial oaths for religious believers who opposed such oaths. As I am not aware of any significant opposition to these statutes.

At about the same time, twelve of the thirteen original states adopted constitutional provisions that protected the “freedom of conscience” and “the free exercise of religion.” Professor Smith quickly concludes that these provisions lacked any substantive import. As discussed in more detail below, the explicit language of the state constitutional provisions sheds considerable light on the meaning of the tersely written federal First Amendment.

Most significantly, Americans living in the new republic reached a consensus regarding the treatment of religious dissenters. Simply put, Americans agreed that it was improper to outlaw a religion, or to punish believers with imprisonment or banishment on account of their private religious choices. As described in Part III of this Book Review, this consensus represented a dramatic departure from prevailing practices in colonial America. The toleration of religious dissenters, the

Value of Assimilation, 96 COLUM. L. REV. 87, 93 (1996) ("[T]he Constitution permits government to defray the costs of private norm-creating activity, including religious activity, so long as government does not discriminate among religious views or between religious and secular views.") and Michael A. Paulsen, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 NOTRE DAME L. REV. 311, 358 (1986) ("[T]he Constitution permits the state to take steps to remedy the financial inequality confronting those choosing between state-run and religious education.").


68 See McConnell, supra note 27, at 1455–66 (noting that by 1789, every state except Connecticut had adopted a constitutional provision that protected religious freedom).

69 Smith, supra note 2, at 40.

70 See infra text accompanying notes 166–70.

71 See infra text accompanying notes 145–214.
testimonial oath exemptions, and the freedom of conscience provi-
sions all followed from a substantive principle that most Americans
had come to accept—the principle of religious choice.

3. Statements About the Effect of the Religion Clauses

Professor Smith also identifies some statements by supporters and
opponents of the Constitution, which according to Professor Smith
indicate that the framers adopted the religion clauses solely to assign
jurisdiction over religious liberty issues to the states. Professor Smith
acknowledges that the framers never provided a systematic explana-
tion about the meaning of the religion clauses in Congress, at the
state ratifying conventions, or anywhere else. Professor Smith thus
must attempt to divine an interpretation from a few isolated remarks
and fragments of conversations.

At first glance, some of these fragments seem to support Profes-
sor Smith’s argument that the religion clauses were purely jurisdic-
tional. For example, Professor Smith quotes a statement made by
James Madison during the Virginia Constitutional Convention:
“There is not a shadow of right in the general government to inter-
meddle with religion.” Professor Smith reads this statement as pro-
viding that the federal government could not “intermeddle with” the
decisions of each state government on religious liberty
issues. But is that really what Madison meant? Madison might have
meant that the federal government could not “intermeddle with” the
religious choices of private citizens. In other words, while colonial
governments had punished individuals because they had chosen a dis-
favored religion, the First Amendment prevented the federal govern-
ment from engaging in similar persecutions. In contrast to Professor
Smith’s jurisdictional interpretation, this alternative approach would
read the First Amendment as enacting the substantive principle of
religious choice.

\[72\] See Smith, supra note 2, at 26.

\[73\] Although the framers provided no systematic interpretation of the religion
clauses, a number of authors had developed theories of religious liberty. These writ-
ers ranged from the Enlightenment philosopher John Locke, to the evangelical
preacher John Leland. In Part III of this Book Review, I argue that the principle of
religious choice united the Enlightenment and evangelical proponents of religious
liberty. See infra text accompanying notes 145–214.

\[74\] Smith, supra note 2, at 28 (citing McConnell, supra note 27, at 1477).

\[75\] See Smith, supra note 2, at 28.

\[76\] In his reply to this Book Review, Professor Smith emphasizes that Madison
made this statement “in the Virginia convention—not, as Professor Steinberg seems to
assume, after the religion clauses had been drafted or adopted . . . .” Smith, supra
In the footnotes to *Foreordained Failure*, Professor Smith quotes a similar statement from Richard Dobbs Spaight of North Carolina: "As to the subject of religion . . . [n]o power is given to the general government to interfere with it all. Any act of Congress on this subject would be an usurpation." According to Professor Smith, Spaight meant that the federal government could not "interfere with" state decisions on religious liberty issues. But Spaight might have meant that Congress *could* legislate on church-state issues, as long as Congress did not "interfere with" private religious choices.

In short, these statements may indicate that the First Amendment was intended as a jurisdictional provision that prevented Congress from "intermeddling" with each state's regulation of religion, or as a substantive provision that prevented Congress from interfering with private religious choices. The statements cited by Professor Smith are ambiguous, and subject to more than one plausible interpretation. At best, such statements provide limited support for Professor Smith's thesis that the framers did not enact some substantive principle when they adopted the religion clauses.

4. The Lack of Debate

Professor Smith cites the lack of debate about the religion clauses in support of his jurisdictional interpretation of the clauses. Professor Smith accurately notes that congressional discussions of the religion clauses were "desultory and superficial," while most state ratifying conventions "approved the measure with even less reflection or discussion."

In fact, the complete discussion of the religion clauses in the House of Representatives consumes less than three pages. Any Sen-

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77 *Id.* at 137 n.28 (quoting LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 66 (1986)).

78 Professor Smith also paraphrases Roger Sherman of Connecticut, who stated in the House of Representatives that "no constitutional provision on the subject of religion was needed because Congress had no power to establish religion anyway." *Smith*, *supra* note 2, at 28–29. Sherman's statement provides only that Congress had no power "to establish religion," not that Congress lacked the power to legislate on any church-state issue. Also, because Sherman opposed the First Amendment, I am uncertain whether his statements about the amendment are particularly authoritative.

79 *Smith*, *supra* note 2, at 26.

80 See CURRY, *supra* note 59, at 200–02 (quoting the full text of the discussion in the House of Representatives).
ate debate on the religion clauses was not recorded.81 Professor Smith contends that such complacency would make sense "if the enactors believed that they were not answering the difficult [church-state] questions at all but were merely deferring those questions to someone else—the states."82

It's so hard to know what implications one should draw from silence. Perhaps the only safe assumption is that when Congress enacted the religion clauses, the legislators did not intend any radical changes in the status quo. If Congress had intended that the clauses would result in significant law reform, one would have expected vigorous debates about the advisability of the proposed changes.

As discussed above, I believe that the religion clauses were intended in part to prohibit Congress from punishing an individual because of her religious beliefs. If this was the case, then the lack of debate relating to the clauses would not be surprising. As discussed in more detail in Part III of this Book Review, by 1789 all of the states had abandoned the previous practice of imprisoning and banishing religious dissenters.83

Professor Smith asserts that a decision by Congress to leave all religious liberty issues to the states would have provoked little debate.84 But if the religion clauses indeed deprived Congress of all authority to legislate on church-state issues, this jurisdictional approach might have been a good deal more controversial than Professor Smith suggests. During the Revolutionary War, Congress had exempted members of pacifist religious groups from compulsory military service.85 If the religion clauses indeed assigned "jurisdiction over matters of religion to the states,"86 then Congress presumably could no longer legislate on church-state issues by adopting a draft exemption for pacifist believers.87 One might expect that some federal represent-

81 See id. at 206 ("Senate reports on the debates on the Bill of Rights are even more sketchy than those of the House.").
82 SMITH, supra note 2, at 27.
83 See infra text accompanying notes 174-91.
84 Professor Smith is correct that state legislators enacted most of the laws affecting religion before and after the Constitutional Convention. See SMITH, supra note 2, at 38-39.
85 See Resolution of July 18, 1775 in 2 JOURNALS, supra note 28, at 187, 189.
86 SMITH, supra note 2, at 26.
87 Under Professor Smith's interpretation of the religion clauses, it is unclear whether any law requiring compulsory military service would be constitutional. If Congress required pacifist believers to disobey religious tenets and serve in the military, the federal representatives presumably would have passed a law resolving a religious liberty issue. But according to Professor Smith's reading of the religion clauses, only the state governments could legislate on such issues.
atives would oppose this reduction in congressional authority, or at least would believe that the change deserved discussion. If the framers had intended that the religion clauses would divest Congress of all jurisdiction over religious liberty issues, such a result might have seemed too controversial to greet with silence.

5. The Implausibility of a Purely Jurisdictional Interpretation

In arguing that the religion clauses "were purely jurisdictional in nature," Professor Smith analogizes the clauses to a hypothetical federal law on school curriculum matters. In this hypothetical law, Congress concludes that school curriculum issues "should all be resolved on the state and local levels." Such a law would have "no substantive meaning independent of its federalism." Professor Smith concludes that the religion clauses similarly were intended to provide state governments with exclusive jurisdiction over church-state issues.

Professor Smith’s analogy overlooks a key difference between his hypothetical school curriculum law and the religion clauses. A law delegating school curriculum issues entirely to local governments is plausible, because Congress rarely has addressed such issues. Congress not only has legislated on church-state issues, but congressional involvement on such issues seems inescapable. As already noted, the first Continental Congress faced a church-state issue when the lawmakers enacted compulsory military service. If Congress required pacifist believers to serve in the armed forces, the law could violate the free exercise of religion by infringing on the believers’ conscience. If Congress exempted only pacifist believers from military service, the law would mandate different treatment for members of particular religions. One might view such a statutory exemption as an impermissible establishment of religion. The Continental Congress

88 Smith, supra note 2, at 170.
89 Id. at 24.
90 Id.
91 See id. at 26.
92 In the United States, local government institutions traditionally have developed the curriculum of the public schools. See, e.g., Board of Educ. v. Pico, 457 U.S. 853, 863 (1982) (plurality opinion) ("The Court has long recognized that local school boards have broad discretion in the management of school affairs."); Milliken v. Bradley, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools . . . ."); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities.").
resolved this dilemma by exempting members of pacifist religious
groups from compulsory military service.\textsuperscript{93}

At the time when Congress drafted the Bill of Rights, the legisla-
tors were not shy about implementing federal measures that affected
religious liberty. As Professor Smith recognizes, Congress passed a
resolution authorizing a day of public thanksgiving and prayer, ap-
pointed chaplains to serve the Senate and the House of Representa-
tives, and appointed chaplains for the army.\textsuperscript{94}

If the religion clauses assigned jurisdiction over matters of reli-
gion to the states, as Professor Smith argues, then Congress could not
have adopted the prayer resolution or appointed chaplains. But when
Congress approved these actions, the legislators must have decided
that the measures were not laws "respecting an establishment of reli-
gion" or "prohibiting the free exercise thereof."\textsuperscript{95} Contrary to Profes-
sor Smith's assertion, the religion clauses must have included a
substantive component.\textsuperscript{96}

In attempting to deal with these congressional actions that af-
fected religious liberty, Professor Smith contends that Congress had
agreed to "a partial renunciation of jurisdiction over religion."\textsuperscript{97} Pro-
fessor Smith writes that such an approach "would effectively assign to
the states the major, controversial issues of religion—issues regarding
the 'establishment' and regulation of religion—and it would defer the
residual, nonassignable issues of religion to the future."\textsuperscript{98} I'm not en-
tirely certain what Professor Smith means by the phrase "partial re-
nunciation of jurisdiction."\textsuperscript{99} Congress undoubtedly deferred
resolution of issues not before the legislators, just as the Supreme
Court cannot decide a religious liberty issue not yet brought to court.

However, Congress did take action on issues affecting religion.
Congress could approve these measures only after deciding upon a
substantive definition of the religion clauses that permitted such ac-
tion. The religion clauses thus did not simply assign jurisdiction over

\textsuperscript{93} See Resolution of July 18, 1775, in 2 JOURNALS, supra note 28, at 187, 189.
\textsuperscript{94} See SMITH, supra note 2, at 33–34; see also CURRY, supra note 59, at 217–18.
\textsuperscript{95} U.S. CONST. amend. 1.
\textsuperscript{96} See CURRY, supra note 59, at 217. With respect to the adoption of the prayer
resolution, Professor Curry writes: "In the House discussion of the matter, Tucker of
South Carolina argued that 'this . . . is a business with which Congress have nothing to
do; it is a religious matter, and, as such, is proscribed to us.' Congress obviously did
not agree." Id.
\textsuperscript{97} SMITH, supra note 2, at 33.
\textsuperscript{98} Id. at 33–34.
\textsuperscript{99} Id. at 33.
religious liberty issues to the states. The phrases "free exercise" and "establishment of religion" retained some substantive meaning.

6. Summary

Much of Professor Smith's historical account is entirely accurate and appropriate. In the early colonial period, different regions of the United States followed very different practices with respect to church-state relationships. When the Bill of Rights was adopted, some of those differences persisted.

In addition, Professor Smith accurately observes that a central purpose of the religion clauses was to allow each state to make its own decisions about religious liberty, by preventing Congress from passing laws "respecting an establishment of religion" or "prohibiting the free exercise thereof." According to modern doctrine, that all changed with the ratification of the Fourteenth Amendment Due Process Clause, which incorporated the religion clauses and made these provisions applicable to the states.

However, I am not persuaded by Professor Smith's assertion that when the framers approved the religion clauses, they "did not adopt any substantive right or principle of religious freedom." In my opinion, the framers' few terse statements about the meaning of the religion clauses, and the lack of debate on the clauses, provide no more than modest support for Professor Smith's jurisdiction argument.

In his most convincing historical argument, Professor Smith maintains that because "Americans in the late eighteenth-century held contradictory positions at a basic level regarding the religion question," they could not have agreed "on any substantive answer to the

100 See generally CURRY, supra note 59, at 1–77 (describing the divergent church-state relationships in the early colonies).

101 U.S. CONST. amend. I.

102 See Everson v. Board of Educ., 330 U.S. 1, 8 (1947) (holding that the Fourteenth Amendment Due Process Clause incorporates the Establishment Clause of the First Amendment, making the Establishment Clause applicable to the states); Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) (concluding that the Fourteenth Amendment Due Process Class incorporates the Free Exercise Clause of the First Amendment, making the Free Exercise Clause applicable to the states). Professor Smith does not take a position on the debate about whether the Fourteenth Amendment incorporated the Bill of Rights, because "if the religion clauses as originally understood were purely jurisdictional . . . then they contained no substantive right or principle of religious freedom that could have been 'incorporated' even if the enactors of the Fourteenth Amendment had wanted to incorporate them." SMITH, supra note 2, at 50.

103 SMITH, supra note 2, at 17.
Despite some disagreements on important church-state issues, I believe that Americans at the time of the Bill of Rights had reached a consensus on at least one basic principle. As discussed in Part III, Americans had come to support the principle of religious choice. The framers embodied this principle in the religion clauses.

B. Professor Smith's Theoretical Account

After concluding that the framers of the religion clauses did not agree on any substantive principle of religious liberty, Professor Smith considers whether one might construct a theory of religious liberty without reference to any original understanding. Professor Smith concludes that an almost infinite number of such theories are possible. The particular theory that a judge or scholar endorses will depend upon her "background beliefs about religion, government, society, and human psychology." Because a theory of religious liberty will develop out of a nonuniversal collection of background beliefs and not from neutral principles, the theory will be illegitimate.

In the abstract, a variety of different church-state relationships are plausible. But I do not agree with Professor Smith that the First Amendment religion clauses are susceptible to a variety of equally plausible interpretations. As a matter of linguistics, the terms "establishment of religion" and "free exercise of religion" simply do not possess an infinite number of meanings.

Professor Smith is at his best when he criticizes the frequently stated exhortation that government must be "neutral" with respect to religion. According to the Supreme Court, the principle of neutrality requires that government "may not be hostile to any religion or to the advocacy of no-religion, and it may not aid, foster, or promote one religion or religious theory against another . . . ." Government cannot be neutral, but instead must choose between different approaches to church-state relationships. As Professor Smith observes: "Indeed, it would not be much of an overstatement to say

104 Id. at 26.
105 See, e.g., id. at 102 (in determining whether religion inculcates civic virtue, "[t]he only plausible answer . . . is '[i]t depends'—on the kind of religion, the kind of society, and the existence and effectiveness of other institutions for inculcating civic virtue").
106 Id. at 67.
107 See id. at 60.
108 See id. at 77 ("Perhaps the most pervasive theme in modern judicial and academic discourse on the subject of religious freedom is 'neutrality.'").
that modern legal discourse about religious freedom consists of judges and legal scholars unblushingly proclaiming their ‘neutrality’ even as they reject both the premises and the conclusions of their adversaries.\textsuperscript{110}

At the heart of his attack on claims of neutrality, Professor Smith presents a hypothetical based on \textit{Reynolds v. United States}.\textsuperscript{111} In the 1878 \textit{Reynolds} decision, the Supreme Court refused to exempt George Reynolds from a federal law that prohibited polygamy, even though this practice was a sincerely held tenet of Reynolds’ Mormon religion.\textsuperscript{112}

Professor Smith posits a slightly more complex version of the following hypothetical.\textsuperscript{113} Imagine that two groups inhabit a society—the secularists and the theologians. According to the secularists, the uniform application of the laws constitutes a primary goal of good government. The secularists believe that uniform law application helps to prevent arbitrary and malicious prosecutions, discourages lawlessness, and serves many other laudable purposes. When a secular law and a religious tenet clash, a secularist would not exempt a believer from the law.

On the other hand, the theologians believe that protecting religious convictions should be the primary goal of good government. Therefore, when religious dictates and a secular law clash, government should allow the believer to follow her conscience whenever possible.

Professor Smith’s hypothetical illustrates that a court cannot decide the polygamy case and remain neutral. If the Supreme Court refuses to exempt George Reynolds from the polygamy law, the court agrees with the secularists and the theologians lose. If the court mandates an exemption, the theologians win and the secularists lose. No middle ground is possible.

Professor Smith later reinforces this point with a second hypothetical, based on \textit{Epperson v. Arkansas}.\textsuperscript{114} Arkansas has enacted a law that prohibits anyone employed at a state-supported school or university from teaching the evolutionary theory of man’s origins.\textsuperscript{115} Arkansas adopted this law to insure that its schools would teach the creationist account that appears in the Bible.\textsuperscript{116}

\begin{footnotesize}
\begin{enumerate}
\item[110] Smīth, \textit{supra} note 2, at 78.
\item[111] 98 U.S. 145 (1878).
\item[112] See \textit{id.} at 161–67.
\item[113] See Smīth, \textit{supra} note 2, at 68–70.
\item[114] 393 U.S. 97 (1968).
\item[115] See \textit{id.} at 98–99.
\item[116] See \textit{id.} at 103, 107–09.
\end{enumerate}
\end{footnotesize}
Assume that the theologians favor the Arkansas law. This group accepts creationism as a religious tenet. Members are deeply offended by assertions that man evolved from apes. On the other hand, the secularists believe in an evolutionary account of man's origins. Secularists view creationism as superstitious nonsense, offensive to any educated mind.

The Epperson Court invalidated the Arkansas law, concluding that the law was not neutral.\textsuperscript{117} Of course the law wasn't neutral. Arkansas had prohibited the teaching of evolution, and had allowed the teaching of creationism. But in mandating that the state could not prohibit the teaching of evolution, the Supreme Court decision also wasn't neutral. The theologians won before the Arkansas legislature. The secularists won before the United States Supreme Court.\textsuperscript{118}

Government thus cannot rely on neutral principles as the basis for church-state decisions. Professor Smith accurately asserts: "Theories of religious freedom will always rest on background beliefs that provide reasons for tolerating or protecting some aspects of religious practice and for regulating other aspects."\textsuperscript{119} But here Professor Smith reaches a curious conclusion. A theory of religious liberty that rests on such background beliefs must be a "bad theory."\textsuperscript{120}

In fact, all law creation involves choosing from a variety of possible regimes.\textsuperscript{121} Legal choices inevitably follow from the background beliefs of a particular society and its lawmakers.\textsuperscript{122} If government could not make nonneutral choices, anarchy would result.

\textsuperscript{117} See id. at 103-04, 109.
\textsuperscript{118} See Smith, supra note 2, at 84. Smith noted that the Epperson Court's conclusion "rejected the fundamentalist position; and upon reflection it is also apparent that in its premises the Court had rejected in advance the fundamentalist position and background beliefs, with their emphasis on biblical literalism as the avenue to truth." Id. at 67.
\textsuperscript{119} Id. at 60.
\textsuperscript{120} Cf. John H. Garvey, Is There a Principle of Religious Liberty?, 94 MicH. L. REV. 1379, 1389 (1996) (reviewing Smith, supra note 2) ("Any theory of freedom worth fighting for will make assumptions about what human beings are like and how they ought to behave.").
\textsuperscript{121} See, e.g., Richard Michael Fischl, Some Realism About Critical Legal Studies, 41 U. MIAMI L. REV. 505, 529 (1987) (asserting that judicial choices are "constrained in significant ways by a variety of phenomena that make up the professional 'culture' within which legal decisionmaking takes place"); Herbert Hovenkamp, Social Science and Segregation Before Brown, 1985 DUKE L.J. 624, 625 ("Lawyers did not invent racism. Rather they created racist institutions because society was racist and racism was implicit in its values."); see also William P. LaPiana, Victorian from Beacon Hill: Oliver Wendell Holmes's Early Legal Scholarship, 90 COLUM. L. REV. 809, 832 (1990) (describing the belief of Oliver Wendell Holmes that "legal doctrine did not develop according to
A Free Speech Clause example may illustrate that although neutrality is impossible, principled constitutional interpretation is not.\textsuperscript{123} In free speech cases, different types of speech form a hierarchy. Political speech receives the most protection from government regulation. Commercial speech receives somewhat less protection. Still other forms of expression, such as obscenity or "fighting words," receive little or no protection.\textsuperscript{124}

It doesn't have to be this way. Under one possible approach, all types of speech would receive the same amount of protection, regardless of content. Or obscenity could receive the most protection, with political speech receiving little or no protection.

While a government could adopt each of these versions of freedom of speech, each version is not an equally sensible interpretation of the First Amendment. Strong textual and historical evidence demonstrates that the framers adopted the Free Speech Clause primarily to protect political speech.\textsuperscript{125} While no law of nature requires that political speech must receive a high level of protection, such an approach provides a more appropriate interpretation of the Free Speech Clause than other alternatives.

Similarly, although a variety of approaches to religious liberty are possible, these approaches would not all provide an equally plausible reading of the religion clauses. Consider a federal statute requiring all individuals must pledge their allegiance to a particular state-logical rules, but rather reflected a society's social structure as well as its conscious judgments about policy\textsuperscript{126}).

\textsuperscript{123} See Garvey, \textit{supra} note 121, at 1391 (questioning "why a theory of religious freedom (or any other kind of freedom) must be neutral").

\textsuperscript{124} See, e.g., \textit{R.A.V. v. St. Paul}, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all"); \textit{Carey v. Brown}, 447 U.S. 455, 466-67 (1980) (noting that picketing about political and social issues "has always rested on the highest rung of the hierarchy of First Amendment values").

\textsuperscript{125} See, e.g., Vincent Blasi, \textit{The Checking Value in First Amendment Theory}, 1977 AM. B. FOUND. RES. J. 521, 528 (asserting that the framers protected free expression "because of the function it performs in checking the abuse of official power"); Alexander Meiklejohn, \textit{The First Amendment Is an Absolute}, 1961 SUP. CT. REV. 245, 253-55 (arguing that the language and the structure of the United States Constitution indicate that the Free Speech Clause provides an absolute protection to political speech, which government may not limit). \textit{But cf.} Cass R. Sunstein, \textit{Democracy and the Problem of Free Speech} xiv (1993) (observing that a historical inquiry about the meaning of the First Amendment "does not reveal a clear-cut understanding of what speech was protected and what speech was not").
endorsed faith. Citizens who refused to take the pledge would be imprisoned, or expelled from the United States.

A government plausibly might assert that requiring allegiance to a particular state-endorsed church promotes religious liberty, in much the same way that nations have claimed to hold "democratic elections" while allowing only one political party to appear on the ballot. By requiring that all individuals must join the one true religion, the government would insure the salvation of all souls.

But now imagine attempting to explain why the statute that requires allegiance to a state-endorsed church is not an "establishment of religion." For a court to conclude that the hypothetical statute was consistent with the First Amendment, a judge must engage in the most awkward twisting of the Establishment Clause language. Just as some interpretations of the Free Speech Clause capture the meaning of that provision better than others, not all approaches to religious liberty will be equally compatible with the text and the original understanding of the religion clauses.\(^\text{126}\)

**C. Professor Smith's Normative Account**

Professor Smith emphasizes that he does not intend to suggest any normative conclusions about church-state relationships.\(^\text{127}\) Professor Smith's reticence is difficult to explain, because his positions lead inexorably to specific normative conclusions. If the framers did not agree on any substantive understanding of the religion clauses, and if all religious liberty theories are predetermined by the varying background beliefs of particular theorists, "doesn't it follow that courts should simply get out of the business of protecting religious freedom altogether . . . ?"\(^\text{128}\) Instead, elected officials would pursue religious freedom "through compromise, cultivated tolerance, mutual forbearances, and strategic silences."\(^\text{129}\)

Members of small, unfamiliar religions would be the big losers in such a scheme.\(^\text{130}\) While Professor Smith's words have a ringing patri-
otic quality, legislators have a mixed record with respect to nonconforming religious groups. Elected officials sometimes have demonstrated a laudable sensitivity to the needs of nontraditional religions.\textsuperscript{131}

At other times, however, legislators have entertained blatant bigotry. The late nineteenth-century persecution of the Church of the Latter-Day Saints is one of the most embarrassing chapters in American history.\textsuperscript{132} Congress outlawed the church, and jailed church leaders for violating antipolygamy laws.\textsuperscript{133}

In a more recent United States Supreme Court case, Minnesota legislators enacted burdensome reporting requirements to harass small religious groups that engaged in extensive solicitation.\textsuperscript{134} In Hialeah, Florida, officials persecuted the Santeria religion by enacting ordinances that prohibited the group's practice of ritual animal sacrifices.\textsuperscript{135} Even a cursory review of First Amendment doctrine would have informed the Florida lawmakers that the ordinances were unconstitutional.\textsuperscript{136} The ordinances passed anyway.

\textsuperscript{131} See Smith, supra note 2, at 126; see also Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (noting that a number of state legislatures have enacted statutes that exempt sacramental peyote use from peyote proscriptions); Braunfeld v. Brown, 366 U.S. 599, 608 & n.5 (1961) (noting that a number of states have enacted statutory exemptions, which excuse a believer who celebrates her Sabbath on a day other than Sunday from Sunday Closing Laws).


\textsuperscript{133} See, e.g., The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 140 U.S. 665, 665-66 (1891) (upholding the Edmunds-Tucker Act, which dissolved the Mormon Church and authorized federal seizure of church assets); Reynolds v. United States, 98 U.S. 145, 161-67 (1878) (refusing to exempt a Mormon believer from a federal criminal statute that outlawed polygamy); see also Davis v. Beason, 133 U.S. 333, 334-37, 341-48 (1890) (upholding an Idaho statute imposing criminal penalties on any individual belonging to an organization that "teaches, advises, counsels or encourages its members, devotees or any other person to commit the crime of bigamy or polygamy").


\textsuperscript{136} All nine Supreme Court justices agreed that the Hialeah ordinances prohibiting ritual animal sacrifices were unconstitutional. Although three justices authored concurring opinions, two of those opinions did not focus on the ritual sacrifice case. See id. at 559 (Souter, J., concurring) ("[t]his case turns on a principle about which
The inexorable growth of the welfare state's cold bureaucracy poses a greater danger to small religious groups than these instances of outright bigotry. More than twenty years ago, Chief Justice Warren Burger noted that as government regulations had become "more detailed and pervasive," the small Amish religion had "come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards."\(^{137}\)

While lawmakers will be careful to respect familiar religious traditions, they may enact laws that conflict with unfamiliar religious tenets.\(^{138}\)

Professor Smith accurately observes that courts have not always been responsive to the needs of nontraditional religious groups.\(^{139}\) For example, the Supreme Court willingly acquiesced in the nineteenth-century persecution of the Mormons.\(^{140}\)

Nonetheless, members of small religious groups will at least have greater access to the courts than to elected officials.\(^{141}\) Immunized from worries about reelection and obliged to examine precedent, appointed judges are more likely than elected officials to consider the claims of nonconforming religious groups for both pragmatic and institutional reasons.\(^{142}\) In fact, members of small, unfamiliar religious


\(^{138}\) See, e.g., Steinberg, supra note 67, at 253 ("Legislators unfamiliar with a religious group may pass laws that conflict with the group's tenets."); David E. Steinberg, Religious Exemptions As Affirmative Action, 40 EMORY L.J. 77, 116 (1991) (asserting that legislators may be unaware of conflicts between secular laws and the tenets of small religious groups and may not be concerned even if they are aware of any such conflicts).

\(^{139}\) See Smith, supra note 2, at 126.

\(^{140}\) See cases cited supra note 133.

\(^{141}\) See Steinberg, supra note 67, at 274 ("Legislators seeking re-election or other elected offices . . . have good reason to support exemptions advanced by popular and influential religions. If legislators ignore exemption claims pressed by small and unpopular religious groups, the lawmakers need worry little about the political consequences.").

\(^{142}\) See, e.g., James D. Gordon III, Free Exercise on the Mountaintop, 79 CAL. L. REV. 91, 108–09 (1991) (stating that without court intervention, majorities "can protect their own religious preferences while crushing those that they do not share"); Douglas Laycock, The Remnants of Free Exercise, 1990 SUP. CT. REV. 1, 15 (stating that unlike legislators, judges must decide every case brought before them, must treat similar cases alike, and must give principled reasons for their decisions); Lupu, supra note 29, at 600–06 (listing a number of institutional characteristics of the judicial branch, which suggest that courts will be more responsive than legislatures to the needs of nonconforming religious groups).
groups have brought the vast majority of Free Exercise Clause cases heard in the federal courts.\textsuperscript{145} This stark pattern indicates that members of nontraditional religions anticipate a more sympathetic hearing from appointed judges than from elected officials.

Nonetheless, if Professor Smith is correct that courts develop religion clause "principles" only by reference to an arbitrary collection of "background beliefs,"\textsuperscript{144} judicial withdrawal from this area probably would be the appropriate course. An absence of judicial decisions is better than illegitimate decisions. However, the concluding section of this Book Review suggests some optimism about a principled religion clause interpretation. Judicial decisions should rely on the principle of religious choice.

III. THE PRINCIPLE OF RELIGIOUS CHOICE

The following discussion suggests that the religion clauses were intended to protect and promote religious choice. The first section indicates that the principle of religious choice is consistent with the text and the origins of the First Amendment. The second section briefly suggests a few consequences of a religion clause interpretation based on religious choice.

A. The Case for Religious Choice

In seeking to divine the meaning of the First Amendment phrases "free exercise" of religion and "establishment of religion," a reasonable starting point is to determine what those words meant to the framers. Samuel Johnson's influential \textit{A Dictionary of the English Language} listed several definitions of the word "free," including "uncompelled, unrestrained."\textsuperscript{145} To illustrate this use of the term "free," Johnson presented the following passage: "It was free, and in my choice whether or no I should publish these discourses; yet the publication being resolved, the dedication was not so indifferent."\textsuperscript{146} Other contemporary dictionaries provided similar definitions, which equated the word "free" with "choice."\textsuperscript{147}

\textsuperscript{143} See, e.g., Kathleen M. Sullivan, \textit{Religion and Liberal Democracy}, 59 U. Chi. L. Rev. 195, 216 (1992) (observing that "not a single religious exemption claim has ever reached the Supreme Court from a mainstream Christian religious practitioner").

\textsuperscript{144} Smith, \textit{supra} note 2, at 67

\textsuperscript{145} 1 \textit{SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE} 9S (1755).

\textsuperscript{146} Id.

\textsuperscript{147} See, e.g., 1 \textit{JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE} (1775) (defining the word "free" as meaning "[h]aving liberty, uninslaved, independent, unrestrained"); James Buchanan, \textit{Linguae Britannica Vera
Among several definitions for the term "exercise," Johnson’s dictionary provided the terms “practice; outward performance.” Johnson explicitly indicated that religious “exercise” meant religious practice with the following illustration: “The same prince refused even those of the church of England, who followed their master to St. Germain’s, the publick *exercise* of their religion.” Other dictionaries in use as of 1789 similarly defined exercise as referring to “practice.” These definitions of “exercise” as “practice or performance” call into question narrow Free Exercise Clause readings, which assert that the clause primarily protects religious speech.

In one of several definitions listed for the verb “to establish,” Johnson uses the following words: “To settle in any privilege or possession, to confirm.” Johnson then provides the following example of an “establishment of religion”: “Soon after the rebellion broke out, the Presbyterian Sect was *established* in all its forms by an ordinance of the lords and commons.” James Buchanan’s dictionary offered a more specific definition, reporting that the term “establishment” meant “Maintenance or Support.”

In light of these contemporary definitions, a plausible reading suggests that the First Amendment was intended to protect religious choice. The amendment provided that the state could not infringe religious choices in either of two ways. First, government could not prohibit the free exercise of religion, which meant that government could not prevent an individual from choosing a particular religion or particular religious beliefs. Second, government could not make a law

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148 1 JOHNSON, *supra* note 145, at 8H.
149 1Id.
150 See, e.g., 1 ASH, *supra* note 147 (stating that among other things, the term “exercise” means “an act of divine worship, preparatory practice, habitual action”); 1BUCHANAN, *supra* note 147 (listing one definition of the verb “to exercise” as “[t]o use or practice”); 1DYCHE, *supra* note 147 (defining the verb “to exercise” to mean, among other things, “[t]o practice or to do a Thing often”).
152 1 JOHNSON, *supra* note 145, at 8H.
153 1Id.
154 1BUCHANAN, *supra* note 147; see also 1 ASH, *supra* note 147 (stating that, among other things, the verb “to establish” means “[t]o settle firmly, to ratify”); 1DYCHE, *supra* note 147 (defining the verb “to establish” to mean “[t]o confirm, appoint, settle, and do whatever is necessary to make a thing safe, sure, certain, and durable”).
respecting an establishment of religion, which meant that government could not maintain or support a particular church.

For the advocates of religious liberty in the early years of the United States, religious liberty meant religious choice. The proponents of the First Amendment religion clauses came from two very different traditions. The framers identified with the Enlightenment viewed established churches as impediments to the advancement of science and reason. In contrast, leaders of the dissenting evangelical religions sought a more passionate, zealous religion, in comparison to the bland conformity of the established churches.

The principle of religious choice united the very different Enlightenment and evangelical proponents of religious liberty. For the Enlightenment statesmen, the principle of religious choice offered the hope of reclaiming questions of morality and virtue from the monopoly of the established churches. For the evangelical religions, religious choice meant an end to years of government persecution, designed to maintain the primacy of the established churches.

James Madison, the author of the First Amendment, stood at the crossroads of the Enlightenment and the evangelical traditions. A product of the Enlightenment, Madison displayed a sympathy for the plight of the persecuted evangelical religions.

155 See, e.g., Mark DeWolfe Howe, The Garden and the Wilderness: Religion and Government in American Constitutional History 5–9 (1965) (comparing Enlightenment and evangelical approaches to church-state relationships); McConnell, supra note 27, at 1437 ("To determine the meaning of the religion clauses, it is necessary to see them through the eyes of their proponents, most of whom were members of the most fervent and evangelical denominations in the nation."); John Witte, Jr., The Essential Rights and Liberties of Religion in the American Constitutional Experiment, 71 Notre Dame L. Rev. 371, 381–85 (1996) (contrasting Enlightenment views on church-state relations with very different evangelical approaches).

156 See, e.g., Witte, supra note 155, at 384 (stating that Enlightenment views on church-state issues "were based on a profound skepticism about organized religion and a profound fear of an autocratic state").

157 See Thomas C. Berg, Church-State Relations and the Social Ethics of Reinhold Niebuhr, 73 N.C. L. Rev. 1567, 1581 (1995) ("The proposition that religious beliefs must be voluntary to be effective was fundamental both to deists, who thought true religion must follow from the exercise of reason, and to evangelicals, who thought saving faith could follow only from the moving of the Holy Spirit.").

158 See infra text accompanying notes 174–89 (describing some examples of the persecution suffered by members of nonconforming religious groups).

159 See, e.g., Timothy L. Hall, Roger Williams and the Foundations of Religious Liberty, 71 B.U. L. Rev. 455, 505 (1991) (stating that although Madison shared "the Enlightenment sensibilities of John Locke and Thomas Jefferson," Madison's "overall understanding of religious liberty was more expansive than that of Jefferson and Locke"); see also Letter from James Madison to William Bradford (Jan. 24, 1774), in 1 The Papers of James Madison 104, 106 (William T. Hutchinson & William M.E. Rachal
In the first article of his well-known *Memorial and Remonstrance Against Religious Assessments*, Madison began with a ringing endorsement of religious choice. Madison wrote: "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."160 If any doubt remained that this is what Madison meant by the term “free exercise of religion,” Madison dispelled those doubts when he used the term explicitly later in his Remonstrance. Madison wrote that all men are

to be considered as retaining an *equal* title to the free exercise of Religion according to the dictates of conscience. Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us.161

The seventeenth-century philosopher John Locke was probably the most influential figure for the Enlightenment statesmen in the early United States.162 In *A Letter Concerning Toleration*, Locke urged a "law of toleration," under which all churches would be “obliged to lay down toleration as the foundation of their liberty; and teach that liberty of conscience is every man’s natural right, equally belonging to dissenters as to themselves; and that no-body ought to be compelled in matters of religion either by law or force.”163

Like the American Enlightenment leaders, the leaders of the evangelical religions endorsed the principle of religious choice. In his essay *The Rights of Conscience Inalienable*, Virginia Baptist leader John Leland proclaimed:

Let every man speak freely without fear, maintain the principles that he believes, worship according to his own faith, either one God,

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161 *Id.* at 186 (internal quotation marks omitted).
three Gods, no God, or twenty Gods; and let government protect
him in so doing, i.e., see that he meets with no personal abuse, or
loss of property, for his religious opinions. 164

Similarly, in proposing a Massachusetts Bill of Rights, Baptist
leader Isaac Backus wrote that because “nothing can be true religion
but a voluntary obedience unto his revealed will, of which each ra-
tional soul has an equal right to judge for itself, every person has an
unalienable right to act in all religious affairs according to the full
persuasion of his own mind . . . .”165

The principle of religious choice was endorsed in state constitu-
tional provisions enacted during and after the Revolutionary War. By
1789, every state but Connecticut had adopted one of these provi-
sions. 166 The constitutional provisions adopted by different states typically used similar language. 167 Several state constitutions explicitly
guaranteed the “free exercise” of religion. 168 However, these state
constitutional provisions often were somewhat more descriptive than
the terse First Amendment of the United States Constitution. The ad-
ditional language demonstrates that when the framers used the term
“free exercise of religion,” they were referring to the principle of reli-
gious choice.

The early Pennsylvania Constitution contained one of the most
succinct statements of the religious choice principle. The constitution
provided: “That all men have a natural and unalienable right to wor-
ship Almighty God according to the dictates of their own consciences

166 See McConnell, supra note 27, at 1455. Professor McConnell provides a com-
prehensive survey and analysis of the early state constitutional provisions protecting
religious choice. See id. at 1455–66.
167 See id. at 1455–56 (noting the similar language found in each of the early state
constitutional provisions that protected religious liberty).
168 See, e.g., Ga. Const. of 1777, art. LVI, reprinted in 1 Federal and State Constitu-
tions, Colonial Charters, and Other Organic Laws of the United States 377, 383 (Benjamin Perley Poore ed., 1878) [hereinafter Federal and State Constitu-
tions] (“All persons whatever shall have the free exercise of their religion.”); N.Y. Const. of 1777, art. XXXVIII, reprinted in 2 Federal and State Constitutions, supra,
at 1328, 1338 (“[T]he free exercise and enjoyment of religious profession and wor-
ship, without discrimination or preference, shall forever hereafter be allowed.”); S.C. Const. of 1789, art. VIII, § 1, reprinted in 2 Federal and State Constitutions, supra,
at 1628, 1632–33 (guaranteeing “[t]he free exercise and enjoyment of religious
profession”).
and understanding." The New Hampshire Constitution endorsed a similar principle:

> Every individual has a natural and unalienable right to worship GOD according to the dictates of his conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience.

Professor Smith acknowledges the widespread adoption of state constitutional provisions that guaranteed the free exercise of religion. However, he quickly concludes that these provisions did not suggest any substantive agreement about church-state relationships. He writes: "[W]hile Americans may have concurred in endorsing the slogan 'freedom of conscience,' the agreement was largely verbal."

Professor Smith accurately explains that even where a state constitutional provision guaranteed the free exercise of religion, a state often would not provide equal treatment to different religious groups. In the early years of the republic, states typically barred non-Christians from public office, and often prevented members of some Christian faiths from holding office. A public disagreement with the prevailing Christian orthodoxy could result in a blasphemy prosecution. In New England, individuals could face fines for irregular attendance at Congregational Church services.

But in focusing on the controversy generated by these outdated and repressive practices, Professor Smith fails to acknowledge a substantive consensus that Americans had come to embrace. By the time of the Constitution, Americans agreed that an individual could choose her religious beliefs, and that the state could not punish an individual

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170 N.H. Const. of 1784, pt. I, art. V, reprinted in 2 Federal and State Constitutions, supra note 168, at 1280, 1281. See also Mass. Const. of 1780, art II., reprinted in 1 Federal and State Constitutions, supra note 168, at 956, 957 ("[N]o subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship."); N.J. Const. of 1776, art. XVIII, reprinted in 2 Federal and State Constitutions, supra note 168, at 1310, 1313 ("[N]o person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor, under any pretense whatever, be compelled to attend any place of worship, contrary to his own faith and judgment . . . .").

171 See Smith, supra note 2, at 40.

172 Id.

173 See id. at 38.
for refusing to follow a particular faith. That might not seem like much. But the toleration of private religious choices was a major departure from the state persecution of religious dissenters, which had continued until just a few years before the American revolution.

During the colonial period, states imposed a wide variety of penalties on religious dissenters. In 1651, John Clarke, John Crandall, and Obediah Holmes were arrested in Massachusetts while performing Baptist religious services. Sympathetic friends paid Clarke's heavy fine of twenty pounds and Crandall's fine of five pounds. Holmes would not allow anyone to pay his fine, and he was whipped in public.

Imprisonment was not uncommon for religious dissenters. In 1768, a Spotsylvania, Virginia magistrate imprisoned Baptist preachers John Waller, Lewis Craig, and James Childs to punish these men for their religious beliefs. Craig served four weeks in jail. Waller and Childs were imprisoned for eight weeks. Massachusetts authorities imprisoned the founders of the First Baptist Church of Boston in 1668, and again in 1670.

Punishments could be more severe. In 1659, three Quaker women living in New Hampshire were condemned on account of their faith. The three women were sentenced to be "whipped from town to town out of the province." In 1658, Massachusetts barred all Quakers from the colony, and prescribed the death penalty for any Quaker who returned after banishment. Between 1659 and 1661, at least four Quakers were put to death in Massachusetts. After a skirmish in the 1650s between Puritans and Catholics in Maryland,

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175 See id. at 133.
176 See id.
179 See Albert Henry Newman, A History of the Baptist Churches in the United States 178–87 (1894); see also Leonard W. Levy, The Establishment Clause: Religion and the First Amendment 1 (1986) (noting that in 1774, eighteen Baptists from Warwick, Massachusetts were jailed because they had not paid an assessment that supported the town's Congregational minister); Robert B. Semple, A History of the Rise and Progress of the Baptists in Virginia 32–33 (G.W. Beale ed., 1894) (in December 1770, Baptist preachers William Webber and Joseph Anthony both were imprisoned in Virginia for about three months).
180 Cobb, supra note 177, at 293.
181 See Sweet, supra note 174, at 146.
182 See id. at 146–47.
four Catholics were hanged and Jesuit priests fled from Maryland to Virginia.\footnote{183}

In addition, colonies both banished dissenters and prohibited dissenters from entering. In 1644, Massachusetts banished all Baptists.\footnote{184} In 1700, a New York statute banished all Catholic priests "under pain of perpetual imprisonment."\footnote{185} Under a 1659 Virginia law, any Quaker entering Virginia was to be arrested, imprisoned, and exiled.\footnote{186} Further, any shipmaster who brought a Quaker to Virginia would be fined 100 pounds.\footnote{187}

Religious persecutions were not limited to the earliest days of the American colonies. The Virginia imprisonment of Baptist preachers John Waller, Lewis Craig, and James Childs occurred less than ten years before the Revolutionary War.\footnote{188} In 1756, Maryland imposed double taxation on Catholics living in the colony.\footnote{189}

But at about the time of the Revolutionary War, Americans in all states renounced the practice of punishing religious dissidents and proscribing private religious choices. Although members of dissenting sects were not guaranteed equal treatment with respect to suffrage, holding public office, or other benefits of citizenship, these individuals could practice their religions in peace. As one of the leading chronicles on America's early religious history describes the new approach: "All states agreed with [Thomas] Jefferson that civil government could interfere when 'principles break out into overt acts against peace & good order' but otherwise, citizens had a right to practice the religions of their choice, even the hated Catholicism, which had been proscribed in colonial America."\footnote{190} Other scholars offer similar descriptions of the American consensus on church-state relations at the time of the Constitution.\footnote{191}

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\item[183] See id. at 179.
\item[184] See Curry, supra note 59, at 13.
\item[185] Id. at 71.
\item[186] See Cobb, supra note 177, at 90.
\item[187] See id.
\item[188] See supra text accompanying notes 177-78.
\item[189] See Curry, supra note 59, at 80.
\item[190] Id. at 219.
\item[191] See Walter Berns, The First Amendment and the Future of American Democracy 30 (1985) (stating that the religion clauses of the First Amendment established that the federal government "must protect the rights of conscience, or the right of every man to believe what he will"); Morton Borden, Jews, Turks, and Infidels 5 (1984) ("By 1788, Jews had, in a word, achieved toleration in the United States. None of the state governments threatened the 'free' exercise of religion."); Gerard V. Bradley, Church-State Relationships in America 55 (1987) (stating that by 1789, "[d]irect compelled subvention of a sect other than one's own was an idea whose time
Contrary to Professor Smith's contention, the framers of the Constitution had found some common ground on church-state issues. The framers and other Americans agreed on the principle of religious choice. The language of the First Amendment religion clauses and state constitutional provisions attempted to establish this principle as a matter of constitutional law.

B. Application of the Religious Choice Principle

An interpretation of the First Amendment religion clauses based on the principle of religious choice would include two components. First, legislation that attempted to increase religious choices would be presumptively valid. Second, government could not take action that would distort or limit private religious choices without some good reason.

Under this approach, the religious choice principle would replace both current Free Exercise Clause doctrine and Establishment Clause doctrine. Today, a law violates the Free Exercise Clause only if it is not "generally applicable," and is enacted to discriminate against some or all religions. In the more common situation where a law imposes a disproportionate impact on members of a particular religion, believers cannot establish a Free Exercise Clause violation. Although Establishment Clause law is somewhat more uncertain, most

had passed"; Gerard V. Bradley, The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself, 37 CASE. W. RES. L. REV. 674, 722 (1987) ("Free exercise gave all believers the right to actually believe and worship as they pleased. A good cognate term is the one found in several state constitutions, protecting against 'molestation' on account of belief.").

192 Professor Thomas Berg has endorsed a similar approach to the First Amendment religion clauses. Under Professor Berg's "voluntarism" principle, "government should, as much as possible, minimize the effect it has on the voluntary, independent religious decisions of the people as individuals and in voluntary groups." Berg, supra note 33, at 703-04. Professor Berg derives his voluntarism principle in part from historical evidence. See id. at 708-11.

For another similar reading of the religion clauses, see Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePAUL L. REV. 993, 1001 (1990) (advocating that "the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance").


194 In such cases, believers could bring a Free Exercise Clause action prior to Smith. On the changes in Free Exercise Clause law that resulted from the Smith decision, see generally Steinberg, supra note 67, at 246-52.
cases begin with a three-part test first stated in *Lemon v. Kurtzman*. This Book Review suggests that both Free Exercise Clause law and Establishment Clause law should be replaced with a single doctrine based on religious choice.

Recall the hypothetical Michigan statute that exempted Amish believers like Jerry Swartzentruber from a state highway safety law, which required that any slow-moving vehicle must display a bright orange reflector. Courts and commentators sometimes have viewed such statutory exemptions with suspicion. Such statutes do not treat religious and secular objections in the same way. Instead, these statutes exempt only religious believers from the requirements of a law.

If the religion clauses enacted the principle of religious choice instead of the principle of neutrality, the focus changes. The Michigan exemption increases the choices available to Swartzentruber. He no longer must decide between violating an Amish principle, and violating a state law.

Under the religious choice principle, a statute that attempted to increase religious choices would be invalid only if the law violated a legal principle independent of the religion clauses. For example, as--

195 403 U.S. 602 (1971). The *Lemon* test provides: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster ‘an excessive government entanglement with religion.’” *Id.* at 612–13 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

Commentators frequently have criticized the *Lemon* test. See, e.g., Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Prrt. L. Rev. 673, 680 (1980) (“[T]he Court’s three-prong [*Lemon*] test has generated ad hoc judgments which are incapable of being reconciled on any principled basis.”); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3, 18 (1978–79) (“[T]he three-prong [*Lemon*] test has resulted in as much confusion and conflict under the establishment clause as the Court’s decisions under the free exercise clause.”); see also David E. Steinberg, *Alternatives to Entanglement*, 80 Ky. L.J. 691, 692 (1991–92) (asserting that the Supreme Court should at least abandon the entanglement portion of the *Lemon* test).

196 See supra text accompanying notes 25–32.

197 See, e.g., *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 705–11 (1985) (concluding that Connecticut had violated the Establishment Clause where a Connecticut statute provided that no employee could be required to work on his Sabbath); Kurland, supra note 195, at 16–18 (opposing both court-mandated religious exemptions and statutory exemptions); Lupu, supra note 29, at 599–606 (arguing that courts should be able to mandate religious exemptions, but that courts typically should not permit statutory religious exemptions adopted by legislators). But cf. Smith, 494 U.S. at 890 (holding that statutory religious exemptions often will be permissible, but courts in most cases may not mandate religious exemptions).
sume that Congress adopted a modest tax exemption for private schools and allowed sectarian schools that practiced racial segregation to rely on the exemption. Making such an exemption available to discriminatory private schools might be unconstitutional, because the exemption would conflict with the antidiscrimination principle of the Equal Protection Clause of the Fourteenth Amendment. But with the exception of laws that raised problems extrinsic to the religion clauses, government statutes expanding religious choices would be constitutional.

As a second component of a religion clause interpretation based on religious choice, a government could not enforce legislation that limited or distorted private religious choices unless the government possessed some good reason for the prohibition. The Free Exercise Clause cases that seem most compelling involve situations where a government proscribed a religious practice without an adequate explanation.

For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the United States Supreme Court invalidated a series of Hialeah, Florida ordinances that prohibited the ritual sacrifice of animals. According to the city, these ordinances prevented members of

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198 Cf. Bob Jones Univ. v. United States, 461 U.S. 574, 602–04 (1983) (upholding an Internal Revenue Service ruling, which concluded that a tax exemption for private schools did not apply to schools practicing racial discrimination).

199 Cf. Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 59 (1996) (“[A]s with racial affirmative action, religious accommodation is a matter on which courts should intervene cautiously, in limited circumstances.”).

200 Prior to 1990, where a law conflicted with sincerely held religious beliefs, a court would mandate a free exercise exemption unless the state demonstrated that denying an exemption claim would serve a “compelling state interest.” *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406–09 (1963) (holding that in opposing a free exercise exemption from an unemployment compensation rule, South Carolina had not demonstrated that denying an exemption would serve a compelling state interest). Recent cases have expressed deep skepticism about whether the compelling interest test is appropriate for Free Exercise Clause cases. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 517, 529–30 (1997) (invalidating the Religious Freedom Restoration Act, and concluding that the compelling interest test "reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved"); *Smith*, 494 U.S. at 888 (applying the compelling interest test in Free Exercise Clause cases "would be courting anarchy").

I intentionally have declined to specify the state’s burden of justification when the state seeks to enforce a law that limits or distorts private religious choices. My point here simply is that the state should be required to justify the enforcement of such a law. In many situations, current doctrine does not require the state to demonstrate any meaningful justification.

the Santeria religion from inflicting cruel treatment on animals. However, the city allowed the killing of animals in several other activities that seemed at least as cruel as the ritual sacrifices. These practices included hunting, fishing, scientific experiments on animals, and the extermination of pests. If the city did not view the prevention of cruelty to animals as an overriding consideration in these other contexts, then this policy also did not support the prohibition on ritual sacrifices.

In the more controversial Employment Division v. Smith, the United States Supreme Court held that Oregon need not exempt Native American believers from a state law prohibiting possession of peyote. Peyote is a sacrament used in Native-American Church rituals. The Smith decision was so unpopular that Congress attempted to circumvent the case with the Religious Freedom Restoration Act. In 1997, the Supreme Court held that the act was unconstitutional.

Smith captured public attention to a greater extent than other unsuccessful Free Exercise Clause challenges, perhaps because the state provided only a weak justification for the law proscribing a religious ritual. According to the State of Oregon, the peyote prohibition served the state's interest in preventing the distribution of illicit drugs. However, the state failed to demonstrate that peyote use raised any greater evils than the use of sacramental wine in Catholic services. The state produced no evidence suggesting that peyote

202 See id. at 543 (discussing the city's interest in "preventing cruelty to animals").
203 See id. at 543-44 (listing a number of circumstances where Florida law authorized the killing of animals).
204 See id. at 544 (stating that the City of Hialeah did not explain "why religion alone must bear the burden of the ordinances, when many of these secular killings fall within the city's interest in preventing the cruel treatment of animals").
208 See, e.g., O'Lone v. Estate of Shabazz, 482 U.S. 342, 349-53 (1987) (holding that two prison work rules did not violate the Free Exercise Clause, even though the rules prevented Muslim inmates from celebrating a weekly religious service on Friday afternoons); Goldman v. Weinberger, 475 U.S. 503, 507-10 (1986) (refusing to mandate that the United States Air Force must exempt an Orthodox Jewish officer from an Air Force regulation that prohibited personnel from wearing headgear indoors, even though the officer's religion required that he wear a yarmulke).
209 See Smith, 494 U.S. at 905 (O'Connor, J., concurring) ("Oregon's criminal prohibition represents that State's judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous.").
210 See, e.g., Edward F. Anderson, Peyote: The Divine Cactus 186-87 (2d ed. 1996) (describing a study, which concluded that alcohol was 21 times more addictive than peyote); Omer C. Stewart, Peyote Religion: A History 3 (1987) ("Peyote is not
was dangerous, addictive, or regularly used as a recreational drug. Absent evidence that the peyote ritual resulted in any genuine harm, the Supreme Court should have protected private religious choices by mandating an exemption from the Oregon law.

I do not mean to suggest that the religious choice principle will make law-and-religion cases easy to decide, with judges applying some mechanical formula. Identifying laws that actually limit or distort religious choices may prove difficult. No simple equation will determine when genuine religious needs must give way to an overriding state policy. For example, after surveying the state and religious interests summarized above, Justice Sandra Day O'Connor voted to deny the court-mandated exemption sought by the Native American believers in Employment Division v. Smith. Justice O'Connor's balancing of the state and private interests led to a different decision than the result advocated in this Book Review.

However, the religious choice principle attempts to identify the ideals that resulted in the religion clauses. Religion clause law will begin to make sense only when courts seek out the principles that led the framers to enact the clauses in the first place.

habit-forming, and in the controlled ambiance of a peyote meeting it is in no way harmful.

211 See Smith, 494 U.S. at 911-12 (Blackmun, J., dissenting) (stating that Oregon offers "no evidence that the religious use of peyote has ever harmed anyone").

212 See id. at 916 (Blackmun, J., dissenting) ("Peyote simply is not a popular drug; its distribution for use in religious rituals has nothing to do with the vast and violent traffic in illegal narcotics that plagues this country.").

213 Admittedly, the writings of the influential British philosopher John Locke rejected free exercise exemptions, such as the exemption sought by the Smith claimants. See Locke, supra note 163, at 43 (concluding that "the private judgment of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation"). Professor Michael McConnell has argued that Locke rejected mandatory exemptions because he could not have contemplated the institution of judicial review, where a court could weigh secular interests against religious commitments. See McConnell, supra note 27, at 1444 ("Locke's key assumption of legislative supremacy no longer holds under a written constitution with judicial review.").

Alternatively, Locke may have concluded that an argument for exemptions based on religious belief would be dismissed as an absurdity. At the time when Locke condemned persecutions of religious dissenters, Locke's argument for simple toleration was quite controversial. Locke may have worried that if he embraced religious exemptions from otherwise valid laws, his argument for toleration would seem radical and would lose all credibility.

C. Professor Smith’s Response

Professor Smith’s insightful response to this Book Review focuses on the “genre” that includes my essay—“historical constitutional scholarship.” To be sure, Professor Smith clearly disagrees with some of my conclusions about the framers’ intentions. But his response seems more concerned with the method that I have used than the results of that method.

In particular, Professor Smith views historical constitutional scholarship as driven by a need to derive some principle “that can be applied by courts to produce results that are attractive under current views and values.” The need to obtain a principle causes legal scholars to distort the historical record, although the scholar has no intention of distorting history and probably will be unconscious of any such distortion. Professor Smith writes:

Tacit presumptions work their way into the [historical] enterprise. Standards of proof are accordingly relaxed—or conversely, for scholarship that subverts an attractive story or principle, tightened . . . . The familiar “level of generality” phenomenon is exploited to craft grand principles that can be attributed to framers who are not in any position to protest.

I was a bit surprised by Professor Smith’s criticism of historical constitutional scholarship. Much of Foreordained Failure is devoted to this sort of reasoning. While I rely on historical materials to assert that the religion clauses implemented the religious choice principle, Foreordained Failure relies on historical materials to assert that the clauses were purely jurisdictional. If my “story” of the religious choice principle is problematic because I have used historical constitutional scholarship to develop this story, then Professor Smith’s story of the jurisdictional principle is similarly suspect.

But Professor Smith’s concerns about historical constitutional scholarship carry an undeniable ring of truth. The development of constitutional principles inherently involves generalizing about, and thus simplifying, history. Historical events are often complex, messy, and cannot be summarized completely into a neat principle—much less a one-sentence principle. As Professor Smith accurately notes in

215 Smith, supra note 47, at 1.
216 See id. at 6–19.
217 Id. at 2.
218 Id. at 2–3.
219 See Smith, supra note 2, at 17–54.
"Foreordained Failure, the framers approached religious liberty issues from different perspectives and with different goals."²²⁰

Therefore, the most accurate summary of the framers' intent with respect to church-state issues might be something like the following: "The religion clauses of the First Amendment resulted from a variety of different views about federal-state relations, church-state relations, and religious liberty." Why not just leave it at that?

Such a statement is unsatisfactory because American courts and legislators attempt to make law based on principles derived from a variety of evidence. Interpretation is an essential part of legal reasoning, regardless of whether a lawmaker bases her decision on the United States Constitution, on an antitrust statute that is more than one hundred years old,²²¹ on common law principles that date back to medieval England, on social science evidence, or simply on sound public policy.

The alternative would be to treat legal decisions as purely discretionary. Lawmakers would reach decisions based simply on their good judgment, and would not attempt to justify their decisions by resort to some principle. At least with respect to religious freedom, Professor Smith seems comfortable with significant legislative discretion.²²²

However, a purely discretionary approach to lawmaking is largely alien to our society, as reflected in our Constitution. Consider the following laws that legislators might enact because they seemed sensible. One such law might prohibit any religious rituals that were inconsistent with the public good.²²³ A second law would allow police to conduct a search for evidence whenever officers thought that a search was appropriate. A third law would impose criminal punishment on a particular individual because she had used offensive language one month ago, even though no law had proscribed the woman's conduct at that time.

²²⁰ See Smith, supra note 2, at 19-21.
²²² See Smith, supra note 2, at 117.
²²³ The possibility that officials actually might enact such a law is not as far-fetched as initially might seem to be the case. See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533-47 (1993) (invalidating a municipal ordinance that sought to prohibit a religious group from practicing ritual animal sacrifices); Employment Div. v. Smith, 494 U.S. 872, 884-90 (1990) (upholding an Oregon law that imposed criminal penalties for the possession of peyote, even when believers used this hallucinogenic cactus in Native American religious rituals); see also supra text accompanying notes 132-33 (describing federal attempts to abolish the Church of Latter-Day Saints in the nineteenth century).
An initial response to these sort of discretionary judgments is that the hypothetical laws violate the original understanding of particular constitutional provisions, such as the First Amendment religion clauses,\textsuperscript{224} the Fourth Amendment,\textsuperscript{225} and the ex post facto clause.\textsuperscript{226} A more fundamental concern is that this sort of ad hoc discretionary decisionmaking seems at odds with a constitutional premise that officials will reach decisions based on principles. The premise appears in the language of the Due Process Clause,\textsuperscript{227} the Equal Protection Clause,\textsuperscript{228} and even the Ninth Amendment mandate that "the enumeration in the Constitution, of certain rights . . . shall not be construed to deny or disparage others retained by the people."\textsuperscript{229}

If one insists that constitutional interpretation requires a reference to principle, then historical evidence is an attractive method for deriving such principles. Historical evidence is simply less susceptible than most other forms of constitutional reasoning to the sort of manipulation that Professor Smith fears. One might make a good social science argument that the United States Constitution should forbid all religious meetings—or at least Karl Marx seemed to think that such an argument was plausible.\textsuperscript{230} But the history of the First Amendment simply does not support such an interpretation of the framers' intentions.

Even though I disagree with Professor Smith about the intent expressed by the framers in the First Amendment, our disagreement is relatively modest. Arguments based on historical fact simply are not susceptible to the same degree of manipulation and indefiniteness as arguments based on a social science hypothesis. If a lawmaker must base constitutional decisions on principled reasons, then historical research is an attractive method for finding plausible principles.

\textsuperscript{224} U.S. Const. amend. I.
\textsuperscript{225} U.S. Const. amend. IV (prohibiting "unreasonable searches and seizures").
\textsuperscript{226} U.S. Const. art. I, § 9, cl. 3 (providing that "[n]o Bill of Attainder or ex post facto Law shall be passed").
\textsuperscript{227} U.S. Const. amend. V, amend. XIV, § 1 (providing that neither the federal government nor a state may take a person's life, liberty, or property without due process of law).
\textsuperscript{228} U.S. Const. amend. XIV (providing that no state may "deny to any person within its jurisdiction the equal protection of the laws").
\textsuperscript{229} U.S. Const. amend. IX (emphasis added).
\textsuperscript{230} In a frequently quoted passage, Karl Marx described religion as "the opiate of the masses." Karl Marx, Introduction to a Critique of the Hegelian Philosophy of Right (1844).
Conclusion

Simply invoking the word "choice" will not resolve all of the complex issues relating to religious freedom. Maybe religious choice isn't even the right principle. Nonetheless, the religion clauses enacted some substantive principle or set of principles. The clauses were not adopted simply to leave questions of religion to the states, or to the discretion of elected officials.

Courts are like ghosts—they have no life unless you believe in them. Argue convincingly that courts are capable of only arbitrary, subjective, and unprincipled decisions, and that's what courts are likely to give you. Suggest a principled approach, and courts might surprise you.